

Table of Cases Reported

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[39] The 22nd and 23rd June and 8th July, 1898. ..

PRESENT:

LORDS WATSON, HOBHOUSE AND DAVEY, AND SIR R. COUCH.

Rameswar Koer and another.....Defendants
versus
Mahomed Mehdi Hossein Khan and others.....Plaintiffs.

[On appeal from the High Court at Fort William in Bengal.]

Contract Act (IX of 1872), section 60—Creditor's appropriation of payments to one or other of debts—Transfer of Property Act (IV of 1882), sections 86, 88—Enforcement of mortgage—Rate of interest from date of suit to date fixed for realization.

One of two mortgages bore interest at 12 per cent. on the mortgage debt payable with rests; and the other carried simple interest. Payments made by the debtor had been appropriated by the creditor to payment of the interest on the bond bearing simple interest, while the compound interest, on the other hand, been left to accumulate. In a suit, brought against the representative of the debtor after his decease, to enforce the mortgage bearing compound interest, the objection was taken to the appropriation by the creditor.

Held, that the rule in section 60 of the Indian Contract Act, 1872, follows the ordinary law in prescribing a rule as to the case in which the creditor may, at his discretion, apply, to one or other of the debts due to him, payments made by the debtor. A reluctance shown by the debtor to agree to pay compound interest, before he executed the mortgage bond at such interest, was not an indication, within that section, that he intended that application of his payments should be made first to that bond.

The Transfer of Property Act, 1882, was in force when this suit was instituted, but not when the relation of debtor and creditor between the parties commenced. Assuming that a discretionary power to a Court remained under section 209, Civil Procedure Code, to decree interest to run, at less than the contract rate, in a suit commenced before Act IV of 1882 became law, still the best guide to discretion, in this case, was to be found in section 86 * of that Act, which required the Courts to decree mortgage debts with interest at the rate provided by the mortgage (if to that rate no valid legal objection could be taken), down to the date fixed for realization.

APPEAL from a decree (24th April 1894) of the High Court, varying decrees (15th September 1892) of the Subordinate Judge of Patna.

The plaintiffs, now respondents, were the representatives of the late Nawab Latif Ali Khan, C.I.E., of Patna, who died on the 26th April 1890. The original defendant was Raj Kumari Ratan Koer, the grand-daughter of the late Run Bahadur Singh, Raja of [40] Tekari, who died in the same year, and his

* [Sec. 86.—In a suit for foreclosure, if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree, and ordering that, upon the defendant paying to the plaintiff or into Court the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the property; but that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.]

representative. She died after having obtained leave, on the 25th March 1895, to file this appeal, and by her will she had appointed the appellants to represent her. This suit was brought upon a registered mortgage, executed in favour of the late Nawab, on the 9th August 1880, corresponding to the 19th Sawan 1287, Fasli, by the late Raja, to secure repayment of Rs. 1,00,000 in five years, with interest payable at periods of four months, and at the rate of one per cent. a month, the unpaid interest in each month to be added to the principal.

The plaint, filed on the 7th August 1891, claimed the principal, with Rs. 49,500 for interest and Rs. 10,278 on account of compound interest, with future interest from the date of the suit, at the rate of 12 per cent. per annum, till payment.

Among other grounds of defence, Raj Kumari, in her written statement, alleged that the late Nawab and the plaintiffs had credited to the interest due in another account money remitted to him by the late Raja for payment of the interest on the mortgage bond in suit; that this had been done in regard to a bond executed by the Raja at Gaya on the 26th March 1881, payable six months later, for Rs. 38,550 in favour of the late Nawab which bond bore simple interest only; that sums, amounting to Rs. 9,100, after the 26th September 1881, had been credited to the interest account of that bond, without any right on the part of the creditor to apply them in that manner; and that such sums ought to have been credited to the account of the mortgage bond of the 9th August 1880.

The issues raised these questions. The Subordinate Judge, in deciding in favour of the plaintiff on the facts, was of opinion that the law in section 92 of the Evidence Act would have precluded variation of the mortgage bond by oral evidence of what had been said at the time. He decided the question of appropriation by the creditor according to section 60 of the Contract Act, IX of 1872, there being no intimation by the debtor to which debt the payments were to be applied, and "no other circumstances" indicating to which debt the payment was to be applied. His decree was for payment at the mortgage rate of [41] interest down to the date of the institution of the suit, and he decreed interest at 4 per cent. per annum from that date until realization, fixing the latter date at six months from the date of his decree.

Both parties appealed to the High Court; the defendant, on the ground, amongst others, that section 60 of the Contract Act, 1872, had been wrongly applied; the plaintiff, cross-appealing, that the right direction in the decree would have allowed interest at 12 per cent. until the date of payment.

The High Court (BEVERLEY and AMEER ALI, JJ.) affirmed the findings below, but altered the rate of interest at 4 per cent. to 12 per cent. from the date of the institution of the suit until realization. Referring to *Surya Narain Singh v. Jogendra Narain Roy Chowdhri*, (1892) I. L. R., 20 Cal., 360, they made the decree "that interest run, on the amount due on the mortgage with interest, at 12 per cent. from the 7th August 1891 to the 15th March 1893, the date fixed by the lower Court for the repayment of principal and interest."

On this appeal,—

Mr. C. W. Arathoon, for the Appellants.—On the finding of the Subordinate Judge, and on the construction of the two bonds, an implied intimation should have been attributed to the Raja to the effect that he intended that payments made by him should be applied in payment of that bond which carried compound interest. He could not have intended that the period during which such interest should accumulate should be unnecessarily prolonged.

The facts, showing that the Raja would have first paid off the debt bearing compound interest, should have been considered to be an indication by him of that bond to which he intended that his payments should be applied. This should have been held to have rendered section 60 of the Contract Act, 1872, inapplicable in this case.

Regarding the interest at 12 per cent. allowed by the High Court, it was clear that the plaintiffs' claim related to a transaction [42] which preceded the date of the coming into operation of the Transfer of Property Act, 1882. Section 86 of that Act was inapplicable to the decree in question. The first Court, not being bound by it, rightly decreed interest from the date of the institution of the suit at the Court's discretion, under section 209, Civil Procedure Code, which was applicable to the decree in question.

Sir W. Rattigan, Q. C., and Mr. A. Phillips, for the Respondents, in regard to the appropriation of payments, were called upon only as to one item of Rs. 1,734, which purported to have been credited to the Gaya bond on a date before any money on it was due. As to this, it was argued that, if opportunity had been afforded by the point having been mentioned at the hearing, it might have been explained. Several explanations were conceivable. The defendant [?] might have shown a mistake in the date, or that the date of the receipt of the money, and not the date of its appropriation to the bond was represented by the entry. At this stage the account should not be re-opened. As to the interest to be paid the decree of the High Court was right. Section 86 of the Transfer of Property Act applied to the remedy of creditors claiming enforcement of mortgage securities, and the fact of the indebtedness having arisen, and of the mortgage having been executed before the Act came into operation, did not prevent sections 86, 88 from being applied to this decree. The remedy was governed by the Law of Procedure in force at the time of the suit. No right or liability, which had arisen under a different law, in force before the passing of the Act IV of 1882, was affected by the application of section 86 to the decree in the suit commenced before the passing of the Act.

But even if it were assumed that the provisions of the Act were inapplicable to this decree, the result would be the same. If it were to be taken that the Court at the date of this decree could in the matter of a mortgage award interest at its discretion, without adhering to the stipulated rate, from the date of the institution of the suit, acting under section 209 of the Civil Procedure Code, still, in the exercise of that discretion, the rate proscribed in the Act of 1882 was shown thereby to be a suitable rate. There could be [43] no better exercise of the Court's discretion, and on this ground the decree of the High Court should be affirmed, should the other ground fail.

In regard to the rate of 12 per cent. the reasons for that, the contract rate being given down to the date of the decree, appeared in the judgment of this Committee in *Orde v. Skinner*, (1880) I.L.R., 3 All. 91 (107); L. R., 7 I. A., 196 (211).

Mr. C. W. Arathoon replied.

Afterwards, on the 8th July, their Lordships' judgment was given by .

Lord Hobhouse.—The suit in which this appeal is presented is one for the enforcement of a simple mortgage. The Subordinate Judge passed a decree in favour of the plaintiffs for the sum of Rs. 1,24,239-8 and interest at 4 per cent. per annum from the date of the suit to date of realization; with direction for sale in case of non-payment in six months. Both parties appealed to the High Court on several grounds; when the High Court varied the decree by ordering 12 per cent. interest instead of 4, and with that exception affirmed it.

The defendant appeals from the High Court decree on grounds of which only two need be considered.

The mortgage bond in question is dated the 9th August 1880. The principal money secured is a lakh of rupees to be paid in five years. Interest is to be paid at the rate of rupee 1 per cent. per mensem, by three equal instalments in the year, each for four months' interest. In default of those payments of interest, the bond provides that the unpaid interest shall be added to capital and bear interest in its turn.

By their plaint the mortgagees claimed Rs. 49,500 interest and Rs. 10,728 compound interest. The sum allowed by the Subordinate Judge is considerably less; but the defendant contends that it ought to be less still; because the mortgagees have appropriated to another bond called the Gaya bond which carries simple interest, divers payments which they should have appropriated to the bond now in suit which carries interest on interest.

[44] The Gaya bond is dated 26th March 1881 and is made payable six months later. The Indian Contract Act, 1872, follows the ordinary rules of law in providing that when the debtor has omitted to intimate, and when there are no circumstances indicating, to which of several debts a payment is to be applied, the creditor may apply it at his discretion to any debt actually due and payable to him from the debtor. In this case the mortgagor did omit to intimate any intention on the point. Mr. Arathoon contends that there are circumstances indicating that his payments should be applied to the bond in suit. But the only circumstance he can point to is the original reluctance of the mortgagor to pay any compound interest at all. That reluctance was overcome, and it has nothing whatever to do with the appropriation of payments. It is clear that the mortgagees had a right, in the silence of the debtor to apply to the Gaya bond payments made after 26th September 1881 when, that bond had fallen due.

One sum, however, Rs. 1,734-12 in amount, is endorsed on the Gaya bond as having been paid on a day before the bond fell due. It is a very small matter, because it is only the interest on that sum which is in question. As regards the principal it cannot signify to the mortgagors whether it went in payment of one bond or the other. Still, if there were clearly an error it might now be rectified. But it is certain that the specific point was never raised in the Courts below. In her written statement the defendant, who represents the original mortgagor, complains that the mortgagees have wrongly made credits to the interest due on other bonds, not that anything had been credited to interest not due. Both in that statement and in her grounds of appeal to the High Court the ground taken by her is that every one of the payments made should have been credited to the bond in suit, not that the earliest payment was distinguishable from the others. The case has been argued in both Courts on grounds applying equally to all the payments, and the defendant's arguments have been rightly rejected. If the point now made had been made in the Courts below, some answer or explanation might have been forthcoming. Their Lordships are not in a position to deal with it now.

[45] The second ground taken for the appeal is that the High Court have altered the rate of interest after the date of suit from 4 to 12 per cent. The Subordinate Judge evidently considered that the case fell within section 209 of the Civil Procedure Code, which gives a discretion to the Court in such matters. The High Court founded their order on sections 86 and 88 of the Transfer of Property Act, which indicate clearly enough that the ordinary decree in a suit of this kind should direct accounts allowing the rate of interest provided by the mortgage up to the date of realization.

It is pointed out by Mr. *Arathoon* that, though the suit was instituted after the passing of the Transfer of Property Act, the legal relations of debtor and creditor had arisen before it. Whether that would prevent the application of the Act is disputed, but assuming in the defendant's favour that it would, the same result must ensue in this case. The discretion given by the Code is a judicial discretion to be exercised on proper judicial grounds. The Legislature has stated what should be the rule in suits of this kind, and the Courts cannot have a better guide to their discretion. No peculiarity has been shown to exist in this case for cutting down the mortgage rate of interest. If the High Court has allowed something less, the mortgagee makes no complaint. The mortgagor cannot complain if he is made to pay no more than he contracted to pay.

The appeal, therefore, fails on both the assigned grounds. Their Lordships will humbly advise Her Majesty to dismiss it, and the appellants must pay the costs.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *Dallimore & Son*.

Solicitors for the Respondents: Messrs. *T. L. Wilson & Co.*

C. B.

NOTES.

[TRANSFER OF PROPERTY ACT, 1882, SEC 88 --INTEREST IN MORTGAGE DECREE—

In *The Maharaja of Bhartpur v. Rani Kanno Dei* (1900) 23 All., 181 P.C., the Privy Council said with reference to this decision, "It is true that in the case of *Rameswar Koer*, (1898) 26 Cal., 39, decided in July 1898 this Board upheld the High Court of Calcutta in awarding interest subsequent to the date fixed for payment by the mortgagor, which would have been wrong if the decision in *Amolak Ram*, (1896) 19 All., 174, had been right. But that point was not raised, and probably never was thought of by anybody until *Amolak Ram's* case came to be known, so that the decision of this Board is rather a proof of the prevalence of doctrines contrary to the principle of *Amolak Ram* than a conscious pronouncement against it." In that decision they expressed "their concurrence with the Courts of Calcutta and Madras and with the ultimate decision of the Court of Allahabad" in (1899) 21 All., 361, as regards the interpretation of sec. 88.

In *Sundar Koer v. Rai Sham Krishen*, (1906) 34 Cal., 150, the Privy Council dealt *in extenso* with these questions. They said, "The point argued on the cross-appeal was that interest ought to have been allowed at the rate stipulated in the bonds with (it is assumed) compound interest from the fixed day, until actual realisation. The learned Counsel referred to the provisions contained in ss. 86 and 88 of the Transfer of Property Act, and relied in support of his argument on the language used by Lord HOBHOUSE in delivering the judgment of this Board in the case of *Rameswar Koer v. Mahomed Mehdi*, (1898) 26 Cal., 39 * * "Their Lordships have carefully examined the case cited by Mr. *Cohen* (26 Cal. 39) and are satisfied that the question which is now before them was not before the Board or present to the mind of Lord HOBHOUSE. It was an appeal by the mortgagor from a decree of the High Court of Calcutta, which had directed payment of interest at 12 per cent. per annum (being the mortgage rate) from the date of the institution of the suit to the date fixed by the Subordinate Judge for the repayment of principal and interest, but contained no direction for payment of interest after that date. And the point argued was that interest from the date of the suit should be at 4 per cent. only as had been directed by the Subordinate Judge, instead of at 12 per cent. allowed by the High Court. The mortgagee did not appeal. The passage in the judgment which is relied on, is as follows :—

'The High Court founded their order on sections 86 and 88 of the Transfer of Property Act, which indicate clearly enough that the ordinary decree in a suit of this kind should direct accounts allowing the rate of interest provided by the mortgage, up to the date of realization.'

"The expression *up to the date of realisation* may have been used *per in curiam*, or it may have meant 'the *day fixed for realisation*,' as in fact it seems to have been understood by the reporter of the case in the Indian Law Reports as expressed in his marginal note, 26 Cal. 39. Their Lordships cannot have intended to say that sections 86 and 88 of the Transfer of Property Act indicate that interest at the mortgage rate should be paid up to the time of actual payment of the mortgage money to the mortgagee. These sections contain no direction for interest beyond the day to be fixed by the Court up to which the account is directed to be taken, and in fact the whole difficulty on which there has been so much controversy has arisen from that circumstance. It is enough to say that the question as to the rate of interest (if any) to be allowed after the fixed day until actual realisation was not before the Board and the case is not an authority on that question."

Finally they held in that case as follows. "Their Lordships have no hesitation in expressing their concurrence with the High Court of Calcutta, not only in allowing interest after the fixed day, but also in allowing interest *at the Court rate* and not at the mortgage rate." This decision was applied by the Privy Council in (1907) 35 Cal. 221.

Similar construction had been placed in (1900) 23 Mad., 637; (1901) 29 Cal., 43; (1902) 6 C.W.N., 769; (1903) 30 Cal., 953; (1903) 31 Cal., 138; (1905) 29 Mad., 170; (1907) 29 All., 322. See also (1901) 5 C.W.N., 653; (1899) 21 All. 361 where the contract rate of interest was allowed up to the date of actual payment.]

[46] APPELLATE CIVIL.

The 13th July, 1898.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Srikant Mondul and others, Minors, by their mother and Guardian
Satyamoni Dasi.....Plaintiffs

versus

Saroda Kant Mondul and others.....Defendants.*

*Bengal Tenancy Act (VIII of 1885), section 85—Sub-lease of a raiyat
holding, by a registered instrument for a period of more than
nine years, whether valid.*

A sub-lease of a holding, by a *raiyyat* without the consent of the landlord though created by a registered instrument, is altogether void, under section 85 of the Bengal Tenancy Act.

THE facts of this case are as follows : The plaintiffs brought a suit against the defendants for recovery of possession of a hut, as well as for the declaration of their *jamai* right to certain land, on the allegation that the plaintiffs obtained a

* Appeal from Appellate Decree No. 119 of 1897, against the decree of F. F. Handley, Esq., District Judge of 24-Pergunnahs, dated the 9th of December 1896, reversing the decree of Babu Dwarka Nath Ghose, Munsif of Basirhat, dated the 30th of November 1895.

permanent lease of the land from the defendant No. 7 and that the remaining defendants, who were the superior landlords and persons claiming under them, resisted the plaintiffs from obtaining possession of the same. The defence of the landlord defendants, *inter alia*, was that defendant No. 7, who was only a *raiyat*, had no right to grant a sub-lease of the *raiyat* holding without their consent, and as such the sub-lease was invalid. The sub-lease was for a period of more than nine years, and was created by a registered instrument. The Court of First Instance decreed the plaintiff's suit. On appeal to the District Judge he reversed the decision of the first Court, holding that inasmuch as defendant No. 7, the grantor of the sub-lease, was a *raiyat*, he had no right to create a sub-lease in favour of the plaintiffs, without the consent of the landlords, under section 85 of the Bengal Tenancy Act. Against this decision the plaintiffs appealed to the High Court, mainly on the ground that the sub-lease was valid at least for nine years.

[47] Dr. Ashutosh Mookerjee for the Appellants.

Babu Grish Chunder Chowdhury, for the Respondents.

The judgment of the High Court (BANERJEE and STEVENS, JJ), was as follows :—

Banerjee, J.—This appeal arises out of a suit brought by the plaintiffs, appellants, for declaration of their *jamai* right to certain lands and their purchased right to a hut standing on the land, and for possession of the same, on the allegation that the plaintiffs have obtained a permanent lease of the land from the defendant No. 7, who is a *gantidar*, and that the remaining defendants, who are the superior landlords, and persons claiming under them, have resisted the plaintiffs in obtaining possession of the same.

The defence of the defendants Nos. 1 and 2, who are the superior landlords, was to the effect that the defendant No. 7, under whom the plaintiffs claim to hold as sub-lessees, never had any permanent right in the land, that he was only a *raiyat* in respect of the same, and that the plaintiffs therefore have acquired no right to the property in dispute.

The first Court found for the plaintiffs and gave them a decree. On appeal by the defendants, Nos. 1 and 2 the Lower Appellate Court has reversed that decree, holding that the plaintiffs have acquired no right to the land in dispute by their sub-lease, it being invalid under section 85 of the Bengal Tenancy Act.

In second appeal it is contended for the plaintiffs, appellants, that the decision of the Lower Appellate Court, dismissing the whole suit, is wrong in law, first, because the suit, so far as it relates to the hut in question, ought not to have been dismissed, when the first Court found that the plaintiffs had proved that they had purchased the hut and that finding had not been displaced; and secondly, because the finding of the Lower Appellate Court, that the sub-lease is altogether void, is incorrect, and the Lower Appellate Court ought to have held that the sub-lease was valid, at least for nine years.

The first contention is substantially correct, and the case must go back to the Lower Appellate Court in order that it may dispose of the appeal with reference to the hut.

[48] As regards the second point, section 85 of the Bengal Tenancy Act provides in sub-section 1, that if a *raiyat* sub-lets otherwise than by a registered instrument, the sub-lease shall not be valid against his landlord unless made with the landlord's consent; the second sub-section provides that a sub-lease by a *raiyat* shall not be admitted to registration if it purports to create a term exceeding nine years; and the third sub-section provides that

where a *raiyyat* has, without the consent of his landlord, granted a sub-lease by an instrument registered before the commencement of the Act, the sub-lease shall not be valid for more than nine years from the commencement of the Act.

The only case, then, in which, according to this section, a sub-lease created by a registered instrument without the consent of the landlord, though purporting to be for a longer period than nine years, is to be upheld for the period of nine years, reckoned from the commencement of the Bengal Tenancy Act, is where the document was registered before the commencement of the Act. In any other case, the validity of a sub-lease will have to be tested by the conditions imposed by section 85; and there is nothing in the section authorising the Court to split the contract of sub-letting into two parts, a valid portion extending to a period of nine years, and an invalid portion for the remainder of the term.

It was argued that the sub-lease in this case was registered, and as there was nothing on the face of that document to disentitle it to be registered, the grantor purporting to be, not a *raiyyat*, but a tenure-holder, the condition required by the first sub-section was satisfied, and the sub-lease was one by a registered instrument, and was therefore valid.

We are of opinion that this argument is wholly unsound; for if it were otherwise, it would always be in the power of any *raiyyat* to render the section altogether nugatory by pretending to be a tenure-holder and granting a sub-lease in perpetuity, or for any long term, and thus inducing the registering officer to register it. The effect, such as section 85 attaches to a registered sub-lease, attaches to such a document when the registration has taken place, not merely as a matter of fact, but also in accordance with the conditions of sub-section 2; and in the present case, it having [49] been found that the grantor of the sub-lease was a *raiyyat* we must take it that the sub-lease ought not to have been admitted to registration if it had been executed without a misrepresentation of fact as it has been.

That being so, we think that the Lower Appellate Court was quite right in holding that the sub-lease in this case was altogether void, having regard to the provisions of section 85 of the Bengal Tenancy Act. As the appeal fails upon the main contention raised in it, we think that notwithstanding that the case has to be remanded to the Lower Appellate Court, in regard to the claim for the but, the respondents are entitled to the costs of this appeal.

S. C. G.

Appeal allowed. Case remanded.

NOTES.

[In 29 Cal., 148, it was held that a sub-lease would be valid for nine years though created for more than nine years if executed before the Tenancy Act.

In 36 Cal., 256; 13 C.W.N. 183, it was held that a sub-lease without landlord's consent though void against the landlord, would be valid as between the *raiyyat* and under-*raiyyat*. See also 6 C.W.N. 916; 919.

As regards notice etc., when the landlord seeks to eject the under-*raiyyat*, see 2 C.L.J. 570; 4 C.W.N. 667; 5 C.W.N. 858; 34 Cal. 104.

As regards *rent*, see (1900) 2 C.L.J. 540.]

[26 Cal. 49]

APPELLATE CRIMINAL.

The 7th July, 1898.

PRESENT :

MR. JUSTICE O'KINEALY AND MR. JUSTICE HENDERSON

Basanta Kumar Ghattak.....Appellant

versus

Queen-Empress.....Respondent.*

Evidence—Evidence in Criminal Case—Criminal Procedure Code (Act X of 1882), section 342—Statement of accused under that section—Misdirection.

A gap in the evidence for the prosecution cannot be filled up by any statement made by the accused in his examination under section 342 of the Criminal Procedure Code. It is a misdirection to ask the jury to consider a document, purporting to be proved by such a statement, as evidence against the accused.

THE appellant had filed a petition of complaint against one Nibarun Chunder Biswas, who was committed for trial to the Sessions Court at Jessore under section 477 of the Penal Code. At the trial the appellant was examined as a witness, and ordered by the Sessions Court to be committed for trial under section 193 of the Penal Code for having made false statements. The evidence adduced at the trial of the appellant consisted of his petition of complaint, his statement on oath and deposition before the Com-[50] mitting Magistrate, and also his deposition before the Sessions Court. There was no evidence to prove the petition of complaint, but the order on the back of it in the handwriting of the Deputy Magistrate, and the statement of the accused taken under section 342 of the Criminal Procedure Code, were considered as sufficient to prove it. The Sessions Judge agreeing with the jury convicted the appellant. In appeal before the High Court it was argued that the petition of complaint was wrongly admitted as evidence in the case, and that the Sessions Judge had misdirected the jury by telling them that the filing of that petition was one of the circumstances from which they were to find that the charge had been proved.

Mr. K. N. Chaudhuri and Babu Dwarka Nath Mitter for the Appellant.

The Deputy Legal Remembrancer (Mr. Gordon Leith) for the Crown.

The judgment of the High Court (O'Kinealy and Henderson, J.), was as follows :—

This is an appeal from a decision of the Sessions Judge of Jessore, who tried the case with the aid of a jury.

It has been argued before us that there have been several misdirections in the charge. The only misdirection, however, that we can find in it is in regard to a petition of complaint, and an order on the back of it, which was put in evidence and is called Exhibit III. It was a complaint made in another proceeding altogether, and all the evidence given in regard to it is that the order on the back of it is in the handwriting of a certain Deputy Magistrate. There is no evidence to show that this complaint was ever put in by the present appellant, and that being so, we think that the evidence that the handwriting on the back of it is the handwriting of a Deputy Magistrate, is not sufficient. The Sessions Judge in charging the jury pointed out this as one of the

* Criminal Appeal No. 399 of 1898 against the order passed by L. Palit, Esq., Officiating Sessions Judge of Jessore, dated the 16th of May 1898.

material circumstances from which the intention of the appellant would be apparent, and the document itself was read out.* We think under these circumstances there has been a misdirection.

[51] It has also been pointed out by Counsel on behalf of the appellant that the statement of the appellant was taken under section 342, and, so far as we can see, he has properly objected to the reception of that evidence. The object of that section is not to fill up a gap in the evidence for the prosecution, but, to enable the prisoner to explain any circumstances appearing in the evidence against him. At that time this statement was not properly in evidence against him, and we think the Judge was wrong in asking the accused about it.

The result is that the conviction and sentence are set aside, and the case remanded to the Sessions Judge for a retrial.

S. C. B.

NOTES.

[This was applied in (1901) 5 C. W. N., 670 ; (1903) 27 Cal., 238 ; 19 All., 238.]

[26 Cal. 51]

APPELLATE CIVIL

The 9th May, 1898.

PRESENT :

MR. JUSTICE O'KINEALY AND MR. JUSTICE GUPTA.

Chhato Ram, Minor, by his Mother and Guardian Akhaj Sahun...Defendant

versus

Bilto Ali.....Plaintiff.*

Limitation Act (XV of 1877), section 19—Acknowledgment by guardian of minor—Guardians and Wards Act (VIII of 1890), sections 27 and 29—Act XL of 1858—Guardian, Powers of.

An acknowledgment of a debt by the guardian of a minor appointed under the Guardian and Wards Act does not bind the minor and is not such an acknowledgment under section 19† of the Limitation Act as would give a new period of limitation against the minor.

* Appeal from Appellate Decree No. 473 of 1897, against the decree of Babu Atal Behari Ghose, Subordinate Judge of Lohardagga, dated the 9th of February 1897, reversing the decree of Babu Bhabun Mohan Ganguli, Munsif of Ranchi, dated the 9th of December 1895.

† [Sec. 19 :—If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.

When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed ; but oral evidence of its contents shall not be received.

Explanation 1.—For the purposes of this section an acknowledgment may be sufficient, though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform, or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

Explanation 2.—In this section "signed" means signed either personally or by an agent duly authorized in this behalf.]

THE suit out of which this appeal arose was instituted on the 2nd of April 1895 for the recovery of Rs. 500 with interest, alleged to have been lent to the minor defendant's father on the 18th of March 1891. The plaintiff stated that the certificated guardian of the minor defendant executed a deed on the 14th of March 1894, in which the guardian made an acknowledgment of the loan. The Original Court dismissed the suit, holding that the guardian had no power to acknowledge a debt so as to bind the [52] minor under section 19 of the Limitation Act. The Subordinate Judge held that the suit was not barred, and gave a decree for the amount claimed. The defendant then preferred this second appeal.

Babu *Jogesh Chunder De* for the Appellant.

Babu *Jogendra Chunder Ghose* for the Respondent.

The judgment of the High Court (**O'Kinealy and Gupta, JJ.**) was as follows:—

This is an appeal from a decision of the Subordinate Judge of Ranchi, dated the 9th February 1897.

The defendant's father had given a bond for money to the plaintiff, and after he died one Akhaj Sahun was appointed guardian, under Act XL of 1858, of the minor and obtained a certificate. That certificate gives him all the powers he can exercise under the late Guardians and Wards Act. Under section 27 of the present Act large powers are given to the guardian in relation to the property of the ward, but these powers are somewhat limited by section 29. Before the passing of the latter Act, two kinds of guardians were acknowledged in our Courts, namely, a natural guardian and a certificated guardian, and the powers of a guardian who had obtained a certificate were more limited than those of the natural guardian. The present Act has somewhat enlarged the powers given under Act XL of 1858, but they are certainly not greater than those given to a natural guardian. The debt fell due and was acknowledged by the guardian Akhaj Sahun within the period of limitation, and the question we have now to decide is whether a guardian, under the Guardians and Wards Act, has the power under section 19 of the Limitation Act to give a new period of limitation by a proper acknowledgment. A guardian is not ordinarily an agent. He has certain statutory powers in regard to the property under his management and no more. In some three decisions of this Court it has been decided that a natural guardian has not the power to acknowledge a debt so as to bind the minor under section 19 of the Limitation Act. [53] We can see no difference in regard to that section between a guardian who has obtained a certificate and one who has not.

We, therefore, decree the appeal and dismiss the suit with costs in all the Courts.

S. C. B.

NOTES.

[LEGISLATION—

In the Indian Limitation Act, 1908, section 21, clause (1) is as follows:—"The expression 'agent duly authorised in this behalf' in sections 19 and 20 shall in the case of a person under disability, include his lawful guardian, committee, or manager, or an agent duly authorised by such guardian, committee or manager to sign the acknowledgment or make the payment."

This sets at rest the previous conflict between 26 All. 593; 13 Cal. 292; 20 Bom. 61; and 26 Bom. 221; 29 Cal. 647; 23 Cal. 374; 17 Mad. 221; 17 All. 198.]

* See *Azuddin Hossein v. Lloyd*, (1883) 13 C. L. R., 112, and *Wajibun v. Kadir Baksh*, (1886) I. L. R., 13 Cal., 292.

[26 Cal. 53]

The 11th August, 1898.

PRESENT :

MR. JUSTICE BANERJEE, MR. JUSTICE RAMPINI, AND
MR. JUSTICE HENDERSON.

Kameshwar Pershad and another.....Plaintiffs

versus

Amanutulla alias Manick Babu and another.....Defendants.*

Second Appeal—Grounds of Second Appeal—Civil Procedure Code (Act XIV of 1882), sections 584, 585—Professional communication—Evidence Act (I of 1872), sections 65, 66, 127—Secondary Evidence.

The grounds upon which a second appeal lies to the High Court are those set out in section 584 of the Civil Procedure Code, and section 585 enacts that no second appeal shall lie except on the grounds mentioned in section 584. The provisions of those sections should be strictly adhered to. *Anangamanjari Chowdhurani v. Tripura Sundari Chowdhurani*, (1887) I. L.R., 14 Cal., 740 : I. L. R., 14 I. A., 101 ; *Pertap Chunder Ghose v. Mohendra Nath Purkait*, (1889) I. L. R., 17 Cal., 291 : I. L. R., 16 I. A., 233 ; *Durga Chowdhurani v. Jewahir Singh Chowdhri*, (1890) I. L. R., 18 Cal., 23 : I. L. R., 17 I. A., 122 ; and *Ram Ratan Sukal v. Nandu*, (1891) I. L. R., 19 Cal., 249 : I. L. R., 19 I. A., 1, referred to.

(*Per* BANERJEE, J.)—Section 127 of the Evidence Act (I of 1872) extends to a communication made to the pleader's clerk the same confidential character that attaches to a communication to the pleader direct, under section 126.

(*Per* BANERJEE and RAMPINI, JJ.)—Where oral evidence was given to prove the contents of a letter, which was neither produced nor called for, but no objection was raised to the giving of the evidence, *Held* that this was secondary evidence of the contents of a document, and could not be given without satisfying the conditions of section 65 of the Evidence Act. Section 66 rendered it legally inadmissible, although no objection was raised to the giving of it.

[54] THE facts of this case, so far as they are material to this report, appear from the judgments. The appeal originally came on for hearing before Mr. Justice RAMPINI and Mr. Justice HENDERSON, who differed in opinion, and the case was referred, under section 575 of the Civil Procedure Code, to Mr. Justice BANERJEE who agreed with Mr. Justice RAMPINI.

The plaintiffs appealed to the High Court.

Mr. C. P. Hill, Moulvie Mahomed Yusuf, and Babu Uma Kali Mukerjee for the Appellants.

Moulvie Serajul Islam, Moulvie Syed Shumsul Huda, and Moulvie Mahomed Mustafa Khan, for the Respondents.

The judgments of the High Court were as follows :—

Rampini, J.—This is a suit to recover possession of an eight-annas share of mouzah Ledha, which the plaintiff purchased at a sale in execution of a decree obtained against the defendant No. 2. The defendant No. 1 resists the plaintiff's suit on the ground that he is in possession of the property by virtue of a *mokurari* lease executed in his favour by the defendant No. 2. The plaintiff seeks to have this *mokurari* lease set aside on the ground that it is a

* Appeal from Appellate Decree No. 2091 of 1896, against the decree of H. Holmwood, Esq., District Judge of Gaya, dated the 17th of August 1896, reversing the decree of Babu Suresh Chunder Banerjee, Munsif of Aurangabad, dated the 28th of February 1894.

fictitious and collusive lease, and that the defendant No. 1 is but a *benamidar* for defendant No. 2, who is still the owner, and who is really in possession of the mouzah.

The Munsif decreed the suit, but on appeal his decree was reversed by the District Judge, who, on the 30th July 1894, dismissed the suit, holding that the plaintiff had failed to prove that the *mokurari* lease was a fictitious transaction. A second appeal was then preferred to this Court, and on the 13th May 1896 the judgment of the Lower Appellate Court was set aside by a Division Bench of this Court, and the appeal was remanded to the Judge with certain instructions. The ground of the remand by this Court was that the judgment of the Lower Appellate Court was erroneous in law. The defects in the District Judge's judgment pointed out by this Court were: (1) That the Judge was wrong in supposing that the Munsif had shifted the onus of proof from the plaintiff to the defendants merely because of the relationship between the latter; (2) that the Judge was wrong in supposing that the transaction took place [55] long before the plaintiff attempted to sell the property; and (3) that the Judge had omitted to remark upon the absence of the defendant No. 1 and upon his omission to prove that he actually paid consideration for the deed.

The case accordingly went back to the Judge "for a fresh decision on the point, as to whether the plaintiff had made out a *prima facie* case, such as he might reasonably be expected to prove, and, if so, whether the defendant had succeeded in rebutting it."

The appeal was retried by the District Judge on the 17th August 1896, and he has now found: (1) that the plaintiff has entirely failed to make out any *prima facie* case whatever against the defendant No. 1, whose *bona fides* was alone in issue; and (2) that the only point on which the plaintiff had offered evidence had been fully rebutted by the defence witnesses. He accordingly again decreed the appeal.

The plaintiff again appeals to this Court, and again it is argued that the Judge's decision is erroneous in law, and it has been contended that there are errors and defects in the Judge's judgment, which have affected the merits of his decision, and we are again asked to remand the case to the Judge with fresh instructions for a fresh decision.

I am unable to see that there are any such errors or defects in the Judge's decision as would justify us in taking this course. The Judge appears to me to have fully carried out the instructions given him by this Court, when remanding the case. He has rightly placed the onus of proof in the first instance, on the plaintiff, and has considered the evidence on both sides and has come to the conclusion that the plaintiff has not succeeded in establishing his case that the *mokurari* is a fictitious and fraudulent transaction. He has further held that the defendants have rebutted the evidence adduced by the plaintiff in support of his case. He has fully considered the evidence of the passing of the consideration and holds that it did not pass. He has considered the non-appearance of the defendant No. 1 in the Munsif's Court, and his failure to give evidence as to the [56] passing of the consideration. He has further discussed the evidence of possession on both sides, and after fully complying with this Court's instructions has come to a fresh decision in the case.

I can see no defect in his judgment such as would justify us in again remanding the case.

There appears to me to be only one error in his judgment on a point of law, viz., that he has excluded the evidence of two pleaders on the ground that

it was inadmissible under section 126 of the Evidence Act. But he points out that the Bench of this Court, who remanded the case, did not in any way animadvert on the exclusion by him of the evidence of these two witnesses at the first hearing of the appeal, and he argues that this shows either that the exclusion of the evidence of these two pleaders was not objected to before this Court, or else that this Court considered that their evidence had been rightly excluded from consideration.

However this may be, I consider that the evidence of these two pleaders is inadmissible, and has been rightly excluded, though not for the reason assigned by the District Judge. Their evidence has been read to us. They were called on to give evidence as to the contents of a letter received by a pleader's *mohurir* from the defendant No. 1. Now this letter was not called for, and was not produced at the Court. Therefore, no secondary evidence of its contents was admissible, and the evidence of the pleaders is, therefore, inadmissible under section 66 of the Evidence Act. The learned Counsel for the appellant urges that no objection appears to have been raised to the giving of this evidence, and hence he contends that their evidence is admissible. But there is no law in this country that the absence of objection to evidence, which is legally inadmissible, makes it admissible. I therefore consider that the evidence of the pleaders has been rightly excluded from consideration. In any case, their evidence, which has been referred to before us by both sides, is not material. The Munsif points out that their evidence at the best can only give rise to a suspicion with regard to the claim of defendant No. 1.

[57] I am further of opinion that we cannot interfere with the judgment of the Judge of the Lower Appellate Court as his finding on the only issue that arises in the case is a finding of fact, which cannot be set aside by us in second appeal. There are numerous rulings of the Privy Council to this effect : see *Anangamanjari Chowdhurani v. Tripura Sundari Chowdhurani*, (1887) I. L. R., 14 Cal., 740 : L. R., 14 I. A., 101 ; *Pertap Chunder Ghose v. Mohendra Nath Purkait*, (1889) I. L. R., 17 Cal., 291 : L. R., 16 I. A., 233 ; *Durga Chowdhurani v. Jewahir Singh Chowdhuri*, (1890) I. L. R., 18 Cal., 23 : L. R., 17 I. A., 122 ; *Ram Ratan Sukal v. Nandu*, (1891) I. L. R., 19 Cal., 249 : L. R., 19 I. A., 1 ; *Ram Gopal v. Shamskhaton*, (1892) I. L. R., 20 Cal., 93 : L. R., 19 I. A., 228 ; and *Lukhi Narain Jaga Deb v. Joda Nath Deo*, (1893) I. L. R., 21 Cal., 504 : L. R., 21 I. A., 39. I am, therefore, of opinion that this appeal should be dismissed with costs, but as my learned brother does not agree with me on this point, the appeal must be laid before the learned Chief Justice for reference to a third Judge.

Henderson, J.—This was a suit by the plaintiffs, who are respectively the auction purchaser of an eight-anna share in a certain *mouzah* named Ledha, and his *treccadar*, to obtain direct possession of that share by setting aside a *mokurari*, which had been set up by the defendants, on the ground that the *mokurari* was fraudulent and executed without consideration. It was alleged in the plaint that the plaintiffs had been in possession of the *mouzah*, but had been dispossessed, and an issue was framed upon this allegation. The Munsif was of opinion that the issue as to the possession and dispossession of the plaintiff was not very material, and he found upon the evidence that the plaintiff had never been in possession, although the plaintiff No. 2 had made an attempt to take possession, but without success.

The real issue in the case was, whether the *mokurari* executed by the defendant No. 2 in favour of the defendant No. 1 was collusive and fraudulent. As to this issue the Munsif held, and rightly held, that under the circumstances it was for the plaintiffs to make out a *prima facie* case. He

found that a few years [58] before the execution of the *mokurari*, the plaintiff No. 1 had obtained a decree against the defendant No. 2; that the defendant No. 1 was a relative of defendant No. 2; and that notwithstanding the execution of the *mokurari* the defendant No. 2 had continued to remain in possession of the *mouzah*. Under these circumstances he held that the plaintiffs had made out a *prima facie* case, and proceeded to deal with the evidence adduced by the defendant to meet that case. Upon that evidence he found that the consideration for the *mokurari* had not been satisfactorily proved, and that there had been no change in the possession; and he laid considerable stress on the fact that the defendant No. 1 had not himself given evidence to prove payment of consideration and change of possession. Upon these findings he came to the conclusion that the *mokurari* was fictitious and gave the plaintiffs a decree. On appeal the District Judge held that the plaintiffs entirely failed to prove their case, and that the defendants were not called upon to produce even as much evidence as they did, and he allowed the appeal. On second appeal, the High Court, after commenting at some length upon various passages in the judgment of the District Judge, and pointing out that he had not sufficiently considered the evidence of the plaintiffs' witnesses, that the defendant No. 2 had after the execution of the *mokurari* continued in possession, and that he had altogether omitted to remark upon the evidence of the defendant No. 1, and upon his omission to prove that he actually paid consideration for the deed, made an order remanding the case in the following terms:— "Under these circumstances, we think that the District Judge has not properly applied his mind to the evidence in the case, and that the case ought to be sent back to him for a fresh decision on the point whether the plaintiffs have made out a *prima facie* case, such as he might reasonably be expected to prove, and if so whether the defendant has succeeded in rebutting it. The case will go back accordingly." The District Judge has now reconsidered his former decision, and has held that the plaintiffs have entirely failed to prove their case.

With regard to the question whether the defendant No. 2 ever relinquished possession, he says: "But admitting their existence (the relationships between the defendants), what the [59] plaintiffs really undertake to prove, and that under the circumstances is about the only relevant fact they are in a position to prove, is that defendant No. 2 [not?] has relinquished possession. If he establishes a *prima facie* case on this point the onus certainly shifts very heavily to the defendants." He then deals with the evidence adduced by the plaintiffs to show that they had had possession, but had been dispossessed by the defendant No. 2. This evidence he rejects as the Munsif had done. He goes on to say:

"It is argued by respondents that, although he disbelieves the possession of Ajudhia Sing (plaintiff No. 2), and his dispossession by Shamsheer Bahadur (defendant No. 2), the Munsif is at liberty to take the plaintiffs' evidence, as a whole, as sufficient to prove that Shamsheer Bahadur never relinquished possession to his alleged vendors (*mokuraridars*).

"The next argument is that the consideration of Rs. 1,000 is inadequate and defendant No. 2's evidence shows that it was probably never paid. The third argument is that the defendant No. 2 produces no witnesses as to the passing of the consideration. The fourth, that defendant No. 1, though given every opportunity, does not appear. Finally, it is said that no *challans* for Government revenue are produced.

"As regards the first point I find it is impossible to separate the false story of dispossession by Shamsheer Bahadur from the general allegation that

Shamsher Bahadur was in possession. The whole evidence is directed to one point, and the possession of Shamsher Bahadur is merely incidental to his conduct in dispossessing Ajudhia Sing, an event which never happened. The case on plaintiffs' evidence is simply this: *A* dispossessed *B*. Therefore *A* must have held possession. When it is shown that the first member of this proposition is absolutely untrue, it seems impossible to me to assume the second."

I shall first deal with the finding that it is impossible to separate the false story of dispossession by Shamsher Bahadur, the defendant No. 2, from the general allegation that Shamsher Bahadur was in possession, that is, did not relinquish possession. To my mind there is no connection between the two points. They are quite distinct. It may be that the plaintiffs' [60] story that they were dispossessed is entirely false, or false so far that they merely attempted unsuccessfully, as the Munsif held, to take possession. But in either view it does not follow that the evidence adduced by the plaintiffs to show that the defendant No. 2 never relinquished possession after the execution of the *mokurari* is false. The non-relinquishment of possession depends upon evidence which is entirely independent of the evidence as to the alleged dispossession, and that evidence is corroborated by other circumstances, which are admitted. This appears from the original judgment of the District Judge. The weight to be given to that evidence, and to the corroborating circumstances, was no doubt a question for the Judge. In his original judgment the District Judge makes the following remarks: "The only point that plaintiff does offer any evidence on is the point of defendant No. 2's possession. All his witnesses say that defendant No. 2 continued in possession, and defendant No. 1 never had possession. This, it is contended, is supported by the defendant's evidence that the village *amlas* were never changed. I do not think this contention can prevail, the parties are admittedly relatives. The *patwari* is a permanent official, and the *barahil* is the *chowkidar* of the village, and has always been *barahil* of the sixteen annas. The plaintiff's witnesses are *ryots* of a neighbouring village, and there is not a particle of evidence to show where the collections really went. It is only shown that the same servants continued to collect them." In his judgment on remand the District Judge has repeated his observations with regard to the fact that the *patwari*, *barahil* and *chowkidar* had not been changed, but he appears to have withdrawn from his consideration the evidence as to the non-relinquishment, apparently because he has been unable to separate what he calls the false story of dispossession by the defendant No. 2 from the alleged non-relinquishment of possession by defendant No. 2. In this, I think, he has erred. In the passage I have quoted from his former judgment he had stated that all the plaintiff's witnesses say that defendant No. 2 continued in possession and that defendant No. 1 never was in possession. In his present judgment he appears also to be wrong in saying that the whole evidence is directed to one point, and that the [61] possession of Shamsher Bahadur is merely incidental to his conduct in dispossessing Ajudhya Singh (plaintiff No. 2). The case on the plaintiffs' evidence is not simply the *A* and *B* proposition stated in the passage I have quoted. It is not quite clear whether the District Judge means to hold, but I think he does mean to hold, that the Munsif was not at liberty to take the plaintiffs' evidence, as a whole, to prove that Shamsher Bahadur, defendant No. 2, never relinquished possession to his alleged vendor (*mokuridar*); but, if [he does mean so to hold, I think he is again wrong.

The District Judge does not appear to have properly applied his mind to the point whether possession changed on the execution of the *mokurari*.

It has been contended that the District Judge has wrongly excluded from consideration the evidence of two pleaders who were called by the plaintiffs. It may be, and I express no opinion as to it, that this evidence is of little weight, but it was clearly relevant on the question whether the defendant No. 2 did in fact relinquish possession to the defendant No. 1. With regard to this evidence the Munsif makes the following remarks: "The plaintiffs examined two pleaders of this Court, one Babu Thakur Prasad, and another Babu Sashi Bhusan Mukerjee, pleaders for defendant No. 1. It appears from their evidence that in the latter part of the year 1892, the defendant No. 1 wrote a letter to the address of one Abdul Thakur, *mohurir* of pleader Babu Shashi Bhusan Mukerjee; that in that letter reference was made to the successful result of the criminal case in favour of defendant No. 1; and that the defendant No. 1 in that letter stated that the *enam* or reward for the criminal case will be sent by the defendant No. 2. The letter is not forthcoming. It is said to be with Abdul Thakur, and it was not called for. The letter was being opened by Babu Sashi Bhusan on a particular day in this Court room, when Babu Thakur Pershad, pleader, without any authority and against the protest of Sashi Babu, read a portion of it to the hearing of Munshi Ibrahim Hossein, plaintiff's pleader, who immediately said to the other two pleaders that they would have to give evidence on this point, and that they should remember the content [62] (*sic*) thereof. This fact throws a good deal of suspicion on the claim of defendant No. 1 to this property as his own."

In his original judgment the District Judge, with regard to this evidence, made the following remarks: "The communications were privileged and I must expunge all reference to this evidence from the judgment and the record." In his judgment now under appeal he says: "The evidence of the plaintiff's witnesses Nos. 7 and 8 I excluded as inadmissible, and their Lordships have not overruled my finding on this point. I need not, therefore, re-admit their evidence, but would merely draw attention to the Munsif's remarks on it at pages 8 and 9 of the paper book, as showing that it was on their evidence alone, coupled with the fact of relationship, that the Munsif held the document fictitious and threw the onus on the defendants. If their evidence disappears there is not one particle of the plaintiff's case left."

I may mention here that it was pointed out to us that it was in evidence that Sashi Bhusan Mukerjee on being pressed stated that the costs in the criminal case, which arose out of the attempt by the plaintiffs to get possession, would be paid by defendant No. 2. There can be no question that the evidence of the pleaders (witnesses Nos. 7 and 8) was admissible, and that the District Judge had, therefore, improperly withdrawn it from consideration. The fact that this Court, in remanding the case, did not refer to the opinion expressed by the District Judge, as to the admissibility of the evidence, does not, it seems to me, preclude us now from dealing with it. The remark of the District Judge, that it was on their evidence alone coupled with the fact of relationship that the Munsif held the *mokurari* fictitious and threw the onus on the defendants, is not correct. It is merely a repetition of what he had said in his previous judgment, and upon this point this Court in remanding the case pointed out the incorrectness of the statement, and drew his attention to the fact that the Munsif had relied upon other circumstances, and amongst them to the continuance in possession by the defendant No. 2. What the Munsif said on page 8 was: "He adduced evidence to show that he obtained the decree against defendant No. 1 in the year 1888, that the defendant No. 1 is maternal [63] uncle of one Ekbul Hossein, who is defendant No. 2's sister's husband, and that the defendant No. 2 is in actual

possession of the property. The relationship as between defendant No. 2 and defendant No. 1 has been admitted. The plaintiff No. 1 has, therefore, shown that the particular transaction is suspicious, and the onus, therefore, shifts on the defendant No. 1 to show that the consideration was actually paid, and that he is actually in possession for himself.

As to the consideration for the *mokurari* the High Court on remanding the case said: "On the question of consideration the Judge merely says this: 'The defendant meets the mere statement of plaintiff that no consideration passed by his own statement on oath that he got the money.' That remark applies to defendant No. 2, who was the party alleged to be interested in effecting this fictitious transfer in order to save the property from his creditor. The Judge omits altogether to remark upon the absence of the defendant No. 1, and upon his omission to prove that he actually paid consideration for the deed." The District Judge now makes the following remark: "I do not think any witnesses as to the passing of the consideration were necessary, unless plaintiff had made out some *prima facie* case to prove that no consideration did pass. It is absurd to say that defendant must prove affirmatively every point which plaintiff has entirely neglected to give any evidence upon. Defendant No. 1 had no obligation beyond putting forward defendant No. 2 to admit the receipt and to prove the *potta*, which is itself a perfectly valid legal receipt." The passage which I have first quoted shows a want of appreciation of the position. The determination of the question, whether the consideration was paid or not, could only become necessary, if the plaintiff's made out a *prima facie* case that the *mokurari* was not genuine, and then it was for the defendants, who alone had any knowledge on the subject, and not for the plaintiffs, to prove consideration. It was not enough to say that the defendant No. 1 had no obligation beyond putting forward defendant No. 2 to admit the receipt and prove the *potta*, which is itself a perfectly valid receipt. The recital as to payment in the *potta* is no evidence of payment as between the plaintiffs and the defendants. The [64] District Judge appears to have paid very little attention, if any, to the direction in this connection given to him in the judgment remanding the case as to the absence of the defendant No. 1, and his omission to prove that he actually paid consideration for the *mokurari*. Moreover, in dealing with the discrepancies between the evidence of defendant No. 2 and the recitals in the *mokurari* as to the payment of consideration, the Judge relies upon a supposed usage, as to which there is absolutely no evidence.

With regard to the fact that the defendant No. 1 did not give evidence the District Judge finds that his non-appearance was due to a misapprehension of the proper procedure on the part of the Munsif, and he has quoted a passage from the Munsif's judgment, but I am unable to see that there was any misapprehension on the part of the Munsif as to the proper procedure. It appears that while the plaintiffs were anxious to have the defendant No. 1 examined in Court, they did not wish to examine him as their witness on commission. It was no part of the duty of the plaintiffs to call the defendant No. 1 as their witness. If it became material to prove that the consideration actually passed it was for the defendant No. 1 to prove that fact. He had ample opportunity, the Munsif has stated, to give his evidence, the case being adjourned on many occasions for his appearance. It was not until after the conclusion of the evidence on both sides that any application was made by his pleader that he might be examined on commission. No medical certificate as to his health appears to have been furnished on his behalf, for the Judge remarks that if the Munsif

doubted that the man was really ill he should have ordered a medical certificate to be produced. The District Judge has held that the defendant No. 1 was perfectly ready and also within time with his evidence, and had no opportunity given him to give it. This may possibly amount, though I am not prepared to say it does, to a finding of fact with which this Court ordinarily cannot interfere, but it seems to me that it also involves a finding that the Munsif was wrong in refusing, as he did, under the circumstances stated by him, to issue a commission at the last moment—a finding with which I cannot agree.

[65] With regard to the non-production of the *challans* for Government revenue, the District Judge remarks that “their non-production by any one shows that the defendant No. 1 must have been the person who paid.” This certainly was not the proper inference to draw. If the plaintiffs had made out a sufficient case to make it necessary to prove who paid the Government revenue, it was for the defendant No. 1 to prove that he, if it was the fact, paid it. Again, the District Judge states that the defendant No. 1 was precluded from producing the *challans*, as he was given no opportunity to give his evidence, but surely these *challans* might have been proved, without the defendant No. 1 going into the witness box himself.

In my opinion, if the Judge really considered that the defendant No. 1 had been improperly precluded from giving evidence, which under the circumstances was necessary for his case, his proper course would have been to remand the case in order that his evidence might be taken.

Finally, the District Judge finds that “the plaintiff has entirely failed to prove his case, i.e., to make out any *prima facie* case whatever against defendant No. 1 whose *bona fides* alone is in issue, and that the only point the plaintiff offered evidence upon has been fully rebutted by the defence witnesses,” and he allowed the appeal and dismissed the plaintiff’s suit.

Even in the statement of his final conclusion the District Judge repeats the mistake in saying that there was only one point on which the plaintiffs had given evidence, the one point being apparently the alleged dispossession of the plaintiffs by the defendant No. 2, and not the non-relinquishment of possession by the defendant No. 2 on the execution of the *mokurari*. See paper book, page 9.

It has been urged before us by the respondent’s pleader that the finding on the whole case is a finding of fact with which this Court cannot interfere on second appeal, and we have been referred to a number of decisions of the Privy Council. On the other hand, Counsel for the appellants has contended that the District Judge has not complied with the directions given to him by this Court in its judgment remanding the case, and that by [66] reason of the defects in his judgment, which I have pointed out, there has been an entire mistrial of the case.

The question, whether a second appeal will lie, having regard to the decisions of the Privy Council in *Durga Chowdhram v. Jewahin Singh Chowdhri*, (1890) I. L. R., 18 Cal., 23 : L. R., 17 I. A., 122, and *Ram Gopal v. Shamskhaton*, (1892) I. L. R., 20 Cal., 93 : L. R., 19 I. A., 228, is one which is not free from difficulty. I may mention, however, that the judgment of the learned Judges of this Court, who made the order of remand in this case, is really an authority, if the point were taken, that a second appeal does lie. The finding of the District Judge, with which this Court had then to deal, is the same finding as that now before us. But, be that as it may, the judgment of the District Judge is extremely unsatisfactory, and I consider there is great force in the contention that there has really been a mistrial of the case.

In the first place, the District Judge has improperly excluded from consideration the fact, which he himself admits, that all the witnesses for the plaintiffs say that the defendant No. 2 continued in possession, and that the defendant No. 1 never was in possession after the execution of the *mokurari*. He has done so not so far as one can gather from his judgment because he has disbelieved their evidence, but because he considered it was impossible to separate the story of the alleged dispossession of the plaintiffs from the story of the defendant No. 2 having continued in possession—two matters between which, as I have said before, there was no apparent connection. This error is one of law rather than of fact. Had he considered that evidence it is possible he would have taken a very different view as to the necessity for the defendants to have proved affirmatively that the consideration actually passed. He might also have taken a different view of the fact that after the execution of the *mokurari* the same servant continued to collect the rents.

In the next place he was wrong in treating the evidence as to the possession of the defendant No. 2 as being merely incidental [67] to his conduct in connection with the alleged dispossession of the plaintiffs. This also is not a mere error in finding of facts.

Again he erred in holding that the Munsif and therefore he himself also were not at liberty to take the plaintiffs' evidence as a whole to prove that the defendant No. 2 never relinquished possession, and also in excluding altogether from consideration the evidence of the pleaders. These I take it are errors in law.

In stating that, apart from the relationship and the evidence of the pleaders, there was not a particle of the plaintiffs' case left; he appears merely to be repeating the view already referred to that the evidence as to non-relinquishment could not in the face of the story as to the alleged dispossession be considered.

The District Judge has also erred in law in treating the recitals in the *mokurari* as to the payment of consideration as any evidence as between the plaintiffs and the defendants, and also in relying upon a supposed usage in respect to such recitals as to which there was no evidence whatever. With regard to the passing of the consideration, if, by reason of the case made by the plaintiffs as to the relationship of the defendants and the non-relinquishment of possession by the defendant No. 2, it became necessary to decide the question at all, it was for the defendant to show that the consideration actually passed.

The finding that the fact that the defendant No. 1 did not give his evidence was due to a misapprehension on the part of the Munsif as to the proper procedure, and that the defendant No. 1 had no opportunity given to him to give his evidence, in my opinion precluded the District Judge from drawing—as he was entitled though not bound to draw—an inference against the defendant.

The errors to which I have drawn attention are not merely errors in findings as to matters of fact. They are no doubt involved in such findings, and if they are not strictly errors in law they are errors in law and fact. To use a phrase more often applied to a charge to a jury, the District Judge has misdirected himself as to various matters of law and fact, and, moreover, while he has omitted to take into consideration all [68] evidence in the case, he has relied on matters which were not in evidence at all.

For the reasons stated above, I am of opinion that it is impossible to say that there has been a proper trial of the case by the District Judge. His final conclusion that the plaintiffs have entirely failed to make out a case against defendant No. 1 is one based upon, amongst other considerations, the various

erroneous findings to which I have alluded. It is not correct, therefore, in my opinion to say that his final conclusion is merely an erroneous finding of fact, with which this Court cannot, regard being had to the decisions of the Privy Council to which I have referred, interfere on second appeal. I would therefore send the case back to the District Judge in order that he may reconsider his decision in the light of the observations which I have made.

Banerjee, J.—The suit out of which this appeal arises was brought to recover possession of certain immoveable property, upon obtaining a declaration that the *mokurari* lease, dated the 5th December 1891, executed by the defendant No. 2 in favour of the defendant No. 1, was a fabricated, collusive and fraudulent document, and that the defendant No. 1 had acquired no title under it.

The allegations of fact upon which the plaintiffs brought this suit were, that the plaintiff No. 1 had purchased an eight-annas share of *mouzah* Ledha at a sale in execution of a decree against defendant No. 2; that the defendant No. 1 in collusion with the defendant No. 2 dispossessed the plaintiff No. 2, who was a *ticcadar* under the plaintiff No. 1, and set up a false and fraudulent *mokurari* lease; and that the plaintiffs were, therefore, obliged to bring this suit.

The defence of the defendant No. 1, who alone contested the suit, was to the effect that the *mokurari* lease impugned by the plaintiffs was a real *bona fide* and valid lease, and that the defendant No. 1 was entitled to retain possession of the property in dispute as *mokurari*dar.

The first Court found for the plaintiffs and gave them a decree. [69] On appeal by the defendant No. 1, the learned District Judge reversed the Munsif's decree and dismissed the suit. There was a second appeal against the District Judge's judgment; upon which that judgment was set aside, and the case remanded to the District Judge for a fresh decision upon the point as to whether the plaintiffs had made out a *prima facie* case, such as they might reasonably be expected to prove, and, if so, whether the defendant had succeeded in rebutting it. Upon this remand, the learned District Judge, after a consideration of the evidence, has come to the conclusion that the plaintiffs have failed to make out a *prima facie* case, and he has accordingly again dismissed the plaintiffs' suit. The plaintiffs have now preferred this second appeal, and as the learned Judges, Mr. Justice RAMPINI and Mr. Justice HENDERSON, before whom the appeal came on for hearing, have differed in opinion, the former being of opinion that the appeal ought to be dismissed, and the latter that the decree of the Lower Appellate Court ought to be reversed, and the case remanded, the case has been referred to me under section 575 of the Code of Civil Procedure, read with section 557.

The grounds upon which the learned Vakil for the appellant contends that the judgment of the Lower Appellate Court ought to be reversed are, *first*, that the learned Judge below is in error in holding that it is impossible to separate the false story of dispossession by Shamsher Bahadur from the general allegation that Shamsher Bahadur was in possession, when he ought to have held that the two points were fairly separable from one another; *second*, that the learned Judge below was in error in excluding from consideration the evidence of the two pleaders as inadmissible; *third*, that the learned Judge below is wrong in holding that no witnesses, as to the passing of consideration, were necessary; *fourth*, that the learned Judge in the Court below is also wrong in his remarks about the non-examination of the defendant No. 1; *fifth*, that the learned Judge below is further wrong in his remarks on the non-production of the Government *chakman*; and, *sixth*, that the learned Judge below is wrong in observing that the evidence as to the payment of consideration a few days after

registration, was exactly in conformity with usage, in the absence of evidence [70] to prove such usage. And these, I may add, are also the main grounds upon which Mr. Justice HENDERSON in his judgment says that the decision of the Lower Appellate Court ought to be set aside.

Before considering these points in detail, I may observe that the grounds upon which a second appeal lies, and it is open to this Court to interfere with the judgment of the Lower Appellate Court, are those set out in section 584 of the Code of Civil Procedure, and section 585 expressly enacts that no second appeal shall lie except on the grounds mentioned in section 584. And their Lordships of the Privy Council have, in more than one case, pointed out the necessity of adhering strictly to the provisions of these sections. I need only refer to the cases of *Anangamangari Chowdhurani v. Tripura Sundari Chowdhurani*, (1887) 1. L. R., 14 Cal., 740; L. R., 14 I. A., 101; *Pertap Chunder Ghose v. Mohendra Nath Purkait*, (1889) I. L. R., 17 Cal., 291; L. R., 16 I. A., 233; *Durga Chowdhurani v. Jewahir Singh Chowdhurani*, (1890) I. L. R., 18 Cal., 23; L. R., 17 I. A., 122; and *Ramratan Sukal v. Nandu*, (1891) I. L. R., 19 Cal., 249; L. R., 19 I. A., 1.

Now, the grounds mentioned above, upon which I am asked to interfere with the judgment of the Lower Appellate Court can come only under the heads (a) and (c) of section 584, if indeed they can come under the section at all.

Let us then see how far the grounds urged before me by the learned Vakil for the appellant really come under either of those two heads. The first ground is, that the learned Judge below is in error in saying that it is impossible to separate the false story of dispossession by Shamsher Bahadur from the general allegation that Shamsher Bahadur was in possession, when really there is no logical impossibility in separating the one from the other. Can this come under either clause (a) or clause (c) of that section, 584? That is, is it contrary to any law or does it involve any error of procedure, for a Court that has to deal with the facts of a case, to say, that it cannot believe one part of the story told by certain witnesses when another part of the story told by the same witnesses is manifestly false?

[71] The answer to this question must, in my opinion, be in the negative. It is true that the Lower Appellate Court has expressed itself a little too strongly when it says that it is impossible to separate the one story from the other; but we must take language in its ordinary sense, and I do not think that the learned Judge below meant, in the passage of the judgment to which reference is made, that it was logically impossible to separate one part of the story from the other. All that he means to say, as is evident from the context and especially from an earlier part of the judgment, in which he has criticised the evidence of the witnesses in detail, is, that taking the evidence as a whole, he finds it practically impossible to accept as true that part of their statements wherein they allege that the defendant No. 2, Shamsher Bahadur, was all along in possession, when he must disbelieve their evidence so far as it goes to show that the plaintiff, Ajudhya Singh, had obtained possession, and had been subsequently dispossessed by Shamsher Bahadur.

Upon the second point, the learned Judge below is of opinion that the evidence of the two pleaders, who depose to defendant No. 1 having written to the *mohurir* of one of them, who was his own pleader, that the pleader's reward in a certain criminal case was to be paid by the defendant No. 2 was inadmissible, because it involved the disclosure of a privileged communication. That view Mr. Justice RAMPINI considers incorrect, though he is of opinion that the evidence has been rightly excluded. I am of opinion that so far as the evidence of the pleader Shashi Bhusan Mukerjee is concerned, the

ground upon which the learned Judge below has excluded it, is correct, because Sashi Bhusan Mukerjee was the pleader of defendant No. 1, who wrote the letter, and though the communication contained in the letter was not addressed to the pleader direct but was addressed to the pleader's clerk, section 127 of the Evidence Act extends to such a communication the same confidential character that attaches to a communication to a pleader direct under section 126.

As regards the evidence of the other pleader, Thakur Pershad, I concur with Mr. Justice RAMPINI in thinking that the learned Judge was wrong in excluding it on the ground of its involving [72] a disclosure of a privileged communication; and I also agree with him in thinking that, though the evidence of this second pleader was not inadmissible upon the ground upon which the learned District Judge excluded it, it is really inadmissible on the ground that it involves the giving of secondary evidence of the contents of a document without satisfying the conditions required to be fulfilled by section 65 of the Evidence Act.

As to the third point, no doubt the learned Judge below is wrong in law when he says, "I do not think any witnesses as to the passing of the consideration were necessary;" but that part of his judgment is wholly matter of surplusage, he having in an earlier part of his judgment found that there was evidence to prove payment of consideration, that evidence consisting of the receipt for the consideration and the deposition on oath of the defendant No. 2 in which the receipt of consideration is admitted.

On the fourth point I think it enough to say that the learned Judge below has found—I am quoting his words—"that the defendant No. 1 was perfectly ready and also within time with his evidence and had no opportunity given him to give it;" and I think that this finding is sufficient to dispose of the objection that the learned Judge below was wrong in not attaching due weight to the non-examination of defendant No. 1; and this remark is sufficient also to meet the fifth point raised.

As to the sixth point, it is true that the learned Judge below does make use of the word "usage," when he says that "it is the invariable practice to acknowledge full consideration of the purchase-money in these deeds, and the deposit of 25 per cent. or so, followed by the payment in full four or five days after registration, i.e., when 'takaza badlani, or exchange of the registration receipt for the money takes place, is so exactly in conformity with usage that it corroborates defendant No. 2's statement." But what he really means to say is this, that the account given by the defendant No. 2 as to the manner in which consideration was paid, is one that accords best with the way in which such transactions usually take place; and I do not think that this involves any error of Law. If any fact had been found without any evidence to support it then no doubt the finding would have been open to interference in second [73] appeal as has been held by the Privy Council in the case of *Hemanta Kumari Debi v. Brojendra Kishore Roy Chowdhry*, (1890) 1 L. R., 17 Cal., 875 : L. R., 17 I. A., 65. But that is not the case here. I should add that not only has the Lower Appellate Court found in this case that the plaintiffs' evidence is insufficient to make out a *prima facie* case but it has also found that the evidence adduced by the defendant has sufficiently met the only case put forward by the plaintiff in his evidence. The learned Judge observes: "As regards the actual evidence to rebut plaintiff's case on the record it fully and categorically meets the only case put forward by plaintiff in his evidence. That case is, as I have said, that defendant No. 1 never had possession. Three *raiya*s of Ledha, of whom one is *chowkidar* and one is *barahil*, distinctly swear that he was." And, then, after giving his reasons for dissenting from

the Munsiff's view, that these witnesses were not reliable, he concludes in these words: "I have thus given the evidence for both sides my most mature and detailed consideration, and I can only repeat my previous finding that the plaintiff has entirely failed to prove his case, *i.e.*, to make out any *prima facie* case whatever against defendant, No. 1, whose *bona fides* alone is in issue, and that the only point the plaintiff offered evidence upon has been fully rebutted by the defence witnesses."

I am, therefore, of opinion that no ground has been made out for the interference of this Court with the judgment of the Lower Appellate Court in second appeal, and I agree with Mr. Justice RAMPINI in dismissing this appeal with costs. The respondent is entitled to the costs of the two hearings in this Court.

S. C. C.

Appeal dismissed.

NOTES.

[This was dissented from in (1903) 31 Cal., 155, as regards the powers of the Appellate Court, to entertain objections as to admissibility of evidence.]

[74] APPELLATE CIVIL.

The 22nd August, 1898.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,
AND MR. JUSTICE BANERJEE.

Corporation of Calcutta.....Petitioners

versus

Bhupati Roy Chowdhry.....Opposite Party.*

Calcutta Municipal Consolidation Act (Bengal Act II of 1888), sections 125, 132 and 135—"Valuation," Meaning of—Re-valuation made by the Municipality within six years from the date of the valuation made after hearing objection, Legality of—Provincial Small Cause Courts Act (IX of 1887), section 25—Code of Civil Procedure (Act XIV of 1882), section 622—Statute 24 and 25 Vic., c. 104, section 15—Superintendence of High Court.

The word "valuation" in section 135 of the Calcutta Municipal Consolidation Act (Bengal Act II of 1888) means, not "the amount of the valuation" only, but also the process or act of valuation.

A valuation was made by the Calcutta Municipality of a holding; the rate-payer objected to the amount, and the Vice-Chairman of the Municipality, on hearing the objection, fixed the valuation at a certain amount. Within six years from this valuation fixed after objection, a re-valuation was made by the Municipality, and the rate-payer objected to the legality of such valuation on the ground that the Municipality had no power to make a re-valuation within six years from the date of the last valuation. The Vice-Chairman overruled the

* Civil Rule No. 1617 of 1898.

objection, and the rate-payer appealed under section 157 of the Act to the Judge of the Court of Small Causes at Sealdah, who allowed the appeal.

Held, that inasmuch as the objection raised by the rate-payer was an objection to the valuation within the meaning of section 135 of the Act the Judge of the Small Cause Court had jurisdiction to deal with it. That being so, it was not open to the High Court to interfere, either under section 25 of the Provincial Small Cause Courts Act, or under sec. 622 of the Code of Civil Procedure or under section 15 of 24 and 25 Vic., c. 104.

THE facts of this case, so far as they are necessary for the purposes of this report, appear sufficiently from the judgment of the High Court.

Mr. C. P. Hill and Mr. W. K. Eddis for the Petitioner.

Dr. Ashutosh Mookerjee, Babu Ganendro Nath Bose, and Babu Nanda Lal Sircar for the Opposite Party.

[75] The judgment of the High Court (MACLEAN, C. J., and BANERJEE, J.) was as follows:—

Maclean, C. J. (BANERJEE, J., *concurring*).—The facts necessary to be stated for the decision of this rule are shortly as follows: In a valuation made by the Corporation of Calcutta to take effect from the 1st April 1891, the annual value of certain premises belonging to the opposite party was fixed by the Commissioners at 651 rupees. On the 2nd April 1891, the opposite party objected to that valuation, but, owing, as it is said, to the great number of objections taken by other rate-payers, the objection was not determined until the 28th January 1895, when the Vice-Chairman reduced the annual value to 487 rupees. Under the "Calcutta Municipal Consolidation Act, 1888" (Bengal Act II of 1888) fresh valuations are to be made every six years, and, in 1897, the Commissioners made a fresh valuation to take effect from the 1st April 1897 and the annual value of the above property was fixed at 566 rupees. On the 10th July 1897 the opposite party, under section 135 of the Act, gave notice of his objections to the last valuation. These objections were heard by the Vice-Chairman on the 10th December 1897, and the valuation was reduced to 540 rupees. The opposite party appealed under section 157 to the Court of Small Causes at Sealdah, and the Judge of that Court, on the 23rd May 1898, allowed the appeal, and determined that the said valuation was illegal, inasmuch as a period of six years had not expired from the date of the last preceding valuation, and set aside the last valuation. Under these circumstances we are invited by the present rule to interfere under section 25 of the Small Cause Courts Act (IX of 1887).

To this rule two objections are raised—

First.—That, unless the Judge of the Small Cause Court had no jurisdiction to determine the matter, this Court cannot interfere, either under section 25 of the Small Cause Courts Act, or under section 622 of the Code of Civil Procedure, or under section 15 of 24 and 25 Vic., c. 104.

Secondly.—That, if the above point be decided adversely to the opposite party, the Judge was right on the merits.

It has not been disputed by Mr. Hill, nor could it well be dis-[76]puted on the authorities, as they stand, that if the Judge of the Small Cause Court had jurisdiction to determine the matter, this Court will not interfere under section 15 of Statute 24 and 25 Vic., c. 104 (see the cases collected in the case of *Tejram v. Harsukh*, (1875) I. L. R., 1 All., 101. Save in cases cognizable by the Small Cause Court, we could not interfere under section 25 of the Small Cause Courts Act by reason of sub-section (c) of section 3 of that Act. As regards section 622, although this Court may interfere in regard to certain errors other than those of jurisdiction, no such errors have been suggested in the present

case. But the Corporation contend that the Judge of the Small Cause Court had no jurisdiction to determine the question of the legality of the valuation in the sense of whether or not the Corporation could make the valuation at the time they did, and it becomes necessary to decide this question at the outset, for if it be decided against the contention of the Corporation, the second question, as to the merits, will not arise.

The contention of the opposite party is that, upon the true construction of the Act I have referred to (Bengal Act II of 1888), the Corporation were premature in re-valuing his house, as six years had not elapsed from the date of the last "valuation," *viz.*, the 28th January 1895. The question of jurisdiction appears to me to hinge upon what is meant by the term "valuation" in section 135 of the Act, for the person dissatisfied with that "valuation" may object if he comply with the provisions of the section. The Corporation contend that the term "valuation" means "the amount of the valuation" or the amount at which any particular property is valued, and that it is only to the amount of the valuation that the rate-payer can object; and it is only such an objection with which the Small Cause Court has jurisdiction to deal. The point is, perhaps, not free from doubt, but the first criticism on this contention is that the Act speaks of "valuation", not "amount of the valuation," and it would be rather incongruous if the dissatisfied person, *i.e.*, the rate-payer, can object to the payment of part of the valuation, but cannot challenge the valuation [77] in its entirety. The opposite party here, *i.e.*, the rate-payer, says that he objects, not to a part of the valuation, but to the valuation in its entirety, and that he objects to that valuation, because it is premature, *i.e.*, made before the Corporation were entitled to make it, and consequently that it imposes upon him a liability to pay the new assessment from a date from which he is not bound to pay it. He argues that this goes to the very root of the matter, and consequently that he objects to the entire valuation. It is a little difficult to see why this is not an objection to the valuation. What does the term "valuation" mean? Is it confined merely to the amount at which the property is valued, or does it cover the process or act of valuation? Section 125 speaks of a valuation being cancelled on the ground of irregularity, which points to something beyond the mere question of amount. If a valuation were made before the proper time it would be irregular. Again section 132, which speaks of the valuation of districts, imports that the term "valuation" cannot be construed in the restricted sense for which the Corporation contend, for the valuation of a district cannot mean the mere amount of the valuation, but must include the process or act of valuation itself. A "valuation" is the act of valuing, and the opposite party may under section 135 object to that act of valuing, and here he objects to the whole act of valuing on the ground that it is unauthorised and premature.

I think then the contention of the opposite party is well founded, and that we should be placing a narrow construction on the section if we were to adopt the argument of the Corporation. In my opinion, then, the objection raised by the rate-payer was an objection to the valuation within the meaning of section 135, and that being so, the Judge of the Small Cause Court had jurisdiction to deal with it, and it is not open to us to interfere.

I do not propose to enter into the merits, *i.e.*, as to whether or not the Judge of the Small Cause Court has placed a right construction on the Act, but I cannot refrain from saying that the language of the Act is very far from clear upon the point, and that the view taken by the Judge of the Small Cause Court is open to the criticism, on the score of confusion and [78] inconvenience in the working of the assessment of the Corporation, to

which Mr. *Hill* has subjected it. However, we have nothing to do with that; if the Act does not meet, in this respect, the reasonable requirements of the Corporation, it may be advisable to amend it. That, again, is a matter for the consideration of the Corporation.

For these reasons the rule must be discharged with costs.

S.C. G.

Rule discharged.

NOTES.

[I. As regards the jurisdiction of the High Court, this was followed in (1901) 6 C.W.N., 480; (1909) 36 Cal., 994; 13 C.W.N., 1221; 6 C.L.J., 50; but see 31 Mad., 510.

II. In (1910) 15 C.L.J., 500, with reference to sec. 162 of the Calcutta Municipal Act, III of 1899 (B.C.), it was held that the Small Cause Court Judge had jurisdiction to deal with the question of valuation and that question alone; as to the manner in which the land was to be assessed, after the valuation had been settled, whether it was or was not to be assessed as vacant land, was a question entirely beyond the jurisdiction of the Small Cause Court Judge.

III. 'Valuation' includes the whole process or act of valuation. This was applied in (1905) 33 Cal., 396; 10 C.W.N., 289; 3 C.L.J., 169.]

[26 Cal. 78]

The 27th July, 1898.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, AND

MR. JUSTICE BANERJEE.

Totaluddi Peada and others.....Defendants

versus

Mahar Ali Shaha.....Plaintiff.*

Mortgage—Transfer of Property Act (IV of 1882), section 59—Mortgage deed signed by the mortgagor, attested by one witness, and containing an acknowledgment by the Sub-Registrar, whether valid—Indian Succession Act (X of 1865), section 50—Mortgage being invalid whether a money decree can be made upon the covenant in the bond.

The requirements of section 59 of the Transfer of Property Act are not satisfied when a mortgage bond is signed by the mortgagor, attested by one witness, and contains the Sub-Registrar's signature to the endorsement, recording the admission of the execution by the executant; therefore such a mortgage is not valid in law.

When a suit is brought upon a mortgage bond, although the mortgage is held to be invalid on the ground that the requirements of section 59 of the Transfer of Property Act were not satisfied, the plaintiff is entitled to recover, upon the covenant, money which the defendant covenanted to pay.

THIS appeal arose out of an action brought by the plaintiff to enforce a mortgage bond. The bond was alleged to have been executed by three persons: *M*, *T* and *G*. *M* signed his name himself, but *T*'s and *G*'s names were signed by the pen of one Mangal Kazi, who also signed his name as the writer of the names of the executants. He did not sign separately as a witness, but the scribe signed his own name as such. Below the word witness [79] in the bond appeared the signatures of the scribe as well as of Mangal Kazi: the latter, however, as the person by whose pen two of the executants signed. *M* signed in the presence of Mangal Kazi. Before the Sub-Registrar, *M* signed himself, and *T*'s name was written by the pen of the said Mangal

* Appeal from Appellate Decree No. 827 of 1897, against the decree of Babu Gris Chandra Chatterjee, Subordinate Judge of Khulna, dated the 17th of February 1897, reversing the decree of Babu Bhupal Chandra Ganguli, Munsif of that district, dated the 18th of November 1898 [1896 ?].

Kazi. *G.* was then in jail, and his admission was recorded by the officer in charge of the jail, who put his signature below the statement made by *G.* The bond also contained the Sub-Registrar's signature to the endorsement, recording the admission of the executants.

The defence, *inter alia*, was that no decree could be passed upon the bond, as it was an invalid one, the requirements of section 59 of the Transfer of Property Act not having been satisfied. The Munsif dismissed the suit of the plaintiff, holding that the requirements of section 59 of the Act were not satisfied, and the bond was invalid under the law. On appeal to the Subordinate Judge he reversed the decision of the first Court. Against this decision the defendants appealed to the High Court.

Dr. Ashutosh Mookerjee for the Appellants.

Babu Chunder Kant Sen, for Babu Dwarka Nath Chuckerbutty, for the Respondent.

The High Court (MACLEAN, C.J., and BANERJEE, J.) delivered the following judgments:—

Maclean, C. J.—Upon the question whether this is or is not a valid mortgage, having regard to the provisions of section 59 of the Transfer of Property Act, I think it is not. That section says that a mortgage can only be effected by a registered instrument, signed by the mortgagor and attested by at least two witnesses. The question of attestation is a question of fact, and this mortgage was not attested by two witnesses; for I am unable to accept the argument for the plaintiff that the acknowledgment by the Sub-Registrar is equivalent to the attestation of an attesting witness. But although as a mortgage the deed may not stand, I think the plaintiff is entitled to recover upon the covenants in the bond, the principal money which the defendants covenanted to pay. There is no question of this money demand [80] being barred by limitation, and he is entitled to a money decree on that covenant.

Then, as regards the interest, which is at a high rate, the question of liability must depend upon the question whether the plaintiff did or did not obtain possession of the land covered by the mortgage. Upon that question, as no evidence was gone into on the point in either of the lower Courts, I think there must be a remand to the Lower Appellate Court, in order that it may ascertain whether the plaintiff did or did not get possession. We think that, under the circumstances, there should be no order as to the costs of this appeal.

Banerjee, J.—I am of the same opinion. The suit out of which this appeal arises is brought to enforce a mortgage bond. The mortgage bond is attested by only one witness; and the question is whether it can be valid, having regard to the provisions of section 59 of the Transfer of Property Act. The Court of Appeal below has, in effect, held that the requirements of section 59 have been satisfied by the Registrar's signature to the endorsement recording the admission of execution by the executant; and, in support of this view, the Lower Appellate Court refers to certain cases, of which I may mention *Horendra Narain Acharji Chowdhry v. Chandra Kanta Lahiri*, (1888) I.L.R., 16 Cal., 19, which are cases under section 50 of the Indian Succession Act.

I am of opinion that this view is unsound. It is quite true that the signature of the Registrar at the foot of the registration endorsement embodying the admission of the executant has been held to be sufficient attestation within the meaning of section 50 of the Indian Succession Act; but that is no reason for holding that the signature of the Registrar would be sufficient attestation within the meaning of section 59 of the Transfer of Property Act. For

section 50 of the Indian Succession Act, clause 3, says that a will "shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will or have seen some other person sign the will in the presence or by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark or the [81] signature of some other person," and the Registrar's signature would come under the last description of attestation referred to in the third clause of section 50 of the Indian Succession Act. But section 59 of the Transfer of Property Act does not show that the attestation therein contemplated is anything other than the attestation of the act of signing by the executant; and it cannot, in the absence of any express provision to that effect, be taken to include the attestation of the executant's admission of having signed the document.

It was then contended that though this mortgage may be invalid under section 59 of the Transfer of Property Act, still the plaintiff would be entitled to have a declaration that the property in suit is charged with liability to satisfy the debt under section 100 of the Transfer of Property Act. I am of opinion that section 100 is not intended to cover a case like this. It contemplates a case in which the transaction does not amount to a mortgage, although certain property is made security for the payment of money, and not a case where property is intended to be mortgaged, but the mortgage has become invalid by reason of the mortgage-deed not fulfilling the requirements of the law.

Upon the question of interest and the question of the plaintiff's right to obtain a money decree, I agree entirely in the view taken by the learned Chief Justice.

S. C. G.

Appeal allowed. Case remanded.

NOTES.

I. Where the document is a simple mortgage within sec. 58 of the Transfer of Property Act, it should not be treated as falling within sec. 100, merely because it did not comply with the requirements of sec. 59 :—(1905) 32 Cal., 729 : 9 C.W.N., 697 ; 9 C.W.N., 1001 ; (1906) 33 Cal., 985 : 4 C.L.J., 219 ; (1901) 24 Mad., 397 ; but see (1907) 17 M.L.J., 89.

II. A personal covenant which does not require attesting may be proved by the document which was invalid as mortgage by reason of its not having been validly attested :—(1909) 32 Mad., 410 F.B. : 17 M.L.J., 584 ; (1906) 30 Mad., 284 : 17 M.L.J., 167.

III. The requirement as to attestation is not satisfied by mere admission of execution :—(1898) 26 Cal., 246 ; (1900) 14 C.P.L.R., 42 ; (1905) 32 Cal., 729 : 9 C.W.N., 697 ; (1905) 9 C.W.N., 1001 ; see also *Rash Behari Ghose* on Mortgages, (IV Edn., 1911), Vol. I, p. 147, note 4.

In *Shamu Pattar v. Abdul Kadir Ravuthan*, (1912) 35 Mad., 607 : 39 I. A., 218, the Privy Council held similarly, with reference to sec. 59 of the Transfer of Property Act, 1882.

IV. Where the attesting witnesses signed before the execution by the mortgagor, the requirements as to attestation were held not to have been complied with :—(1905) 32 Cal., 729 : 9 C.W.N., 697.]

[26 Cal. 81]
PRIVY COUNCIL.

The 1st, 5th and 26th July, 1898.

PRESENT :

LORDS WATSON, HOBHOUSE AND DAVEY.

Muhammad Imam Ali Khan.....Defendant

versus

Husain Khan.....Plaintiff.

[On appeal from the Court of the Judicial Commissioner of Oudh].

Oudh Estates' Act (1 of 1869) --Estate of a sanad-holding talukhdar—Lineal primogeniture by custom-- Award of a body of talukhdars within section 33 of Oudh Estates' Act—Withdrawal of a voluntary admission.

The title to a *talukhdari* estate devolving upon a single heir by a custom of lineal primogeniture was contested. The plaintiff claimed to succeed his [82] deceased brother as *talukhdar*. The defendant, who was his paternal uncle, was in possession. Before the annexation of the province the *kabuliyat* had been taken in the name of the plaintiff's brother as *talukhdar*, who afterwards had been settled with at both the summary settlements. By primogeniture, whether lineal or by proximity of degree (of which latter kind there was no evidence as to its being the customary one) he was the heir. To him a *sanad* had been granted, and the *talukhdari* had been entered in list II under the Act of 1869. On the other hand, it was urged that the above was consistent with the existence of a trust for the benefit of the titular *talukhdar's* uncles, of whom the defendant was the survivor, they having assented to the recognition of a nominal title in their nephew.

Held, that, in intention as well as in form, the grant of the *talukhdari* had been made absolutely to the *sanad*-holding *talukhdar*.

In regard to the state of things before annexation, it might have been questioned whether or not the property was being held *benami* at that time. But after the Oudh Estates' Act, 1869, had become law, the title shown by the plaintiff must prevail, and he must recover the estate, unless a trust for the defendant should have been established. There had been no consideration given, and there was nothing to create a trust. There had been no transfer, no estoppel, and no bar by time.

In 1868 an award had been made by a body of *talukhdars* as arbitrators within section 33 of the Act, between members of the family other than the present disputants. This as well as a *wajib-ul-arz* of one of the villages of the *talukh* was admissible as evidence of what was the custom in regard to its devolution.

In 1879 the plaintiff had, on his brother's death, while admitting "the custom prevailing in my family of *gaddinashini*," joined in a petition that the defendant's name should be entered *dakhil kharij* in the revenue records.

Held, that there might be a withdrawal of any gratuitous admission, unless there should be some obligation not to withdraw it; that there was no such obligation here; and that there had been no proof of any title upon which the admission could rest.

APPEAL from a decree (26th July 1894) of the Court above mentioned, reversing a decree (7th July 1891) of the District Judge of Lucknow.

This suit was brought by the present respondent against Kazim, Husain Khan, now deceased, and represented by his son the present appellant, to obtain possession of the *talukhdari* estates of Bhatwamau in the Bara Banki District and of Katori Khund in that of Sitapur, with other property; the plaintiff [83] making title through his brother Badshah Husain, deceased in November 1878.

The ancestor, who was *talukhdar*, was Imam Ali Khan, who was succeeded by his son Ali Baksh Khan, who died about the year 1839 leaving four sons. The eldest of these, Nabi Baksh, who was killed in 1857, left two sons, one the said Badshah, and the other Sirdar Husain, the plaintiff-respondent.

The relationship of the parties and all the material facts of the case appear in their Lordships' judgment.

In the time of the last Nawab of Oudh the *kabuliyat* of the above two estates was taken in the name of Badshah, who was then a minor. After the annexation in 1856, at the first summary settlement, the settlement of the *talukh* was made in his name. At the restoration of the *talukh*, in the second summary settlement following upon the events of 1857-58, the *talukh* was again settled in his name as *talukhdar*. On the 11th October 1860 a *sanad* was granted in his name. Afterwards when the lists were prepared under the Oudh Estates' Act, 1869, he was entered as *talukhdar* in list II.

The principal question raised on this appeal was whether Badshah was the absolute owner, or was merely the nominal *talukhdar* holding in trust for two brothers of his father, that is, for the elder Tajammal till his decease, and afterwards for Kazim, the surviving brother. Also it was questioned whether there had or had not been acts that amounted to a transfer of the proprietary right by the plaintiff to the defendant.

The plaintiff (March 1889) alleged the succession of the plaintiff as *talukhdar*, under clause 6 of section 22 of the Act I of 1869, on the death of Badshah, and that Tajammal at one time, and on his death Kazim, had managed the estate under a written authority from Badshah. It was added that Kazim had obtained a *dakhil kharij* in 1879 with the plaintiff's assent, but this assent had been given under undue influence exercised over him. Possession of the *talukhdari* estates, and of the whole of the property left by Badshah, and mesne profits, with interest, were claimed.

The defendant Kazim answered that he and his deceased [84] brother Tajammal, by whose exertions the estates, at one time lost to the family, had been recovered, were entitled; and that the defendant was now the real proprietor. If the plaintiff had ever been entitled to the succession as *talukhdar*,—though this was denied,—yet, by his own acts in 1879, the plaintiff had made it over to Kazim.

The questions, which the above indicated, were stated in the issues framed between the parties.

The District Judge found that until 1856 the custom of the family was for one member to hold the estate, and that under the Nawab of Oudh the estate at one time had been lost to the family, but was recovered by the exertions of Tajammal Husain with the aid of the defendant; and that these two had the beneficial ownership of the estate, and caused the summary settlement of 1856 to be made with Badshah, as a nominal owner or trustee for them. He was of opinion that what took place afterwards, the issue of the *sanad*, and the registration under the Oudh Estates' Act, 1869, gave no better title to him, and that consequently the respondent had failed in establishing his right to the possession of the estate. He dismissed the suit for the *talukhdari* estate.

An issue, whether the defendant had acquired any of the property in his hands with his own funds was found against him.

Both parties appealed.

The Appellate Court was constituted under Act XIV of 1891, of both the Judicial, and the Additional Judicial, Commissioner.

Their judgment was that the decree of the first Court should be reversed, upon the view which they took of the evidence. They attributed weight to

the fact that Badshah's name was entered in the *kabuliyat* prior to the annexation, and that no satisfactory explanation as to this, adversely to the title of Badshah, had come from the defendant. They considered the facts as to the conduct of Tajammal, and of the defendant, in connection with the settling of the estates in the name of Badshah, and the entry in list II, without finding any evidence of a trust.

The judgment concluded by summing up to the following [85] effect the main conclusions at which the Court arrived: The plaintiff was, in their opinion, the heir of Badshah, the last legal owner; and the plaintiff had established that he had not acted with a free will and intention when he petitioned for the defendant's name to be inscribed in the *malguzari* register. The defendant, on the other hand, had not established that the plaintiff had transferred the *talukhdari* rights to him, or shown that the suit was barred.

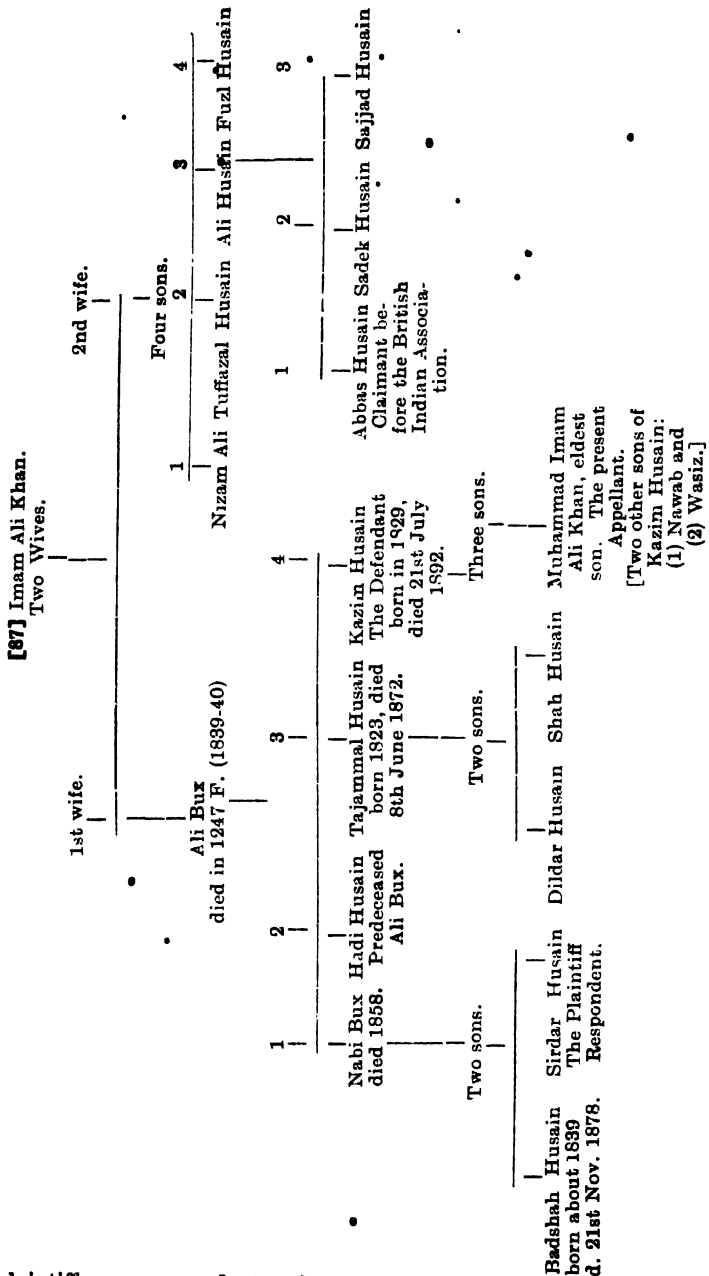
The decree was made for possession and mesne profits.

Mr. Lawson Walton, Q. C., and Mr. G. E. A. Ross, for the appellant, contended that the evidence had shown that Badshah had nominally held the estate, and was, in fact, constituted a trustee for the defendant. The original putting forward of Badshah had taken place in consequence of the state of things in Oudh before annexation having rendered it expedient. He had continued to be the ostensible owner, but had not interfered in the management of the *talukh*. This had been left to Tajammal, and after his death to the defendant Kazim Husain. Badshah had never taken any active part, or exercised proprietary rights over the estates. The mutation of names in the settlement records had, on the death of Badshah, been made in favour of the uncles, with the consent of the plaintiff—a fact which could have hardly taken place had not the position of the plaintiff been that of a person only nominally entitled. All the circumstances connected with the restitution of the *talukh*, after the confiscation of 1858, and the settlement in Badshah's name, at the second summary settlement, were reviewed. The good opinion entertained of Tajammal by the authorities was referred to; and it was contended that the issue of the *sanad* in Badshah's name was not inconsistent with the real proprietorship having belonged to that elder member of the family, who managed the property, but had concurred in allowing the nominal position of *talukhdar* to remain as it had previously been registered. The distinct admission by Badshah that all the authority which he had was to be exercised by Tajammal could be accounted for by there having been the understanding that the actual proprietorship should not be interfered with; nor was there any interference [86] by Badshah, who lived a retired life on the maintenance supplied by his uncle. Reliance was placed on the admission by the plaintiff that Kazim was entitled to the proprietary possession as shown by his signing the petition of the 25th November 1878, for the latter to be entered in the collectorate register, and by his statement made shortly afterwards. Reference was made to *Ramanand Kuar v. Raghu Nath Kuar*, (1881) I. L. R., 8 Cal., 769; L. R., 9 I. A., 41; *Thukrain Sookraj Koovar v. The Government*; (1871) 14 Moo. I. A., 11; *Hardeo v. Jewahir Singh*, (1877) I. L. R., 3 Cal., 522; L. R., 4 I. A., 178; and *Shere Bahadur Singh v. Dariao Kuar*, (1877) I. L. R., 3 Cal., 645, on the subject of *talukhdari* estates held in trust, and the constitution of the trusts in such cases. Reference was also made to the Indian Contract Act, IX of 1872, section 16.

Mr. A. Cohen, Q. C., and Mr. C. W. Arathoon, for the Respondent, were not called upon.

Afterwards, on the 26th July, their Lordships' judgment was delivered by Lord Hobhouse.—The subject of this suit is the *talukh* with the estates of Bhatwamau, and other property said to have belonged to Badshah Husain

Khan. The case can be stated more briefly and clearly by inserting a pedigree which is not disputed.



The plaintiff, now respondent, who sues for possession, is shown on the pedigree as the brother and heir of Badshah. The original defendant Kazim Husain, whose eldest son is now the appellant, is shown as the plaintiff's uncle. The *talukhdar* is [88] entered in List II of the Oudh Estates' Act.

viz., as one whose estates, according to the custom of the family on and before the 13th February 1856, ordinarily devolved on a single heir. His title was either conferred or recognized by the Mahomedan Government before the annexation. After that event both summary settlements were made with him, and the *sanad* was granted to him. He remained legal owner until his death in 1878, when his legal title passed to the plaintiff. At that time Kasim was managing the estates and receiving the rents. The suit was commenced in March 1889. It is not now contended that the defendant has had any such possession as creates a bar by time. So far the facts of the case are undisputed.

The defendant's case is that, before the death of Ali Bux this estate, like many others, was suffering from the misrule and disorder which was the proximate cause of the annexation. Rents were unpaid, tenants absconded, cultivation ceased, and the Government officers tried to extort revenue, which was not earned, by harsh measures against the persons of the proprietors. As regards this estate he says that after the death of Ali, Tajammal, then a youth, was seized and cast into prison, and Nabi, the heir, was frightened, and preferred seeking safety by deserting the estate which the defendant describes as being "lost to the family." He adds that he and his brother Tajammal prevailed on the authorities to recognize Nabi's son Badshah then about 10 years old, and to take a *kabuliat* from him; but he alleges that the real benefit was given to Tajammal and himself who became joint proprietors, Badshah being in effect a *benamidar* for them. As for the settlements, he contends that the first was the consequence of Badshah's position as *kabuliatdar* at the annexation, and that the second and the *sanad* were arranged by Tajammal with the British officers, and that whatever legal interests were passed to Badshah were clothed with a trust for his two uncles. And he further contends that after the death of Badshah the plaintiff did acts by which the defendant's right of ownership was confirmed or fully recognized.

The questions thus raised are of a kind which is very familiar in Indian land litigation, and which happens to have come before [89] their Lordships frequently during the last few months: questions of *benami* where there is undoubtedly an ostensible or paper title on one side, and on the other side an allegation of possession in accordance with a real title. As regards the time prior to annexation it is a pure *benami* case. Afterwards a different element comes in, because the Oudh Estates Act introduces a mode of tenure more nearly resembling the English principle of distinction between legal and equitable estates, and the defendant has to meet the difficulty that the plaintiff possesses a legal estate by the force of which he must recover unless a trust can be fastened on it. Still the disputes are throughout strongly analogous to *benami* disputes, and both sides have adduced, as is usual, a great volume of evidence, including an amount of fiction and falsehood more than is usual even in controversies of this kind.

The District Judge, who tried the cause, believed the substance of the defendant's story, and dismissed the suit, but without costs. The Court of Appeal consisting of the Judicial Commissioner and Additional Judicial Commissioner reversed that judgment, and gave the plaintiff a decree for possession and mesne profits. Their Lordships have now to decide whether the Court of Appeal is right. They do not find it necessary to go into the numerous intricate discussions of subordinate points which have been elaborated with great care by the learned Judges below. They have been much aided by the fulness and accuracy with which all the broader features of the case have been presented by the Counsel for the appellants. At the close of Mr. Ross's able argument they had arrived at the conclusion that the apparent title and the real title coincide, and both belong to the plaintiff.

The history divides itself into three stages : that which comes before the annexation, that which extends from the annexation to the death of Badshah, and that which comes after the death of Badshah.

The first question is what was the position of Badshah at the time of annexation ; and it is perhaps the most important of the questions, because without understanding it rightly it is difficult to get a clear idea of the subsequent events. Is the position which Badshah obtained as *kabuliatdar* to be attributed to the [90] fact that the *talukh* descended according to the rule of primogeniture so that after Nabi Badshah would be the heir of Ali Bakhsh, or to the fact that Tajammal and Kazim themselves becoming beneficial owners chose him as their benamidar ? The first step is to ascertain whether the rule of descent was that of primogeniture. That it descended by custom to a single heir is the common case of both parties. The District Judge is of opinion that it descended by primogeniture not lineal. The only alternative to lineal primogeniture is primogeniture by proximity of degree. But there is no evidence to prove such a mode of descent, and if there were it would not help the defendant's case. Among those who are equal in proximity the elder in line is to be preferred. During Nabi's life therefore he was heir by proximity, and if he were to be considered as dead his son Badshah would be heir to him. It has indeed been suggested in argument, mainly with an eye to the last part of the case, that the family could elect one of themselves to be sole owner, but first, such a custom is not primogeniture, and, secondly, there is no evidence of it except that of the defendant himself and a statement made in mutation proceedings which will presently be examined. Independently, however, of the failure to show an alternative there is good evidence in favour of lineal primogeniture.

In the record is a judgment, signed by Sir Man Sing, of the Committee of *talukhdars* who made many awards respecting the provisions to be made for relatives of *talukhdars* which, by section 33 of the Oudh Estates Act, became, when duly approved and filed, legal decrees. Abbas, who was first cousin of Nabi, Tajammal, and Kazim, sued Badshah for partition ; and thereupon arose an inquiry what was the descendible character of the estate. The judgment bears date the 2nd November 1868, and on this point it was as follows :

"*Secondly*—The statements made at the time of the Summary Settlement and the conclusion arrived at by the Settlement Officers from inquiries (made into the matter) and the statements made by the witnesses before the Committee, tend to show that the custom of succession by right of primogeniture did prevail in this family. After Imam Ali Khan his eldest son Ali Bakhsh Khan, after Ali Bakhsh Khan his eldest son Nabi Bakhsh Khan, [91] and after Nabi Bakhsh Khan his eldest son Badshah Husain Khan, respectively, succeeded to the estate and remained as sole proprietors."

The final award was that Badshah should "remain in possession under the rule of primogeniture and the ancient custom," and that Abbas and other cadets of the family should have a specified amount of land for maintenance.

Besides these decisions which seem to fall strictly within the province of the Committee, they addressed themselves to the question how it happened that the *kabuliat*, the summary settlements, and the *sanad* were procured by or for Badshah. Leaving out Hindustani words they expressed themselves thus—

"Looking into the circumstances of the case and from the information obtained from those acquainted with facts, it is found that Tajammal Husain Khan and others, brothers of Nabi Bakhsh Khan and others, brothers of Nabi Bakhsh Khan . . . in spite of their having been themselves proprietors, . . .

and though it was on account of their loyal services that the estate was conferred and the *sanad* granted, out of their own free will, in order to keep their family usage intact, got the *kabuliat* made and the *sanad* granted in the name of Badshah Husain Khan. This is no secret and the fact is known to ourselves as well as to all the officers. It was for this that Badshah Husain Khan was declared to be the owner at the Summary Settlement, and Tajammal Husain Khan reserved no part of the estate for himself, although he had power to do what he liked, and it was quite possible to do so."

It is not contended that any part of this award is binding on the parties in the present suit. But it cannot be doubted that a suit for partition in 1868, when Tajammal was at the head of affairs in this *talukh*, was one in which he took an active (probably the most active) part, though Badshah was the defendant on the record. In a question of family custom it is impossible to disregard the conclusions of gentlemen who discharged such functions as those of the Committee. Whether their statements as to the special incidents of the *kabuliat* and *sanad* should be looked at is another question. But the defendant relies on the passage just quoted as [92] showing that Tajammal was master of the situation, and might have had the *kabuliat* and the *sanad* made to him if he had pleased. The Committee have mixed up two the matters of *kabuliat* and *sanad* together, though they fall under different considerations. But taking it in the defendant's favour that the Committee really knew the facts and that we ought to receive their account, how does it bear on matters prior to annexation. They say in effect that Tajammal "and others" might have got the *kabuliat* in their names, but that they deliberately preferred to get it in the name of Badshah in order to keep their family "usage intact." That opinion does not support the defendant's claim, but is fatal to it. If Tajammal, or he and others, had really though secretly become proprietors, the family usage would have been destroyed.

There is no explanation what is meant by "others," nor in what sense the Committee meant to style them as proprietors. There is no proof or probability that Tajammal got any concession from the King of Oudh in his own favour; nor any evidence to support Kazim's story that it was he and Tajammal who got the *kabuliat* for Badshah because they thought that a young boy would not be so severely treated as Tajammal had been. Nabi was in the service of the King and so remained till the annexation. It is a much simpler explanation of the facts to suppose that the substitution of his son for himself was by his own wish.

Another piece of evidence on this part of the case is the *wajib-ul-arz* of the village Deokalia, which is part of the Bhatwamau estate. This class of document is always admissible in evidence being an official village record. Its weight may be very slight or may be considerable according to circumstances. This record was made in June 1871, when Tajammal was still at the head of affairs in the *talukh*, and was verified by Karemat Khan, who is described in it as the agent of Badshah under a power-of-attorney, but is proved to have been the servant of Tajammal and of the defendant. If any mis-statement was made, it could hardly have been one to the prejudice of Tajammal and Kazim. The document appears to their Lordships to [93] be of substantial weight on the question of descent, and it has been so treated by the Court of Appeal. The history of Deokalia is part of the history of the *talukh*. The *wajib-ul-arz* traces the descent of the *talukh* to Ali Bux and then proceeds—

"After the death of Ali Bakhsh Khan, out of his sons the eldest son Nabi Bakhsh Khan became the owner of the estate; and Hadi Hasan Khan, Tajammal Husain Khan and Kazim Husain Khan lived in commensality with Nabi

Bakhsh Khan. Nabi Bakhsh Khan in his own lifetime got the *kabuliat* of the estate executed in the name of his son Badshah Husain Khan, the present *talukhdar*, under whom the following new villages have been added to the estate."

The defendant, while admitting that the history of the *talukh* is correct, declares that the quoted passage is entirely false. But he has no ground for saying so except his own improbable and unverified story as to the mode in which the *kabuliat* was procured. The village record gives an intelligible explanation of the facts which Kazim does not. Their Lordships hold it to be proved, *first*, that the *talukh* was one which, according to the custom of the family, descended by lineal primogeniture, and, *secondly*, that Kazim's story of the loss of the estate, its re-acquisition by Tajammal and himself, and the introduction of Badshah as *kabuliatdar*, must be rejected. The evidence leads them to think it most probable that Badshah was introduced because his father Nabi was for some reason desirous of relinquishing his position as *talukhdar*, and wished the next in lineal succession to be substituted for him.

The events after the annexation lend at first sight more colour to the defendant's claim. Up to the first Summary Settlement of 1856 we have no more evidence than before. The Company's officers found Badshah, then a youth of about 17 years, in possession under the *kubaliat*, and for aught that appears they simply acted on the existing state of things. But then came the Mutiny and the confiscations which upset all the settlements of 1856. Nabi joined the insurgents and was killed in 1858. It may well be that when it came to be considered to whom the confiscated estates should be restored, difficulty was felt about [94] re-instating the eldest son of Nabi. About this time Tajammal came upon the scene, and took part in getting back the estate. He too had joined the insurgents, but he had come over to the British side and had made himself active and useful in restoring order. It is clear that he stood high in the opinion of Colonel Barrow, who was a valued and trusted officer of great weight in Oudh affairs. Tajammal was a man of strong character, and it is possible that his young nephew might not have succeeded in doing what he did. There is, however, no evidence or reason to believe that he could have got the estate for himself, as is intimated by the *talukhdars'* committee. It must be remembered that the British Government made a great point of recognising old titles and of restoring as many estates as they could with due regard for security. They felt that the position of the Oudh *talukhdars* was a very peculiar and painful one; that the inducement to take up arms was in many cases very strong; and that when the political necessity of putting down armed revolt had been satisfied, it was both the most prudent course, and the most consistent with a fair consideration of the case, to reinstate those who would enter frankly into the new conditions. It is possible and probable that on this point Tajammal was useful in satisfying Colonel Barrow and other officers.

The documents which bear directly on the reinstatement of Badshah are three in number. The first is a *rubkar* of the Collector of Lucknow, dated 9th January 1859.

"Badshah Husain Khan, *talukhdar* of Bhatwamau, Pargana Fatehpur, appeared before me in camp to-day. By reason of shelter having been given to Munshi Abdul Hakim, Extra Assistant Commissioner, sanction is hereby given that the *talukha* be restored to Badshah Husain Khan as heretofore, according to the Settlement of 1264 Fasli, in case the Special Commissioner of Oudh does not sanction the *mustajari* (farming lease). Therefore it is ordered that the *tahsildar* be ordered to settle the *taluka* with Badshah Husain Khan, according to the terms of the Settlement of 1264 Fasli, and send the Settlement

file with *tabuliat* within two days for my signature, and the Sadar Kanungo is to report, within one day, whether sanction for *mustajari* of the *ilaka* has been received from Major Barrow."

[95] The second is a letter from Colonel Barrow, dated 27th January 1859. He writes :—

"This *taluka* is re-settled with its old proprietor Badshah Husain Khan. Our total assessment is rather above the old Government *jama*."

And on the 11th October 1860 the *sanad* was issued.

It is clear that in intention as well as in form the grant of the estate was made to Badshah. Tajammal probably rendered efficient service in getting it. Of what Kazim did, if he did anything, we have no evidence. There is much to justify the opinion of the *talukhdars'* committee that Tajammal was active in keeping the family custom intact, but there is nothing to show that others were concerned with him, or that he and others were ever proprietors except in the very restricted sense of having some share or interest in the estate for maintenance. We cannot suppose any ownership to have been conferred on him or Kazim unless we first suppose that the British Government lent itself to a *benami* grant or a secret trust—a thing which nobody has ventured to suggest.

It is certain that during his life Tajammal managed the affairs of the *talukh* and to a great extent disposed of its revenues. From his age, his character, and his services, he was naturally held in high honour by his nephews. Badshah appears to have been a weak, indolent and self-indulgent man, who with a concubine was kept in the residence at Bhatwamau on a sufficiently liberal scale to make him comfortable and who was satisfied with that position. The defendant indeed asserts that nearly the whole of the revenues were divided between himself and Tajammal, and that Badshah had a small fixed allowance. But he produced no accounts to support his assertion; or rather he did worse; he did tender some accounts which when the time for proof came were withdrawn. We must infer either that he had no accounts relevant to the question, or that having some he found that they would not suit his case. It is true that Tajammal was the principal acting personage: he was frequently addressed as *talukhdar*, and a great many instances are shown in which he was treated as representing the estate. But all that [96] is consistent with his being manager for Badshah, though his position as being eldest uncle, and his character and services, gave him exceptional predominance in the family and prominence in the eyes of the world. After his death it seems that Kazim enjoyed the same power and position, at least to a great extent.

Great reliance is placed by the defendant on two powers-of-attorney executed by Badshah in the years 1871 and 1873. The earlier of these was given to Tajammal, and it is a singular document. It commences with a recital.—

"Whereas the reins of management of the estate affairs, such as domestic affairs, administration of the *ilaka*, and the conduct of business appertaining thereto, in the Court detailed below, have always been in the hands and under the control of my respected and virtuous uncle, Raja Muhammad Tajammal Husain Khan Bahadur, who in every way is master of me and the estate in place of my father, but whereas by reason of the number (engagement for payment of the revenue) of the estate and the *sanad* being in my name, the said venerable has frequently to encounter difficulties in formal compliance with orders and conduct of cases relating to the estate, the necessity for executing the (*mukhtarnama*) general power-of-attorney has presented itself."

Badshah then covenants that "my respected uncle shall have full proprietary powers like myself," and he personally binds himself to maintain his uncle in the engagement of all the powers specified in five following paragraphs. As to the first paragraph there is doubt about the translation which the Court below has thought of importance and their Lordships do not comment on it. The 2nd, 3rd and 5th are ordinary powers. The 4th runs as follows:—

"4. That like myself, the declarant personally, he has absolute powers of making transfers by mortgage or sale, etc., of the whole or any part of my moveable or immoveable property, and of executing documents of every description, gift, *bakshishnama*, grant of cash or land, *tamliknama* (deed of settlement) and will and to have them duly registered."

The later power was given to Kazim after the death of [97] Tajammal. It is nearly the same with the earlier one, the only substantial difference being that the fourth paragraph asserts not only that Kazim enjoys, but that he has heretofore enjoyed, the powers therein mentioned.

These deeds, as is contended, and as the District Judge decided, confer the fullest proprietary powers and are a complete admission of the *benami* title. To their Lordships it seems that though obviously framed in the interest of Tajammal and of the defendant, they do not prove his case. If his story is true, Tajammal and himself were in the year 1871 actually in proprietary enjoyment. Why were such powers necessary? The reason given is that the settlement and *sanad* were in Badshah's name. But that, according to the defendant, was all a sham well known to the principals and not imposing on the rest of the world. In the ordinary case of *benami* the holding of a settlement or transfer by the *benamidar* would not interfere with the real owner's enjoyment. If the *sanad* did so, why not throw off the temporary mask and claim the full ownership? Why be at the pains of framing a circuitous and inconsistent document such as that of 1871? It professes to be a power-of-attorney, and yet has its permanence secured by covenant. It states that Tajammal had the reins of Government in various specified departments, whereas the claim now is that the recital recognizes and that the fourth paragraph confers full beneficial ownership. It states that Tajammal is "master of me and the estate in place of my father"; whereas the defendant's story is that Nabi never was owner and had nothing to do with Badshah's ownership. It purports at the outset to give full proprietary powers to Tajammal "like myself," and does the same thing in paragraph 4, so that he has only the powers which Badshah also has. If it was really intended to be an admission of full ownership, or to confer full ownership under the guise of a power-of-attorney, it is a very insidious document, and such as would require satisfactory explanation before it could be permitted to operate as between uncle and nephew situated as Tajammal and Badshah were. Treating it as a power-of-attorney it goes to show ownership not in Tajammal but in Badshah.

[98] Another remark to be made on these powers is that they do not support, but tend to destroy, the defendant's theory of joint ownership. In the deed of 1871 Tajammal is treated as absolute owner, not as joint with Kazim. In that of 1873 Kazim is treated as absolute owner. How did he become so, seeing that Tajammal left sons? Nay, not only is he credited with having absolute powers, but with having "heretofore enjoyed" them. How is that reconciled with the enjoyment of absolute powers by Tajammal alone within a few months before? The phenomena are inexplicable on the theory of proprietorship in Tajammal and Kazim. But they are clear enough if we suppose the two uncles to have been managers in exceptional honour and

moral authority, " with the reins of management of the estate affairs in their hands "; and that is what their Lordships conclude to be the true state of the case.

After the death of Badshah it seems that the mutual relations which subsisted between him and the defendant were continued for a while as between the plaintiff and the defendant; for how long, or when dissension began, it is not material to enquire. What is material is to see if the plaintiff's dealings with the estate after it vested in him have precluded him from making his present claim.

Badshah died on 21st November 1878. Four days afterwards the plaintiff and his cousin Dildar, the eldest son of Tajammal, presented an application for mutation of names. They stated as follows :—

" After compliments we beg to submit that Badshah Husain Khan, *talukhdar* of the Bhatwamau estate, breathed his last on 21st November 1878, and that according to the usage and custom of *gaddi-nashini* prevailing in our family, we, the heirs of the deceased *talukhdar*, have unanimously with our own consent appointed Muhammad Kazim Husain Khan, son of Ali Bakhsh Khan, our own uncle, the head of our family, our patron and protector, who is qualified in every way as a *gaddi-nashin* in place of the deceased."

And they prayed for mutation to Kazim.

In addition to this application the plaintiff on the 26th [99] February 1879 filed a written statement which, after reference to the application, proceeded thus :—

" Even now, without coercion and reluctance, and of my own free will and accord, I do affirm the application and give my cordial assent to the same being granted for these reasons, namely, first such a conduct on my part is the natural consequence of the cordiality, confidence and mutual love and affection prevailing in our family, and similarly it was due to the cordiality existing between my father and my uncles, that those persons, though themselves real owners of the estate, caused the *lambardari* of their ancestral and self-acquired estate to be recorded in the name of my deceased brother Badshah Husain Khan; and, secondly, on account of the same love and amity my said uncle was so thick and thin with my late brother, as if the two had only one soul for two bodies; and my deceased brother ratified and admitted for ever the absolute proprietary powers exercised, and formal proceedings taken by the said uncle under the power-of-attorney, dated 30th April 1873, executed in favour of my said uncle, which I may call a will. Under these circumstances the late Badshah Husain Khan shall, as it were, be alive during the life-time of the said uncle. The affection and amity of feelings prevailing between my late brother Badshah Husain Khan and my said uncle were only equalled by the kindness shown me by the said uncle. I too cherish the same feelings of obedience and love to my said uncle, as it was my duty to cherish to the said two souls during the life-time of my late brother. Therefore in my said uncle I recognize a living representation of my late brother in flesh and blood. I make this request with all pleasure and pray that the Government may accede to it, and the name of my said uncle may be recorded in the *lambardari* register. Because of his kindness I am quite certain of my becoming a proprietor on his demise. Being thus confident why should I make any other application than the one I make against the time-honoured customs? "

Upon these representations mutation was effected in favour of Kazim.

These proceedings seem to have caused great difficulty in the [100] Courts below. Apparently in both Courts it was considered that unless the plaintiff

could displace his statements by showing his ignorance of their being made, or that he was pressed into making them by the defendant, his case would be defeated, or at least seriously damaged. Indeed, the District Judge thought that the plaintiff must procure formal cancellation of the mutation before he could maintain the suit. Accordingly those questions have been elaborately tried and argued. In order to show first his ignorance and secondly pressure by the defendant, the plaintiff has told stories which both Courts have found to be entirely false. The Court of Appeal thought that undue influence might be properly inferred from the relative positions of uncle and nephew, from the highly suspicious character of the application and statements, and from the false reasons assigned for mutation, especially the false statement of the family custom.

Their Lordships do not enter into this discussion. They do not see how the proceedings bar the right of the plaintiff to assert his legal title. Supposing that in 1878 he believed them to be true and made them spontaneously, why should he not assert the true state of the case after he has learned it? An Oudh *talukh* cannot be transferred like an ordinary estate under Mahomedan or Hindu law, because the Oudh Estates Act requires special modes of transfer. It is not now contended that the mutation operated as a transfer. It would be absurd to suppose that the plaintiff made any misrepresentation to the defendant; neither was the situation of defendant altered in any way to his prejudice. No consideration was given by the defendant, nor is there anything in the transaction to create a trust. Possibly it might have given the defendant a possession on which time would run; but if so time has not run long enough to create a bar. Mr. Ross, who pressed this part of his case very earnestly though with great fairness, rested mainly, as their Lordships understood, on the admission of title made by the plaintiff; but a gratuitous admission may be withdrawn unless there is some obligation not to withdraw it; and there is not here any title on which such an admission can rest. If then there is no transfer, no estoppel, no bar by time, no trust, why [101] should not the plaintiff assert his legal rights, whatever he may, in ignorance of the facts or in deference to his uncle or for any other cause not injurious to the defendant, have admitted? Their Lordships hold that he can assert them, and they will humbly advise Her Majesty to affirm the decree of the Court of the Judicial Commissioner and to dismiss the appeal. The appellants must pay the costs.

Appeal dismissed.

Solicitor for the Appellant: Mr. J. F. Watkins.

Solicitors for Respondent: Messrs. Young, Jackson, Beard & King.

C. B.

NOTES.

I. As regards the value to be attached to *wajib-ul-arz*, see also *Lali v. Murtidhar* (1906) 28 All., 488 P.C.; *Parbati Kumwar v. Chandarpal Kumwar*, (1909) 31 All., 457 P.C.; *Anant Singh Durga Singh*, (1910) 32 All., 363 P.C.; (1911) 8 A.L.J., 632; 10 I.C., 448.

II. As regards the rule of primogeniture among taluqdars, see also (1909) 31 All., 457 P.C.

III. There might be a withdrawal of any gratuitous admission, unless there is some obligation not to withdraw it and a mere consent to the entry of the name of another in the revenue papers does not create any such obligation:—(1913) 23 I.C., 965 (Oudh) citing 2 A.L.J., 225; 31 All., 73; (1908) 29 Cal., 133.

IV. This class of cases was distinguished in (1913) 20 I.C. 429 (Oudh) from cases of abandonment or compromise of *disputed* claims which even when not well-founded form a valid consideration; (1909) 10 C.L.J. 503; (1906) 4 C.L.J. 323.]

[26 Cal. 101]
ORIGINAL CIVIL.

The 5th May, 1898.

PRESENT :

MR. JUSTICE JENKINS.

Rajendro Nath Sanyal
versus
Jan Meah.*

Summons, Service of—Civil Procedure Code (Act XIV of 1882), ss. 79, 80—

Affidavit of service of summons, Sufficiency of.

Where a defendant cannot be found the affidavit of service must show—

- (1) That proper efforts were made to find him ; and
- (2) That the copy of the summons was affixed on the door of the house in which the defendant *ordinarily* resided at the time of service.

Whether or not these conditions are established to the satisfaction of the Court must in each case depend on its own particular circumstances.

IN this case a question arose as to the sufficiency of the proof of service of the summons under the last paragraph of section 80 of the Civil Procedure Code.

The defendant did not appear at the hearing.

Mr. K. N. Sen Gupta for the Plaintiff.

Jenkins, J.—The sufficiency of service comes constantly before the Court in dealing with undefended cases, and as it appears to have been thought that I have laid down a rule of practice on the subject beyond the provisions of the Code, I am desirous of removing that misapprehension.

[102] Section 79 provides that "when the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons." Then in section 80 it is further provided that, "if the defendant or other person refuses to sign the acknowledgment, or if the serving officer cannot find the defendant, and there is no agent empowered to accept the service of the summons on his behalf, nor any other person on whom the service can be made, the serving officer shall affix a copy of the summons on the outer door of the house in which the defendant ordinarily resides and then return the original to the Court from which it issued, with a return endorsed thereon or annexed thereto stating that he has so affixed the copy and the circumstances under which he did so."

It will be seen, therefore, that (leaving out of consideration the contingency of there being an agent) the primary method of service is by tendering or delivering a copy of the summons to the defendant personally and obtaining his acknowledgment. It is obvious, however, that this mode may fail for one of two reasons: either the defendant may refuse to sign the acknowledgment, or it may be impossible to find him, and accordingly a method of service by affixing a copy of the summons is provided. Apart from refusal to sign there are two necessary conditions to the validity of this mode of service: *1st*, the serving officer must have been unable to find the defendant, and *2ndly* he must have affixed a copy of the summons "on the outer door of the house

* Original Civil Suit No. 182 of 1898.

in which the defendant *ordinarily* resides " and return the original to the Court in the manner prescribed by the Code.

I will shortly deal with these two conditions. For the purpose of establishing that the defendant cannot be found it must be shown that proper efforts to find him were made, as, for instance, that the serving officer went to the place or places and at the times at which it was reasonable to expect he would be found. Then to satisfy the second condition it must be shown that the copy was affixed on the door of the house in which the defendant *ordinarily* resided at the time of service.

[103] Whether or not these conditions are established to the satisfaction of the Court must in each case depend on its own particular circumstances. These requirements are prescribed by the Code and not by any rule of practice outside the Code, and having regard to the applications so frequently made under section 108, I have always thought it necessary to closely scrutinize the mode of service on which reliance is placed. In this particular case I am satisfied that the service was in accordance with the provisions of the Code, and is therefore valid.

Attorneys for the Plaintiff: Messrs. *Sen & Co.*

C. E. G.

NOTES.

[This was followed in (1907) 5 C.L.J., 555 ; (1906) 30 Bom., 623 ; 8 Bom. L.R., 757.]

[26 Cal. 103]

APPELLATE CIVIL.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE PRATT.

Sourendra Mohan Tagore.....Defendant No. 3

versus

Surnomoyi.....Plaintiff.*

Landlord and Tenant—Liability for Rent—Regulation VIII of 1819, section 6—Liability of the transferee of a fractional share of putni to pay rent—Personal liability of putndar for rent, notwithstanding a stipulation in the putni lease that arrears of rent should be realized by auction sale of the putni—Bengal Tenancy Act (VIII of 1885), section 65.

Although the transferee of a fractional share of a *putni* cannot enforce registration of his name on payment of the necessary fee and tender of the requisite security, yet the transfer is not altogether void and he is liable for rent severally and jointly with the registered tenant, if the landlord chooses to recognize him as one of the joint holders of the *putni*, and he is also liable for the entire rent of the *putni* estate.

* Appeal from Original Decree No. 68 of 1897, against the decree of Babu Ananta Ram Ghose, Subordinate Judge of Nuddea, dated the 21st of January 1897.

Notwithstanding a stipulation in the *putni* lease that on default of any instalment of rent, the landlord shall be entitled to realize the same by auction sale of the *putni mehal*, the *putnidar* is also personally liable for the rent of the said *mehal*.

Fotick Chunder Dey Sircar v. Foley, (1887) I. L. R., 15 Cal., 492, and *Tarini Prosad Roy v. Narayan Kumari Debi*, (1889) I. L. R., 17 Cal., 301, referred to.

THIS appeal arose out of a suit brought by the plaintiff, respondent, for arrears of rent and cesses due in respect of a *putni* [104] tenure, pergunnah Plassey, on the allegation that the *putni* was granted by the plaintiff's predecessor on the 10th of Sraban 1251 B. S. (25th July 1843) to Kesab Chandra Roy; that it passed by successive sales for arrears of rent under Regulation VIII of 1819, first to Tarini Prosad Ghose, and after him to Rakhal Das Mukerji, and then by inheritance to Sarat Moni Devi and Haridasi Devi, defendants 1 and 2; and that by some arrangement with defendants 1 and 2 the defendant No. 3, Raja Sir Sourendro Mohan Tagore, was in joint possession with them of the *putni* during the period for which rent was claimed, that is, the year 1301 (1894-95).

The defence of defendant No. 1 was to the effect that she was entitled to eight annas, that is a moiety, of the *putni*; that the said eight annas share was leased in perpetuity to the defendant No. 3 in two equal halves, one by the defendant No. 1 and the other by her predecessor in title defendant No. 2, with a stipulation in each case that defendant No. 3 should pay to the zemindar the *putni* rent payable in respect of the said share; and that consequently the defendant No. 3 and not defendant No. 1 was liable for the rent claimed.

The defence of defendant No. 2 was denial of liability on the ground that she did not any longer own any interest in the *putni*.

The defence of defendant No. 3 was that he was not liable for the rent claimed, as he had not been recorded as *putnidar* in the plaintiff's *sherista*, and as he had made a gift of his interest in the tenure to one Danesh Prokas Ganguli in Kartick 1302 (October 1895).

The Court below exempted defendant No. 2 from liability and gave the plaintiff a decree making defendants 1 and 3 liable, for the amount claimed.

Against that decree the defendant No. 3 preferred this appeal making the plaintiff alone respondent, and it was contended on his behalf—*first*, that no decree ought to have been made against defendant No. 3, as the plaint disclosed no cause of action against him; *secondly*, that even if any decree could properly be made against him, it ought either to specify the extent of his liability, or to direct that the plaintiff should in the first instance proceed [105] against the *putni* tenure for realization of the amount decreed; and, *thirdly*, that the decree ought not to have allowed interest at the rate claimed during the pendency of the suit.

Dr. Rash Behary Ghose for the Appellant.

Babu Sreenath Dass and Babu Promotha Nath Sen for the Respondent.

The judgment of the High Court (Banerjee and Pratt, JJ.) after stating the facts of the case as above, continued as follows:—

At the hearing of the appeal an objection was raised on behalf of the plaintiff, respondent, that the appeal could not proceed in the absence of defendant No. 1, who was not made a respondent, and who was likely to be affected by the result of the appeal if it was decided in favour of the appellant. If the appeal had been likely to succeed, we should have felt bound to make defendant No. 1 a respondent under section 559 of the Code of Civil Procedure. But as

in our opinion the appeal fails on the merits, it becomes unnecessary to say more on this point.

With reference to the first contention of the appellant, it is enough to say that, in our opinion, the plaint discloses a sufficient cause of action against the defendant No. 3, when it alleges that defendant No. 3 was, by an arrangement with the other defendants, in possession of the *putni* jointly with them, and when it asks for a decree for the arrears of rent due in respect of the *putni*. Such a decree may be executed by the sale of the *putni* which will pass the entire tenure and not merely the right, title and interest of the judgment-debtor; and to a suit in which such a decree may be passed a party in the position of defendant No. 3, who has an interest in the *putni*, must clearly be a proper party.

Nor is there any good reason why the suit should not be decreed against defendant No. 3. It is not disputed that during the time in respect of which rent is claimed in this suit, defendant No. 3 held and owned an eight-anna share of the *mehal* Pergunnah Plassey as *putnidar*, and the remaining eight annas as *mourasi ijardar* under defendant No. 1. The only ground urged for exempting defendant No. 3 from liability is, that his name has not been registered as a tenant in the plaintiff's office, and that section 6 of the Regulation VIII of 1819 stands in the way [106] of his name being so registered, he being a transferee of only a fractional share of the *putni*. Now, though it is quite true that the latter part of section 6 of the Regulation VIII of 1819 provides that the right of the transferee to enforce registration of his name on payment of the necessary fee and tender of the requisite security does not extend to the case of transfer of a fractional share of a *putni*, yet it does not follow that the transfer of a fractional share of a *putni* is altogether void, or even that the transferee of such a share is not liable for rent jointly with the registered tenant, if the landlord chooses to recognise him as one of the joint-holders of the *putni*. The portion of the section to which reference is made runs thus: "It is hereby provided that the rules of this and of the preceding section shall not be held to apply to transfers of any fractional portion of a *putni taluk*, nor to any alienation other than of the entire interest; for no apportionment of the zemindar's reserved rent can be allowed to stand good unless made under his special sanction."

The true meaning and intention of the provision is, we think, not to make the alienation of a fractional portion of a *putni taluk* without the sanction of the zemindar absolutely void, nor even to exempt the transferee from liability for rent jointly with the transferor if the landlord chooses to recognise him as one of the joint holders of the *putni*, but only to prevent any splitting of the tenure and apportionment of the rent without the sanction of the landlord, as the concluding words of the section, which contain the reason for the provision, clearly show.

The first contention of the appellant must therefore fail.

The second contention of the appellant has two branches, which we shall consider separately.

The first branch of the second contention, namely, that the decree against the defendant No. 3 ought to specify his liability, and as he is the purchaser of only one-half of the *putni* his liability should be limited to one-half of the amount decreed, is, we think, completely met by the provision of section 6 of Regulation VIII of 1819 just quoted above. It is argued for the appellant that if the landlord sues the transferee, he by so doing waives the benefit of the provisions in section 6 relating to alienation of a part only of the *putni*, and that if the decree [107] makes the transferee of a part only of the *putni*

jointly and severally liable with the transferor for the entire rent it throws on the transferee a heavier liability than what should justly attach to him.

We do not consider this argument sound. By suing the unregistered transferee of a part of the *putni* jointly with the transferor, the zemindar only recognises him as one of the joint holders of the *putni*, but because he does so, he cannot be said to have waived the right secured to him by section 6 of Regulation VIII of 1819 to preserve the unity of the tenure held under him without splitting it and apportioning its rent. And as for the hardship of throwing on the transferee of a part of the *putni* the joint liability for the rent of the whole, it is in the first place the result of the transferee's own act in accepting the transfer without the previous sanction of the zemindar to an apportionment of the rent. And in the second place, the hardship is only apparent and not real; whereas the opposite view would in a case like the present involve real hardship on the transferor. For if the transferee of a part of the *putni* is made to pay the rent of the whole he can always obtain contribution from the transferor or owner of the remaining part; and in this particular case the transferee has taken care to stipulate in the *mourasi* lease he has taken of the remaining share from the transferor or owner of that share, that he is to pay the zemindar's rent out of the amount payable by him as rent of the *mourasi* tenure; whereas if the transferor or owner of the remaining share, that is the defendant No. 1, were alone made liable for the entire rent, it would be throwing on her the burden of paying what the defendant No. 3 has already undertaken to pay for her. Moreover, if the entire rent be realized from defendant No. 3, no suit for contribution will be necessary, as that defendant can always set off the amount paid in excess of his liability and on account of defendant No. 1, against the *mourasi* rent due to defendant No. 1; whereas, if the decree is made against defendant No. 1 alone, a suit by her against defendant No. 3 would be inevitable; so that the decree made by the Court below may result in preventing a multiplicity of suits.

The first branch of the appellant's second contention should, in our opinion, therefore fail.

[108] The second branch of the second contention, namely, that the decree ought to direct the sale of the *putni* tenure in the first place, is sought to be based on the terms of the *putni* lease as well as on the provisions of the rent law. But the clause in the *putni kabuliyat*, which is relied upon and which runs in these words, namely, "If I fail to pay the money due for any instalment, you shall be entitled to realize the same with interest from the first day of the month following the one for which default shall be made by auction sale of the said *mehals* under the provision of Regulation VIII," is only an enabling clause and cannot be taken as restricting the landlord's right to hold the tenant personally liable for the rent. Nor is there anything in the *putni* Regulation (VIII of 1819) to support the contention urged, while, on the contrary, the third clause of section 17 of the Regulation would go to show that arrears of *putni* rent other than those for the current year (and those claimed in this suit are of that description) become the personal debt of the *talukdar*. And section 65 of the Bengal Tenancy Act, which is the provision of the rent law relied upon by the learned *Vakil* for the appellant, has been held not to limit in any way the personal liability of the tenant for rent. See *Fotick Chunder Dey Sircar v. Foley*, (1887) I. L. R., 15 Cal., 492, and *Tarini Prosad Roy v. Narayan Kumari Devi*, (1889) I. L. R., 17 Cal., 301.

The third contention of the appellant is, in our opinion, equally unsustainable. There is no reason shown why interest should not run at the rate at which the Court below has allowed it during the pendency of the suit. The

Court has by section 209 of the Code of Civil Procedure full discretion to award interest at such rate as it considers reasonable during the pendency of the suit; and having regard to the rate allowed, which is not very high, to the nature of the defence, and to the groundless objections upon which payment has been withheld, we do not think that there is any reason for reducing the rate of interest.

The grounds urged before us, therefore, all fail, and the appeal must consequently be dismissed with costs.

S. C. G.

Appeal dismissed.

NOTES.

[A decree-holder who has obtained a decree for rent is free to proceed against any property of the judgment-debtor; 26 Cal., 103; (1902) 6 C.W.N., 794; he is under no obligation to proceed in the first instance against the defaulting tenure; but a landlord who purchases the defaulting tenure in execution of his money decree subject to rent charge, cannot execute his decree for rent as the judgment-debt in his favour for rent is extinguished:—(1912) 18 C.L.J., 29.]

As regards the preservation of the unity of tenure despite alienations by the tenant, see also (1905) 8 C.L.J., 554; (1900) 4 C.W.N., 590.]

[109] *The 12th August, 1898.*

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE RAMPINI.

H. W. Hudson.....Defendant

versus

Basdeo Bajpye.....Plaintiff.*

Parties—Adding parties on appeal—Respondents—Power of the Appellate Court to add parties as respondents—Code of Civil Procedure (Act XIV of 1882), section 559.

C, owner of a factory, executed a *hundi* in favour of B, and purchased land from B from the proceeds thereof. C then sold his factory to H who obtained possession of the land. In a suit brought by B upon the *hundi*, C and H were made defendants, but C did not appear in the first instance and an *ex parte* decree was passed against him alone. C appealed against B without making H a party respondent to his appeal. The Lower Appellate Court passed an order adding H as a respondent, and eventually passed a decree against H. On second appeal by H to the High Court.

Held, referring to section 559 of the Civil Procedure Code (1882). that the Lower Appellate Court was right in adding as a party respondent to the appeal.

Atma Ram v. Balkishen, (1883) I. L. R., 5 All., 266, dissented from. *Upendra Lal Mukerjee v. Girindra Nath Mukerjee*, (1898) I. L. R., 25 Cal., 565, and *Manickya Moyee v. Boroda Prasad Mookerjee*, (1882) I. L. R., 9 Cal., 355, referred to.

THE action, which gave rise to this appeal, was founded upon a *hundi*, executed by C. F. Carleton, owner of Byria Indigo Factory, in favor of the plaintiff Basdeo Bajpye, and the greater part of the loan was for the purpose of a purchase of certain land from the plaintiff himself. Carleton afterwards sold the factory with all its liabilities and dues to H. W. Hudson, who obtained

*Appeal from Appellate Decree No. 309 of 1897, against the decree, of Babu Gopi Nath Mathey, Subordinate Judge of Sarun, dated the 21st of December 1896, modifying the decree of Babu Jadupati Banerjee, Munsif of Motibari, dated the 13th of April 1896.

possession of the land aforesaid. The present suit for recovery of money due upon the *hundi* was brought against C. F. Carleton as defendant No. 1, and H. W. Hudson as defendant No. 2. The defendant No. 2, alone appeared in the first instance and pleaded that there was no cause of action against him. The Munsif held that the defence was good. The defendant [110] No. 1 then applied for permission to file his written statement, but his application was refused and the suit was decreed *ex-parte* against him. The defendant No. 1 appealed against that decree making the plaintiff only respondent to the appeal. Subsequently, the defendant No. 2 was made a respondent by an order passed by the Court of Appeal, and eventually the Munsif's decree was set aside and a decree passed against defendant No. 2, which provided that in case the plaintiff failed to realize the entire amount from the defendant No. 2, defendant No. 1 should be liable for the balance.

The defendant No. 2 appealed to the High Court, and one of the grounds urged was: "That the Court below was wrong in making the defendant No. 2 a party respondent and passing a decree against him, notwithstanding that the plaintiff did not appeal against the decree of the Court of First Instance by which the defendant No. 2 was released."

The arguments and cases cited on both sides sufficiently appear from the judgment of the High Court.

Dr. *Rush Behari Ghose* and *Babu Satis Chandra Ghose* for the Appellant.

Babu Saligram Singh and *Babu Lakshmi Narayan Singha* for the Respondent.

The judgment of the High Court (*Ghose and Rampini, JJ.*) was as follows:—

This appeal arises out of a suit for recovery of certain money upon a *hundi* bearing date the 11th September 1892, executed by the defendant No. 1 Charles Frederic Carleton in favour of the plaintiff. It appears that, at the time of the execution of the *hundi*, Carleton was the owner of the Byria factory, and that the plaintiff had purchased at an execution sale the holding of a certain *raiya*, which Carleton was anxious to buy from him, the plaintiff. Carleton, however, was rather short of money then, and he borrowed the amount required for the purchase of the property by the execution of the *hundi* in question. No conveyance of the property, however, was executed by the plaintiff at that time, for reasons to which it is not necessary for [111] us to refer. Subsequently, the Byria factory, with all the lands appertaining to it, was transferred by Carleton to the other defendant, Hudson; and the correspondence, to which our attention has been called by the learned Vakils on either side in the course of the argument before us, shows distinctly that the land, which it was arranged should be conveyed by the plaintiff to Carleton, came into the hands of Hudson, and he held it for the purposes of raising indigo on it.

The suit, with which we are now concerned, was a suit instituted by the plaintiff against both Carleton and Hudson; and the relief that the plaintiff asked for was as against both the defendants. The Court of First Instance, however, held that there was no cause of action, so far as the defendant Hudson was concerned, and that the decree should go against Carleton alone; and a decree was accordingly made. From that decree, the defendant No. 1, Carleton, appealed, and one of the grounds that was set out in his petition of appeal to the Lower Appellate Court was that, inasmuch as he had sold his right and interest in the Byria factory, together with the debts due by him to the defendant No. 2, Hudson, he (the appellant) could not be held

liable for the debts due to the plaintiff, and that the liability was in the proprietor of the factory. The Subordinate Judge, before whom the appeal came on for trial, was of opinion that, having regard to the provisions of section 559 of the Code of Civil Procedure, Hudson should be made a party respondent to the appeal, he not having been made a party to it by the defendant No. 1. Hudson was accordingly made a party, and the Sub-Judge in dealing with the merits of the case held that the defendant Hudson was liable to pay the plaintiff the money claimed. He, accordingly, modified the decree of the Court of First Instance in this wise, namely, that a decree should be made against Hudson for payment of the money claimed with costs, and that, if by execution of such decree, the plaintiff be unable to realise the whole of the decretal amount from him, then the defendant No. 1 should be made liable for the balance.

The appeal before us is by the defendant No. 2, Hudson; and it has been urged by the learned Vakil on his behalf that inasmuch [112] as no appeal had been preferred by the plaintiff against the decree of the Court of First Instance, dismissing his claim as against the defendant, Hudson, the Subordinate Judge was wrong in law with reference to the provisions of section 559 of the Code of Civil Procedure, in making him a party respondent to the appeal preferred by the defendant No. 1. It has been further contended that inasmuch as the suit of the plaintiff, so far as the defendant No. 2 is concerned, has been based upon the allegation that the defendant No. 1, when he sold the factory to the defendant No. 2, deposited with the latter the amount covered by the *hundi*, and gave instructions to him to pay that money to the plaintiff, and inasmuch as that allegation has not been held by the Subordinate Judge to be proved, and also, inasmuch as the documents referred to in the judgment of the Lower Appellate Court do not warrant the conclusion at which the Subordinate Judge has arrived, the decree passed by him is bad in law.

In support of the first contention raised before us, the learned Vakil for the appellant has relied upon the case of *Atma Ram v. Balkishen*, (1883) I.L.R., 5 All., 266, as showing that the Subordinate Judge ought not to have added Hudson as a party respondent when no appeal had been made by the plaintiff against the decree of the Court of First Instance. This case, however, has been considered in a recent case before this Court, namely, the case of *Upendra Lall Mukerjee v. Girindra Nath Mukerjee*, (1898) I. L. R., 25 Cal., 565, where a Division Bench of the Court, disagreeing with the view expressed by the Allahabad High Court in *Atma Ram v. Balkishen*, (1883) I. L. R., 5 All., 266, came to the conclusion, in circumstances somewhat similar to those in the present case, that it is quite open to the Appellate Court, with reference to the terms of section 559 of the Code, to add a party as respondent to an appeal when no appeal had been made against him. We must confess that the matter is not altogether free from doubt; but having given it our best consideration we must say that our doubt is not so very strong as to necessitate our differing from [113] the view expressed in the case of *Upendra Lall Mukerjee v. Girindra Nath Mukerjee*, (1898) I. L. R., 25 Cal., 565; and we think it is difficult to say that the defendant Hudson was not interested in the result of the appeal preferred by Carleton, or that his presence in that appeal was not necessary for the due adjudication of all the points arising in it. We might, in this connection, also refer to some of the observations of this Court in the case of *Manickya Moyee v. Boroda Prosad Mookerjee*, (1882) I. L. R., 9 Cal., 355, where, in a case where the appeal was preferred by the plaintiff, and the plaintiff

omitted the name of one of the necessary defendants from the category of respondents, and this Court in appeal thought it necessary to add him as a party respondent, the learned Judges observed that they had the power to direct that *that* person be made a party to the appeal "inasmuch as the mortgagee respondent" (that is, the person against whom the appeal had been preferred) "has in a way a right to relief over against him, and it is proper that all questions in dispute should be settled so as to prevent as far as possible further litigation." It seems to us in this case that it was necessary for the purpose of settling all questions in dispute between the parties, and with a view to prevent future litigation in relation to the same matter, to make Hudson a party respondent to the appeal preferred by the defendant No. 1 to the Lower Appellate Court. We accordingly overrule the first objection.

With regard to the other point raised before us, no doubt the main allegation upon which the suit was brought, so far as the defendant No. 2 was concerned, was that defendant No. 1, while selling to the defendant No. 2 the Byria factory, placed in his hands the money covered by the *hundi*, and instructed him to deliver the same to the plaintiff. We do not know whether there is any evidence upon this record in support of this allegation; but certainly the Subordinate Judge has not come to any finding upon it. What he does find is practically that the defendant No. 2 took upon himself the liability of paying the money due under the *hundi* to the plaintiff when the Byria factory, with all the lands appertaining thereto, was transferred [114] to him. The letters, however, to which he refers do not by themselves warrant the conclusion at which he has arrived. But we have examined the whole of the correspondence placed before us on behalf of the appellant in this connection; and it seems to us that the letters marked A and B, coupled with what the defendant No. 2, or rather his manager, wrote in reply to the plaintiff, do indicate clearly that the defendant No. 2 did understand that after the transfer had been made to him it was he who had to pay the money covered by the *hundi* to the plaintiff. That being so, and it being quite clear that the land for the purchase of which this money was borrowed from the plaintiff was indisputably in his possession, though it is alleged in one of the letters that he had given up the land and left it free to the plaintiff to resume possession thereof, it seems to us that in equity the plaintiff is entitled to maintain the judgment which has been pronounced in his favour, namely, that the defendant No. 2 shall be made liable for the money claimed, and that in the event of the whole amount of such money not being recovered by the plaintiff from him, the defendant No. 1 shall be liable for the balance.

With these observations we dismiss this appeal with costs.

S. C. C.

Appeal dismissed.

NOTES.

[This has been approved and followed in (1903) 30 Cal., 655; (1905) 28 All., 95; (1904) 28 Mad., 229; (1908) 31 Mad., 442; (1908) 35 Cal., 538; (1904) 31 Cal., 648, F.B; (1910) 12 C.L.J., 137 wherein the previous cases were reviewed,

Both in 12 C.L.J., 137 and in (1912) 11 M.L.T., 157, the conditions under which the party should be added are pointed out.]

[26 Cal. 114]

The 25th July, 1898.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Bishun Churn Roy Chowdhry and others.....Defendants

versus

Jogendra Nath Roy and others.....Plaintiffs.*

Civil Procedure Code (Act XIV of 1882), sections 544, 559 and 561—Cross-objection—Persons interested in the result of the appeal—Whether a respondent can prefer a cross-objection against another respondent—Added respondent.

In a suit for possession of land the Court of First Instance decreed the plaintiffs' suit in part against the defendants. Some of the defendants appealed to the High Court without making the other defendants party respondents. The plaintiffs preferred cross-objections under section 561 of the Code of Civil Procedure. The non-appealing defendants were added [115] as respondents by an order of the High Court to the effect that they might be made parties without prejudice to any objection that might be urged on their behalf at the hearing of the appeal. The non-appealing defendants at the hearing of the appeal contended that they were wrongly made parties, and that the plaintiffs could not urge their cross-objection as against them.

Held, that the non-appealing defendants were persons, who were interested in the result of the appeal, within the meaning of section 559 of the Code of Civil Procedure, and that therefore they were rightly made parties.

Held, also, that as a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellant, and it is only by way of exception to this general rule that one respondent may urge a cross-objection against another respondent, the exception holding good, among other cases, in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents; but as there was nothing exceptional in this case, the plaintiffs were not allowed to urge their cross-objections against the non-appealing defendants.

THE facts of this case, which fully appear from the judgment of the High Court, were as follow:—

This appeal arises out of a suit brought by the plaintiffs respondents, to recover possession and mesne profits of four plots of land, some of which are covered with water, on the allegation that they appertain to their property, *mouzah* Dighalia, which they hold in zemindari and *putni* right, and from which they have been dispossessed by an order of the Joint Magistrate of Madaripore under section 145 of the Code of Criminal Procedure, dated the 10th May 1884. After the institution of the suit certain persons were added as defendants. The defence was that the suit was barred under sections 13 and 43 of the Code of Civil Procedure, the plaintiffs having sued the defendants in a previous suit in respect of a portion of the lands now in dispute in Suit No. 9 of 1864 and lost their suit; that the suit was barred by limitation, the plaintiffs not having had possession within twelve years of the lands in dispute; that the lands in dispute did not appertain to *halka* No. 15 of the *thakbust* maps

*Appeal from Original Decree No. 170 of 1890, against the decree of Babu Khetter Prosad Mukerji, Subordinate Judge of Faridpur, dated the 20th of February 1890.

to which *halka* the plaintiffs alleged the lands appertained, nor were the plaintiffs entitled to *halka* No. 15, and that the lands appertained to the defendants' estate. On behalf of the added defendants a further objection was taken, that the suit [116] was barred by the rule of three years' limitation, those defendants having been added as parties more than three years after the date of the order under section 145 of the Code of Criminal Procedure referred to in the plaint.

The Court below was of opinion that the claim of the plaintiffs was barred by the principle of *res judicata* as to certain of the plots of land in dispute; that upon the question of limitation, as the evidence was unsatisfactory on both sides, possession should be held to follow title; and that the plaintiffs had made out their title to a portion of plot No. 1. It accordingly gave the plaintiffs a decree in respect of a portion of the land in plot No. 1.

Against that decree some of the defendants preferred this appeal, and the plaintiffs filed cross-objections under section 561 of the Code of Civil Procedure in respect of the portion of the claim that was disallowed. The appealing defendants made the plaintiffs alone respondents in their appeal; and at the hearing of the appeal the question was raised whether, in the absence of the other defendants either as appellants or respondents, the cross-objections could be heard. Accordingly a rule was issued calling upon the non-appealing defendants to show cause why they should not be made parties to this appeal. The rule was disposed of by an order to the effect that they should be made parties without prejudice to any objection that might be urged on their behalf at the hearing of the appeal as to whether they ought to be made parties, and as to whether the cross-objections of the plaintiffs could be entertained as against them.

Babu Lal Mohun Das and Babu Horendra Nath Mookerjee for the Appellants.

Mr. C. P. Hill, Babu Sreenath Das, Babu Basant Kumar Bose, Babu Amarendra Nath Chatterjee, Babu Saroda Churn Mitter, Babu Pramatha Nath Sen, Babu Harakumar Mitter, and Babu Brojo Lal Chuckerbutty, for the Respondents.

The judgment of the High Court (Banerjee and Stevens, JJ.) (after stating the facts of the case as above) was, so far as is material to this report, as follows:—

[117] The points urged in the appeal of the defendants are—*first*, that the Court below is wrong in holding that only a portion of the claim was barred by section 13 of the Code of Civil Procedure, whereas it ought to have held that the whole of the claim was barred, partly under section 13 and partly under section 43 of the Code of Civil Procedure; *second*, that the Court below is wrong in holding that the plaintiffs' claim was not barred by limitation, whereas upon the evidence it was clearly so barred; and, *third*, that upon the question of title the Court below ought to have held that the plaintiffs have failed to make out their right to the lands in dispute.

For the plaintiffs, respondents, it is urged, by way of cross-objection, under section 561 of the Code of Civil Procedure, *first*, that the Court below is wrong in holding that any part of the claim was barred under section 13 of the Code of Civil Procedure; *second*, that the Court below is wrong in holding that the claim as against the subsequently added defendants was barred by the rule of three years' limitation; and, *third*, that the Court below was wrong in holding that the title of the plaintiffs was not made out with reference to a portion of the claim, whereas it ought to have held that the plaintiffs' title had been made out with reference to the whole of the land in suit.

A preliminary objection was taken on behalf of the defendants respondents to the hearing of the cross-objections, on the double ground of these defendants having been wrongly made respondents in the case, and of the cross-objections, not being tenable by the plaintiffs respondents against their co-respondents.

We shall deal with the appeal first and then with the cross-objections, and before disposing of the cross-objections we shall consider the preliminary objection to their tenability.

In support of the first contention urged on behalf of the appellants no tangible ground has been shown why we should hold that the land of plot No. 1 on the Amin's map was either included in the claim in the previous suit, or that the claim in respect thereof had been relinquished in that suit. In the previous suit the present plaintiffs or their predecessors in title claimed three plots of land, all lying to the east of a certain *khal*. That *khal*, [118] notwithstanding some change in position and magnitude by the shifting of its banks by encroachment or recess, is clearly shown by the evidence to be the same as the *khal* running north and south as shown in the present Amin's map, to the west of which lie the lands that have been decreed in favour of the plaintiffs in this suit. It cannot therefore possibly be said that any part of the land decreed in favour of the plaintiffs by the Court below formed part of the subject-matter of the former suit. Moreover, the land which the plaintiffs claimed in the former suit they claimed as being included in *halkas* Nos. 64 and 16, which they alleged to be their property, and no part of the lands of *halka* No. 15 was then in dispute; nor is it shown that the plaintiffs were then out of possession of any portion of the land now in dispute; so that it was not necessary for them to include in the former suit the lands now claimed by them. We must, therefore, hold that neither section 13 nor section 43 of the Code of Civil Procedure can bar the plaintiffs' claim to the lands in respect of which a decree has been granted in their favour by the Court below.

With reference to the second point urged on behalf of the appellants, namely, that the Court below should have held that the plaintiffs' claim was barred by the twelve years' rule of limitation, we are of opinion that though the lower Court's statement of the rule of law applicable to such cases may not be quite correct, and though, where the evidence on the side of the plaintiffs is absolutely false and unsatisfactory, it may not always be safe to apply the principle that possession follows title, yet having regard to the nature of the lands in dispute, and to the nature of the evidence, we think that the safe rule to apply with reference to the claim in respect of plot No. 1 would be that possession followed title, as has been held in the cases of *Radha Gobind Roy v. Inglis*, (1880) 7 C. L. R., 364, and in *Mahomed Ali Khan v. Khaja Abdul Gunny*, (1883) I. L. R., 9 Cal., 744, in which the case of *Radha Gobind Roy v. Inglis*, (1880) 7 C. L. R., 364, has been explained.

[119] [The third contention was on the facts, and this portion of the judgment it is unnecessary to report.]

Coming now to the cross-objections of the plaintiffs respondents, we must first of all dispose of the preliminary objection to the hearing of the same as against the defendants other than those who have preferred the appeal. It is urged on their behalf that the right of a respondent to prefer cross-objections under section 561 of the Code of Civil Procedure is limited to urging them against the appellant, and that there is no right accorded to one respondent to prefer cross-objections against another respondent. In support of this contention the third paragraph of section 561 is referred to, which speaks of the acknowledgment of the appellant or his pleader, or a notice to the appellant or his pleader, in respect of the cross-objections as being a necessary

preliminary, to their being entertained; and the cases of *Kkermukuree Dossee v. Nilambur Mundul*, (1865) 2 W. R., 227; *Hassain Duksh Putooah v. Baroo Beparee*, (1866) 5 W. R., 49; *Tarucknath Roy v. Taboorunnissa Chowdhrair*, (1867) 7 W. R., 39; *Greesh Chunder Singh v. Gour Mohun Banerjee*, (1867) 7 W. R., 49; *Gudadhur Banerjee v. Monmohinee Dossea*, (1867) 7 W. R., 366; *Lallchand v. Kudmoo Koonwar*, (1867) 7 W. R., 532; *Goonomonee Dossia v. Parbutty Dossia*, (1868) 10 W. R., 326; *Anunto Dass Sein v. Ramjoy Sein*, (1869) 11 W. R., 435; *Anwar Jan Bibee v. Azmut Ali*, (1871) 15 W. R., 26; *Sharoda Soonduree Debee v. Gobind Monee*, (1875) 24 W. R., 179, and *Atma Ram v. Balkishen*, (1883) I. L. R., 5 All., 266, are relied upon by the learned Vakils for the defendants respondents. On the other hand, it is urged for the plaintiffs respondents that the defendants respondents being clearly interested in the result of the appeal, which necessarily includes the result of the cross-objections, at least as against the appealing defendants, they have been rightly made parties under section 559 of the Code of Civil Procedure, and they being thus before the Court at the hearing of the appeal and of the cross-objections, if the Court is satisfied upon the cross-objections (which must be heard) that the judgment of the Court [120] below is wrong, there is nothing in the law to prevent it from doing full justice and from reversing or altering the decree of the Court below upon the cross-objections, not only as against the appealing defendants, but also as against the defendants who have been subsequently brought on the record as party respondents. It was further urged that the rule that one respondent cannot urge cross-objections as against another respondent cannot be correct in its broad generality, but must be taken subject at least to one exception, namely, that when a case in the Court below proceeds upon a common ground with reference to all the defendants, in an appeal by some of them only, cross-objections against all of them may be urged, just as in an appeal by some of them the entire decree may be set aside under section 544 of the Code of Civil Procedure in favour of all the defendants. And in support of this view the case of *Anund Chunder Goopto v. Mohesh Chunder Mozoomdar*, (1864) 1 W. R., 226; *Pran Kishore Deb v. Mahomed Ameer*, (1874) 21 W. R., 338; *Timmayya Mada v. Lakshmana Bhakta*, (1883) I. L. R., 7 Mad., 215, and *Upendra Lal Mukerjee v. Girindra Nath Mukerjee*, (1898) I. L. R., 25 Cal., 565, have been referred to.

The question raised in the preliminary objection, which has given rise to some conflict of decisions, is not altogether free from difficulty. There are no doubt considerations both ways. On the one hand, it may be said that the right of urging cross objections on the part of the respondent ought to be limited to urging them as against those of his adversaries in the Court below, who are dissatisfied with the decree of that Court, and who have preferred an appeal against the same, and that other parties, who have not preferred any appeal against the decree of the Court below, and against whom no appeal has been preferred, ought to be left unaffected by the appeal, except so far as it may benefit them under the provisions of section 544. On the other hand, it may be urged that cases may arise in which the appeal of some only of the defendants or of the plaintiffs may open up matters which render it necessary for the ends of justice that the [121] whole case should be gone into, and some of the respondents should be allowed the opportunity of urging cross-objections against their co-respondents.

Upon a consideration of the cases cited and of the arguments on both sides, we think that there are two questions that have to be separately considered—first, whether the non-appealing defendants have been rightly added as respondents; and, second, whether, if they have rightly been added as

respondents, it is open to the plaintiffs respondents to urge cross-objections against them.

With reference to the first question we think that the answer should be in the affirmative. Upon the appeal of the defendants appellants the plaintiffs have taken cross-objections which must be maintainable against the appealing defendants; and if they are successful, they may result in letting the plaintiffs into possession of the lands in respect of which the plaintiffs' claim has been dismissed in the Court below, at least to the extent of the shares of the appealing defendants, and may thus affect the non-appealing defendants by introducing strangers who may interfere with their possession. It must, therefore, be held that the non-appealing defendants are persons who are interested in the result of the appeal within the meaning of section 559 of the Code of Civil Procedure, and, if that is so, they have been rightly made parties.

Upon the second question, we are of opinion that no hard and fast rule can be laid down, and that the correct principle deducible from the cases cited may be shortly stated thus. As a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellants; and it is only by way of exception to this general rule that one respondent may urge cross-objections as against the other respondents, the exception holding good (we do not attempt to lay down any definite exhaustive rule on the point) among other cases in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. One instance of this kind is to be found in cases of the class considered in *Upendra [122] Lal Mukerjee v. Girindra Nath Mukerjee*, (1898) I.L.R., 25 Cal., 565. The view we take is in accordance with that taken in the case of *Anwar Jan Bibee v. Azmut Ali*, (1871) 15 W. R., 26, where the learned Judges observe: "It has been held in a long series of decisions that the cross-appeal cannot reopen any questions which have been decided between co-respondents, but must have reference to the appellant, and the points which are in dispute between the respondent, who takes the cross-appeal and the appellant. It is quite possible that there may be cases in which, when an appellant succeeds in his appeal, questions will be opened up as between the co-respondents, which would otherwise have been decided, and it is also possible when interests are identical that a respondent succeeding in his cross-appeal may open up questions as between himself and his co-respondents."

That being our view of the law, let us see whether there is any thing exceptional in this case that would justify the plaintiffs respondents urging their cross-objections as against the non-appealing defendants. We are of opinion that the question ought to be answered in the negative. The plaintiffs respondents laid claim to certain plots of land. Their claim was decreed only in part. They did not prefer any appeal against that part of the decree which dismissed their claim, or more correctly speaking they preferred an appeal, but it was found to be out of time and the petition of appeal was returned. Thereupon they contented themselves with preferring cross-objections with reference to the portions of the claim that had been disallowed. The appeal, however, in which they urged these cross-objections was at the instance of some only of the defendants in the case, the remaining defendants having been apparently satisfied with the decree that was made against them. Is there anything in justice, which ought to entitle the plaintiffs to say that notwithstanding that they did not do that which was their proper course, namely, prefer an appeal against that portion of the decree, which went against them, they are entitled upon the appeal of some only of their adversaries in the Court below to open

up the whole case as against the other defendants, [123] who were satisfied with the decree? As we have said above the ground upon which this right of theirs is sought to be based is that as the cross-objections must be heard as against the appealing defendants, and as the remaining defendants are on the record, if the Court is satisfied upon the cross-objections that the decree of the Court below is wrong on any point it ought not to allow the erroneous decree to remain in force and perpetuate an injustice when there is nothing expressly laid down in the law to prevent its doing full justice. We do not think that *that* is a correct way of stating the point. The correct way of stating it would be this, namely, whether upon the cross-objections of the plaintiffs, which must be heard as regards the appealing defendants, if the Appellate Court finds that the decree of the Court below is wrong, it ought nevertheless to allow such erroneous decree to stand and to abstain from rectifying it in full and thereby doing complete justice on the ground of the plaintiffs having deprived themselves of such measure of justice by their default in preferring an appeal in time, and when the question is thus stated the answer to it should evidently be in the affirmative, unless there be any exceptional reasons in the case. We may add that there is one important consideration pointed out in the argument on behalf of the defendants respondents, which strongly supports the view we take, namely, that to allow the plaintiffs in such a case to urge their cross-objections against the non-appealing defendants would be to place those defendants in a situation of risk, without their having done anything to incur that risk, and without their being able to withdraw themselves from that position. In the case of the appellants if any cross-objections are urged against them by the plaintiffs respondents they have the option of withdrawing the appeal and thereby preventing the cross-objections being heard, if upon consideration they find it better for them to allow the decree of the Court below to stand as it is. In the case of persons in the situation of the non-appealing defendants, they have not the power of withdrawing from the position of risk in which they may be placed, not by any action of their own, but merely by the action of their fellow-defendants or fellow-plaintiffs as the case may be.

[124] In this view of the matter, it becomes unnecessary to consider the special argument, which was addressed to us on behalf of those of the defendants respondents against whom the suit was dismissed in the Court below on the ground of three years' limitation—a ground which is not common to them, and to the other defendants. If, however, it were necessary to say anything on this point, we should simply have said that the main reason upon which the learned Counsel for the plaintiffs respondents bases the right of his clients to urge their cross-objections against the non-appealing defendants, namely, the fact of the case in the Court below having proceeded upon a common ground, could not apply to those defendants.

[The Court then considered the cross-objections as against the appealing defendants, and the decision being on the facts it is unnecessary to report it. The judgment concluded as follows.]

This disposes of all the contentions raised by way of cross-objection.

The result is that the appeal must be dismissed with costs, subject to the modification referred to above, namely, that the decree of the lower Court should not extend beyond the *thuk* line of mouzah Deghalia as shown on the Amin's map; and the cross-objections must be disallowed with costs.

The defendants respondents will get separate costs. The *chittas* must be treated as papers printed for the purposes of the cross-objections.

S. C. G.

Appeal dismissed, decree modified.

NOTES.

[See the Notes to 26 Cal. 109.]

[26 Cal. 124].

The 9th December, 1898.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE RAMPINI.

In the matter of the application of H. C. Studd and others.*

Practice—Remission of Process fees—Rules of High Court, Calcutta, Chapter XIV—Process fees—Remission of fees in analogous appeals by the same appellants.

Where twenty-nine appeals were presented by certain appellants, and an application was made for remission of process fees, and that only five sets of process fees instead of twenty-nine should be charged under Chapter XIV [125] of the Rules of High Court, on the ground that the appeals were analogous and on behalf of the same appellant, the Court (GHOSE and RAMPINI, JJ.), refused the application.

Held, by RAMPINI, J., that the High Court has no power to grant the remission, and that the fees prescribed by the rules *must* be levied.

THIS was an application on behalf of the appellants in twenty-nine analogous appeals, praying that five sets of process fees instead of twenty-nine might be charged for serving notices of appeal to the respondents in all the appeals.

Babu Sorashi Charan Mitra, for the applicant, contended that the practice of the Court was to grant remission in analogous appeals by the same appellant, and there was nothing in the Rules of the Court which prevented the Court from exercising its discretion in such matters. Under section 93 of the Civil Procedure Code, the Court may pass any order it thinks proper as regards the process fees.

The following **judgments** were delivered by the High Court (GHOSE and RAMPINI, JJ.)

Ghose, J.—I have considered the application of the petitioners for leave to put in five, instead of the twenty-nine, sets of process fees required by the Rules of the Court on the subject; and I think that no sufficient ground has been made out for the granting of such indulgence. I accordingly refuse the application.

I express no opinion upon the question whether or not the Court has the power to relax in any case the process fee rules.

Rampini, J.—In this case, in consideration of his presenting twenty-nine analogous appeals, the applicant applies for a relaxation of the High Court process fee rules, and prays that five sets instead of twenty-nine sets of process fees may be levied. There has hitherto been some diversity of practice in this

* Civil Order No. 2773 of 1898.

Court in respect of this matter, some Benches readily granting a relaxation of these rules, and others refusing to do so.

I am of opinion that this Court has no power to relax the process fee rules in any way. Process fees are levied under the Rules framed by the High Court in accordance with the provisions of section 20 of the Court-fees Act. These rules have the force of law and therefore must be followed, and though the [126] High Court may from time to time alter and add to the Rules, it is necessary that the altered Rules should before being put in force be confirmed by the Local Government and sanctioned by the Governor-General of India in Council.

Now, the Rules which have been drawn up by this Court on the authority of this provision of the law are to be found in Chapter XIV of the High Court Rules for the Appellate Side of the Court, and it is by them prescribed that certain fees are to be levied on the processes issued in each case. It is to be observed that no power is given by these Rules to relax them or to remit the fees in any case whatever, and it appears to me that in these circumstances they cannot be relaxed, and that the fees prescribed by them must be levied, there being no power given to the Court to remit them. The absence in Chapter XIV of all power to relax the Rules or remit the fees is the more noticeable, as in Chapter IX of the High Court Rules, which relates to the preparation of the paper books in appeals from appellate decrees, by clause 11 of Rule 8, power is given to the Court upon the application of any party and upon good and sufficient reason being shown to give such special directions, as to any of the matters to which the Rules in Chapter IX relate, as it may deem fit and even by special order to exempt any party from the operation of any portion of those Rules. The absence of any analogous provisions in Chapter XIV in my opinion points to the conclusion that no discretion is given to the Court in any way to remit the process fees or to depart from the rules relating to them in any respect.

The learned pleader for the applicant, however, argues that, though such power may not be given to the Court by the High Court Rules on the subject, such power is given by section 93 of the Civil Procedure Code, which prescribes that "every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, *unless the Court otherwise directs.*" But this provision of the Civil Procedure Code does not appear to me to give a Court any power to depart from the Rules of the High Court on the subject of the levy of process fees, or to remit these fees. The section relates to the payment of process fees by the parties to a suit, and gives the Court [127] acting judicially power to make an order between party and party only, as to who should pay the process fees. It does not expressly give power to remit the fees, or what comes to the same thing, to order that the process should be served free, or, in other words, at the expense of Government, and in the present cases we cannot, I think, make such an order under section 93 of the Civil Procedure Code, seeing that the Government is no party to the suits.

For these reasons I am of opinion that there is no power anywhere given under which we could comply with the application of the pleader for the appellants in these cases, and I would, therefore, refuse it.

S. C. C.

Application refused.

[26 Cal. 127]

ORIGINAL CIVIL. .

The 12th December, 1898.

PRESENT :

MR. JUSTICE SALE.

Jogendra Nath Gossain and another

versus

Debendra Nath Gossain.*

*Receiver—Mortgage decree—Execution of mortgage decree by sale
of properties in the possession of the Receiver.*

A judgment-creditor can sell properties in the hands of a Receiver of the Court in execution of a mortgage decree, although he cannot execute a decree against such properties by way of attachment and sale.

Semle—A proceeding by way of attachment is an interference with the possession of the Receiver.

Hem Chunder Chunder v. Prankristo Chunder, (1876) 1 L.R., 1 Cal., 403, distinguished.

IN this case a Receiver had been appointed in a partition suit in which a decree had been made declaring the rights of the parties and directing the usual accounts and enquiries. During the partition proceedings and after the appointment of the Receiver two of the co-sharers mortgaged their interest in the undivided properties. The mortgagee obtained a decree on his [128] mortgage and sought to bring to sale certain properties which were included in his mortgage, but which were then in the hands of the Receiver.

A rule was obtained by the judgment-debtors calling on the judgment-creditor to show cause why he should not be restrained from proceeding to a sale of the properties in the hands of the Receiver, on the ground that to sell the mortgaged properties without the leave or sanction of this Court would amount to contempt of Court.

At the hearing of the rule—

Mr. L. P. Pugh for the judgment-debtor.

Mr. A. M. Dunne for the judgment-creditor.

Sale, J.—This is a rule calling on the judgment-creditor, who has obtained a decree on his mortgage under the Transfer of Property Act in the Alipore Court, to shew cause why he should not be restrained from proceeding to a sale of certain properties which are included in his mortgage, but which are now in the hands of the Receiver of this Court.

The suit in which this application is made, and in which the Receiver was appointed, is a partition suit in which a decree was made declaring the rights of the parties and directing the usual accounts and enquiries.

It appears that pending the partition proceedings and after the appointment of a Receiver two of the co-sharers mortgaged their interest in the undivided properties to the judgment-creditor. Some of the mortgaged properties being within the jurisdiction of the Alipore Court the mortgagee instituted his suit in that Court, and seeks to bring to sale the particular properties mentioned in the rule, some of which are situated in Calcutta. The judgment-debtors, after obtaining several postponements of the sale for the purpose of pay-

* Original Civil Suit No. 407 of 1888.

ing off the judgment-creditor, now apply to restrain the mortgagee from proceeding to a sale on the ground that to sell the mortgaged properties without the leave or sanction of this Court would amount to contempt of Court. But the sale of the properties under the provisions of the Transfer of Property Act can have no other effect, so far as the possession or [129] control of the Receiver is concerned, than a private sale by the mortgagors themselves. To obtain the benefits of his purchase and the rights incident thereto, the purchaser must seek the intervention of this Court, and he will be bound by all the proceedings in the partition suit in this Court.

This is not a case where the judgment-creditor is proceeding to execute his decree by attachment. This Court does not permit and will not recognise attachment of the properties in the hands of its Receiver, under process issued without sanction or leave, by inferior Courts, the reason being that a proceeding by way of attachment is an interference with the possession of the Receiver. But as the element of interference with the possession of the Receiver is absent from the present case there is no reason for restraining the sale. The case of *Hem Chunder Chunder v. Prankristo Chunder*, (1876) I. L. R., 1 Cal., 403, is distinguishable, inasmuch as the judgment-creditor in that case, if he had proceeded to execute his decree in the Mofussil Court, could have done so only by way of attachment and sale.

Under the Transfer of Property Act no attachment is necessary, and the reason for the course adopted in the former case does not now exist.

The result is that the rule must be discharged with costs, and the judgment-debtors must in pursuance of their undertaking also pay all costs occasioned by the interim stay of the sale.

Attorney for the judgment-debtors : Babu *Sita Nath Dass*.

Attorneys for the judgment-creditor : Messrs. *Orr, Robertson & Burton*.

C. E. G.

NOTES.

[As regards when a Receiver is a necessary party, see also (1910) 14 C.W.N., 653. As regards the question of priority of advances, see (1908) 34 Cal. 427.]

[130] APPELLATE CIVIL.

The 8th July, 1898.

PRESENT :

MR. JUSTICE AMBER ALI AND MR. JUSTICE PRATT.

Basanta Kumar Roy Chowdhry.....Plaintiff
versus

Promotha Nath Bhattacharjee and others.....Defendants.*

*Interest—Interest on arrears of rent—Bengal Tenancy Act (VIII of 1885), section 67, 178, sub-section 3, cl. (h) and 179—
Contract to pay interest at higher rate than
allowed by s. 67 of the Act.*

A contract by a tenant holding under a permanent *mokarari* lease to pay interest on the arrears of rent at a higher rate than 12 per cent. per annum is not enforceable in law.

THE facts of the case, so far as they are necessary for the purposes of this report, appear sufficiently from the judgment of the High Court.

Babu Nil Madhub Bose for the Appellant.

Babu Dwarka Nath Chuckerbutty for the Respondents.

The judgment of the High Court (Ameer Ali and Pratt, JJ.) was as follows:—

The question involved in this appeal is whether, having regard to the provisions of sections 178 and 179 of the Bengal Tenancy Act, a contract by a tenant holding under a permanent *mokarari* lease to pay interest on the arrears of rent at a higher rate than 12 per cent. per annum is enforceable in law.

The plaintiff brought this suit to recover from the defendant a sum of Rs. 244 for arrears of rent and interest; the interest calculated being at the rate of one anna per rupee per month, according to the terms of a registered *kabuliat* executed by the defendants in favour of the plaintiff. This document is printed at page 6 of the paper book. It purports to create a permanent *mokarari* lease, and was admittedly executed after the passing of the Bengal Tenancy Act.

[131] The Munsif made a decree in favour of the plaintiff in terms of his prayer. On appeal, the Subordinate Judge has varied the amount of interest awarded by the Munsif, and directed that the plaintiff should recover interest at the rate of 12 per cent. only. He was of opinion that section 179 of the Bengal Tenancy Act does not override the provisions of clause (h), section 178, relating to the payment of interest on arrears of rent.

The plaintiff has appealed to this Court, and the contention on his behalf is that under section 179 the plaintiff is entitled to recover the interest agreed upon between the parties by their contract, and that the provisions of clause (h), section 178, do not affect the express terms of section 179. The sole question in this case is what is the meaning to be attached to the provisions of section 179, and whether in the case of tenants holding permanent tenures a contract to pay interest not in accordance with the provisions of section 67 of the Bengal Tenancy Act can be regarded as valid in law. No authority has been cited on either side, and we must therefore deal with the point on general

*Appeal from Appellate Decree No. 50 of 1897, against the decree of Babu Rajendra Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 5th October 1896, modifying the decree of Babu Hari Nath Roy, Munsif of Baripur, dated the 9th of April 1896.

principles. Sub-section 3, clause (h), section 178, provides as follows: "Nothing in any contract made between a landlord and a tenant after the passing of this Act shall affect the provisions of section 67 relating to interest payable on arrears of rent." Section 67 provides that "an arrear of rent shall bear simple interest at the rate of twelve per cent. per annum from the expiration of that quarter of the agricultural year in which the instalment falls due to the institution of the suit." It will be observed that the expression "tenant" in sub-section 3, clause (h) is of a general character. Section 5, which defines the word "tenant," is as follows: "'Tenant,' means a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that person." Sub-section 3, clause (h), section 178, therefore includes tenants holding under *mokarari* leases. Section 179 provides "that nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent *mokarari* lease on any terms agreed on between him and his tenant." It is obvious that if the argument put forward [132] by the appellant be well-founded, we must hold that the Legislature intended by section 179 to repeal what it had expressly enacted by clause (h), sub-section 3, section 178. It may be observed that if this had been the intention of the Legislature nothing would have been easier than to include a saving clause to that effect in the clause referred to. Now, it is a well recognised principle in the interpretation of Statutes that an Act of the Legislature should be so construed as to give effect, so far as possible, to all its enactments; nor must it be so construed as to allow one provision to stultify the other. The question, which we have to determine, is whether there is anything in section 179 by which the Legislature intended to override the provisions of clause (h), sub-section 3, section 178. In order to answer the question it is necessary to bear in mind that ordinarily speaking the word "terms" used in connection with a lease does not include a condition relating to interest upon arrears of rent. In Redmond on Landlord and Tenant, p. 52, will be found a passage showing exactly the matter included in "the terms of a lease." Did the Legislature use the expression "terms" in section 179 of the Tenancy Act in its ordinary legal acceptation, or did it intend to give the word a wider meaning? Having regard to the provisions contained in section 67 and clause (h), sub-section 3, section 178, we are not prepared to say that it had the latter object in view. If that had been the intention it would have avoided the expression "terms," which conveys a distinctive signification in the treatises on the law relating to landlords and tenants, and employed instead the more comprehensive word "conditions." Then, again, it is to be observed that (apart from special legislation) it was considered at one time doubtful whether the holders of permanent tenures generally had the power to create permanent under-tenures. Under s. 3 of the Bengal Regulation of 1812 the proprietors alone were so authorised, and it is by no means improbable that the Legislature intended by section 179 to vest the holders of permanent tenures generally with the right of granting permanent *mokarari* leases on any terms agreed upon between the parties which did not contravene the substantive provisions of the law. However that may be, it seems to us that we ought not to put such a construction on section 179 [133] as would have the effect of nullifying, with respect to an important body of tenants, the enactment in the previous section.

For these reasons, as at present advised, we think that the conclusion arrived at by the Subordinate Judge in this case is correct, and this appeal must be dismissed with costs.

S. C. G.

Appeal dismissed.

NOTES. *

[This was overruled both as regards the scope of ss. 173 and 179, Bengal Tenancy Act, and as regards the contract to pay a higher rate of interest, in (1901) 29 Cal., 674; see also (1899) 26 Cal., 611; (1900) 28 Cal., 166; (1905) 32 Cal., 749.]

[26 Cal. 133]

APPEAL FROM ORIGINAL CIVIL.

The 7th December, 1898.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, MR. JUSTICE PRINSEP,
AND MR. JUSTICE AMEER ALI.

In the matter of Fakaruddin Mahomed Chowdhry, a Minor,
Hafiz Aminuddin Ahmed.....Appellant

versus

G. L. Garth and another.....Respondents.*

*Guardians and Wards Act (VIII of 1890), section 14—Proceedings for
appointment of a guardian in more Courts than one—Report by
District Court to High Court—Direction by Chief Justice—
Powers of High Court—Letters Patent, High Court,
1865, section 17—Jurisdiction—Costs.*

Section 14† of the Guardians and Wards Act (VIII of 1890) does not apply to the High Court in the exercise of its Original Civil jurisdiction; and the terms "report" in clause (2) of that section refers not to a judicial reference, but to a ministerial act.

Proceedings had been taken, for the appointment of a guardian of a minor, under that section, in the High Court and afterwards in a Mofussil Court. The latter reported the case to the High Court; and the Chief Justice thereupon directed that the proceedings in the Mofussil Court should be stayed, and that a Judge of the Original Side of the High Court should hear and determine the matter.

Held, that such direction was in order, and that the Judge who determined the matter had jurisdiction to do so.

* Appeal from order No. 4 of 1898.

† (Sec. 14 :—(1) If proceedings for the appointment or declaration of a guardian of a minor are taken in more Courts than one, each of those Courts shall, on being apprised of the proceedings in the other Court or Courts, stay the proceedings before itself.

Simultaneous proceedings in different Courts.

(2) If the Courts are both or all subordinate to the same High Court, they shall report the case to the High Court, and the High Court shall determine in which of the Courts the proceedings with respect to the appointment or declaration of a guardian of the minor shall be had.

(3) In any other case in which proceedings are stayed under sub-section (1), the Courts shall report the case through the Local Government to the Governor-General in Council, and the Governor-General in Council shall determine in which of the Courts the proceedings with respect to the appointment or declaration of a guardian of the minor shall be had.)

Held, also, that although a petitioner had failed in his application on all points except the removal of the guardian, he was entitled to his costs up to and including the order removing the guardian, as he must be taken to have acted, so far, for the benefit of the minor.

THE appellant, the father-in-law of the above named minor, presented, before SALE, J., a petition for the removal of the minor's [134] mother from her position as guardian of the person of the infant. A rule issued, calling upon the mother to show cause why she should not be removed, and, after the hearing, it was made absolute. The respondent, Mr. Garth, who had, by an order of Court, been appointed guardian of a certain portion of the minor's estate, which was to be mortgaged under a scheme, was allowed to appear on the hearing of the rule. The order of SALE, J., further directed a reference to the Registrar to inquire and report who was a fit and proper person to be the guardian of the minor's person, and gave Mr. Garth leave to appear on the reference for the purpose of assisting the Registrar. By his report, the Registrar found that Moulvie Mahomed Wajid, of Barisal, was a fit and proper person to be the guardian.

Exceptions were taken to that report mainly on the ground that the minor having ceased to reside within the jurisdiction of the Court, SALE, J., could not entertain the matter. The report, however, was confirmed, but the learned Judge declined to allow the petitioner his costs. Afterwards, on the 13th September 1897, the petitioner presented a petition, in the district Court of Barisal, for the appointment of himself as guardian of the minor's person. The District Judge, acting under section 14 of the Guardians and Wards Act (VIII of 1890) reported the case to the High Court on the 12th December. The Chief Justice directed that the proceedings in the Barisal Court should be stayed, and deputed SALE, J., to continue to hear and determine the matter; and, on the 7th January, the last named Judge confirmed the Registrar's report.

The petitioner appealed.

Mr. K. N. *Sen Gupta* for the Appellant. —The lower Court had no jurisdiction to make the order now appealed from, because the minor was residing not in Calcutta, but at Barisal; and the Barisal Court alone had jurisdiction to hear and determine the matter. The person appointed is not a fit and proper person; he intends to deal with the property of the minor in a manner prejudicial to the minor's interests. The order of the Chief Justice directing SALE, J., to hear and determine the application was *ultra vires*. Section 14 of the Guardians and Wards Act directs "the Courts" to refer the matter to the High Court; and all [135] references from a Provincial Court must be heard by a division Bench of the High Court, under rule 3 of the Rules of the Appellate Side, and not by a Judge exercising Original Civil jurisdiction.

Mr. *Dunne* for G. L. Garth (and who was allowed to address the Court only as *amicus curiæ*): It is impossible that the words "the Court" in section 14 of the Guardians and Wards Act should apply, because such a meaning is repugnant to the context, inasmuch as a "Court subordinate to the High Court" cannot be the High Court itself. Rule 51 of the Rules and Orders of the High Court provides that all the powers conferred on the High Court by the Letters Patent may be exercised by a single Judge. In this case, therefore, SALE, J., was "the High Court". Again, if section 14, clause (2), is to apply to the High Court, the High Court must "report the case"; but to whom could it report? The meaning of the section is that where there are proceedings in two Courts subordinate to the same High Court, they must stay their hands, and leave it to the Appellate Court to decide which of them shall try the case. The "report" mentioned in clause (2) does not mean a judicial

reference; the word is not "reference" but "report," and it indicates a purely ministerial act; and the direction of the Chief Justice merely was that SALE, J., should continue to hear the matter, which was already properly before him, and that the proceedings at Barisal should be stayed; and it was perfectly in order. Section 47 of the Act also shows that the expression "District Court," as there used, is not intended to include the High Court.

Mr. *Sen Gupta*, in reply.—The term "the Court" must mean the High Court in the exercise of its ordinary Original Civil jurisdiction, and "District Court" is to bear the same meaning as is assigned to that expression in the Civil Procedure Code, *i.e.*, it includes the High Court. If this be held to lead to a repugnancy in the context, then clause (3) of section 14 of the Guardian and Wards Act which provides for "other cases" must apply.

Mr. *W. M. Dass*, for a relation of the minor, was not called upon.

[136] The following judgments were delivered by the Court (MACLEAN, C.J., and PRINSEP and AMEER ALI, JJ.):—

Maclean, C.J.,—Three points have been argued before us upon this appeal. The first is, that the Court below had no jurisdiction to make the order appealed from. The order was made upon the application of the present appellant himself, who is now, for most obvious reasons, saying that the Court had no jurisdiction to make it. In my opinion the Court had ample jurisdiction to make the order.

It is clear upon the evidence, the appellant's own evidence, that the minor ordinarily resided in Calcutta, and that being so, under section 9 of the Guardians and Wards Act VIII of 1890, the Court below had ample jurisdiction to deal with the application.

The second point is, that having regard to the provisions of section 17 of the Guardians and Wards Act, the gentleman appointed as guardian was not a fit and proper person for the purpose. Hardly any argument, or anything worth calling an argument, has been addressed to us upon this point, which is absolutely untenable.

The third point is one of more importance. It is urged that the direction given to Mr. Justice SALE by myself, as Chief Justice, to determine the matters in dispute, was unauthorised having regard to the language of section 14 of the Guardians and Wards Act. The short facts are these: The present appellant presented a petition on the Original Side of this Court, asking for the removal of the mother of the minor from her position of guardian of his person and property, and for the substitution of himself in her place. A rule was obtained calling upon the mother to show cause, and in the result the mother was removed, and Mr. Justice SALE, who tried the matter, directed an enquiry to be held before the Registrar, to ascertain and report who would be a fit and proper person to be appointed guardian in her place. That enquiry proceeded, and I do not think it is an unfair inference to draw from what appears in the case that the present appellant, finding that he was not likely to be appointed guardian (an office which he obviously desired) instituted fresh proceedings in the [137] District Court at Backergunge, asking for the same relief, which he had sought by his previous application before Mr. Justice SALE, alleging that the property of the minor was within the jurisdiction of the District Court and not of this Court on its Original Side. This was a most improper application. The District Judge, purporting to act under section 14 of the Guardians and Wards Act, reported the matter to this Court on the 12th November 1897, and when the matter was brought before me, I determined that Mr. Justice SALE should deal with it; consequently the reference

proceeded, the Registrar made his report, and Mr. Justice SALE, upon the matter coming before him on the 7th of January 1898, confirmed that report, and appointed a fit and proper person to be the minor's guardian.

It is from that order that the present appeal is preferred ; and it is urged before us that Mr. Justice SALE had no jurisdiction to try the case, and that the reference of the case to him by myself was bad, inasmuch as the order of reference ought to have been made by a Division Bench of this Court under Rule 3 of Chapter II of the Rules of the High Court, Appellate Side. I will deal with this objection at once.

That rule deals with references, and " references " in the ordinary acceptation of that term. Under section 14, the District Judge has only to *report* the case, not to refer it, and all the Judge did was to report it. The " references " referred to in Rule 3 are those which are to be heard and determined judicially, and do not apply to such a report as was made by the District Judge in this case.

However, as in my opinion section 14 does not apply to a case such as the present, whether the matter ought to have been dealt with by a Division Bench or by the Chief Justice, is a matter of no real moment. In my opinion when proceedings have been taken on the Original Side of this Court and also in a District Court, the section does not apply.

Section 14 says this : " If proceedings for the appointment or declaration of a guardian of a minor are taken in more Courts than one, each of those Courts shall, on being apprised of the proceedings in the other Court or Courts, stay the proceedings [138] before itself." If the section had stopped there it would have been a difficult matter to contend, successfully, that the word " Courts " did not cover every Court, and consequently embraced a High Court in the exercise of its ordinary original civil jurisdiction. But to appreciate what the Legislature intended we must look at the whole section, and moreover, the whole Act. Sub-section 2 of section 14 runs as follows : " If the Courts are both or all subordinate to the same High Court, they shall report the case to the High Court, and the High Court shall determine in which of the Courts the proceedings with respect to the appointment or declaration of a guardian shall be had."

" The Courts " referred to in this sub-section must mean the Courts referred to in sub-section 1.

Then it is argued for the appellant that looking at the definition of " the Courts " in the definition clause (clause 4) " the Court " means the " District Court " and the " District Court " includes " a High Court in the exercise of its ordinary original civil jurisdiction." This is ingenious, but it is fallacious. In the first place the definition only applies " unless there is something repugnant in the subject or context," and in section 3 " nothing in this Act shall be construed to take away any power possessed by any High Court established under the Statute 24 and 25 Vic., c. 104." It is not disputed that this High Court in the exercise of its ordinary civil jurisdiction, having regard to section 15 of the Letters Patent of 1865, had power to deal with questions relating to the appointment of guardians of a minor's person and property, and, if so, it could not have been intended that such a Court should be included in section 14 of the Guardians and Wards Act, so as to make it compulsory on that Court to stay the proceedings before itself. If it were otherwise, we should be construing the Act so as to take away, and in a most direct form, a power, and a most useful and important power, possessed by the High Court, which section 3 says is not to be done. If, then, this High Court in the exercise of its ordinary original civil jurisdiction is not within sub-section 1 of section 14, that Court was not bound to stay the proceedings

before itself, and I am not-conscious of any power either [139] in a Division Bench of the Appellate Side of the High Court, or in the Chief Justice to stay such proceedings.

In this view Mr. Justice SALE was clearly entitled to proceed with the case, and without any direction from myself.

In my opinion the case of two petitions being presented, one in a District Court and one in this Court exercising its ordinary original civil jurisdiction, is one not covered by, and not contemplated by the Legislature under section 14, and that section was never intended to interfere with the clear right of this Court on its Original Side, to deal with the question of the appointment of guardians to minors. If, then, the case be not within sub-section 1 of section 14, as, in my opinion, it clearly is not, sub-sections 2 and 3 have no application. It is not necessary, in the view I take, to decide it; but had it been necessary, it is at least doubtful whether if "the Court," in sub-section (2) be read as including a High Court in the exercise of its ordinary original civil jurisdiction, such a reading would not have been repugnant both to the subject and the context of the section.

The appellant, therefore, fails on all the above points and the appeal must be dismissed.

As regards the question of costs, loth as I am to interfere with the discretion exercised by the learned Judge in the Court below, I can see no good reason why the appellant should have been deprived of his costs up to and including the hearing of the rule. The learned Judge gives no reason for refusing the appellant these costs. He succeeded in his application to have the mother removed, and it must be taken that this, which was done at his instance, was for the minor's benefit.

In my opinion he is entitled to have his costs out of the minor's estate up to and including the hearing of the rule, but nothing more. The order must be modified to this extent.

As regards the costs of the appeal, there will be no costs: for there is no respondent properly served. We give liberty, however, as Mr. Justice SALE did, to the guardian of the minor to allow the costs of Mr. GARTH, who has only been heard as *amicus curiæ*, and who has assisted the Court, out of the minor's estate which may come to his hands.

[140] **Prinsep, J.**—I desire only to add a few words with reference to section 14 of the Guardians and Wards Act (VIII of 1890). In all other respects, I agree entirely with the judgment that has been just now delivered by my Lord, the Chief Justice.

The present proceedings were commenced by an application made by the present appellant before the Original Side of this Court, under the provisions of the Guardians and Wards Act, for the removal of the guardian previously appointed by a Judge sitting on the Original Side of the High Court, and for the appointment of himself as guardian. After the case had so far proceeded that it had been referred for enquiry to the Registrar as to the appointment of some particular person as a fit guardian of the minor, the petitioner applied to the District Judge of Backergunge under the Act, for the appointment of a guardian, alleging that that Court had jurisdiction over the matter. On hearing that proceedings had already been taken on the Original Side of this Court, the District Judge of Backergunge stayed his proceedings under section 14, sub-section (1), and reported to this Court under sub-section (2). There can be no doubt that the application made under such circumstances to the District Judge of Backergunge was not *bond fide*.

The petitioner had already complained in his petition to the Original Side of the High Court, of the conduct of the guardian living with the minor in Calcutta, to the detriment of the estate. He, therefore, admitted the jurisdiction of this Court; but it appeared that in the course of the proceedings the mother of the minor removed with the minor to Backergunge. It does not appear whether she removed permanently or temporarily. At all events this Court had ample jurisdiction to try the case when the petition was made.

In regard to the application of section 14 of the Act, that is to say, whether it applies to a matter before the Original Side of this Court, and to the same matter raised in the District Court outside of Calcutta, I should, myself, feel little difficulty in holding that it did apply, were it not for the terms of the last part of section 3 of the same Act—that saves the jurisdiction of the High Court established under Statute 24 and 25 Victoria, Chapter 104; and a reference to that Statute shows that the powers previously conferred on and exercised by the Supreme Court, to which the High Court has succeeded, were reserved for the High Court on its Original Side; and even having regard to the terms of section 3 and the definition of "High Court" given in the General Clauses Act, 1868, I find myself unable to hold that section 14 has in any way curtailed this jurisdiction of the Original Side of the High Court.

I, therefore, agree with the view expressed by my Lord, the Chief Justice, in holding that section 14 does not apply to any case before the Original Side of this Court, and that the report made by the District Judge of Backergunge was properly dealt with by referring it to the learned Judge before whom proceedings had been taken on the Original Side.

Ameer Ali, J.—I agree in holding that section 14 of Act VIII of 1890 (Guardians and Wards Act) does not apply to the Original Side of this Court. I only wish to add a few words with reference to Mr. *Sen Gupta's* contention that inasmuch as appeals are allowed from the Original Side of the High Court, it, that is, the Original Side, must, therefore, be regarded as subordinate to the Appellate Side of the same Court. Under section 14 of 24 and 25 Victoria Chapter 104, the Chief Justice of the High Court had power to determine what Judge in each case shall sit alone and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts. Ordinarily the Chief Justice determines that two Judges shall sit separately to try the cases arising within the original jurisdiction of the High Court, but two Judges are sometimes appointed to sit together. Section 15 of the Letters Patent, 1865, gives a right of appeal from the judgment of one Judge of the High Court, or from the judgment of two or more Judges wherever such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court at the time being, but not from other judgments except to the Privy Council. So that if one Judge of the High Court is appointed to sit alone in the exercise of original jurisdiction his decisions would be appealable to the High Court in its appellate jurisdiction. This would also be the case if two Judges sat together in the exercise of original jurisdiction and disagreed. If two or more Judges forming a Division Bench on the Original Side [142] are agreed, there would be no right of appeal except to the Privy Council. Similarly on the Appellate Side, when two Judges sit together and they disagree, the judgment of the Court below is appealable to the High Court.

If the contention put forward with reference to the subordination of the Original Side of the Court, merely because an appeal was given from the decision of a single Judge, were correct it would follow that every Division Bench of this Court would be subordinate to some other Division Bench

of the High Court. Again it must be remembered that rules of procedure, either for the Original Side or the Appellate Side, cannot be made except by the whole Court, thus showing that the Original Side of the Court is an integral part of the High Court. The mere statement of these facts is, it seems to me, sufficient to show that it could not have been intended that the High Court in the exercise of its ordinary original civil jurisdiction should be treated as subordinate to any other part of the same Court.

I, therefore, agree with my Lord in dismissing the appeal.

Appeal dismissed.

Attorney for the Appellant: Mr. G. A. Smith.

Attorneys for the Respondents: Messrs. Sanderson & Co. (for Mr. Garth), and Babu Raj Mohon Dass (for Golam Obad Chowdhry).

H. W.

NOTES.

[As regards the applicability of the Guardian and Wards Act, 1890, see also *Mrs. Annie Besant v. Narayaniah*, (1914) 27 M.L.J., 30.

As regards the Original Side not being subordinate to any other side of the High Court, see also (1904) 8 C.W.N., 797.]

[26 Cal. 142]

ORIGINAL CIVIL.

The 20th, 21st and 22nd June and 13th July, 1898.

PRESENT :

MR. JUSTICE P. O'KINEALY.

Motichand and another

versus

Fulchand and another.*

Contract—Sale of Goods—Offer of Performance—Tender of railway receipts indorsed in blank—Goods not available—Goods subject to demurrage or freight—Duty of seller.

P agreed to sell and *F* to buy certain goods to be delivered to *F* in April-May 1897. The contract of sale contained (*inter alia*) the following clauses :—

"(10) The goods to be tendered fully 48 hours before the expiration of the present term of 72 hours granted by the railway company in order to [143] enable buyers to weigh sample, and inspect the same; and the delivery not to be considered complete until the samples have been refracted and examined, and any dispute about quality, &c., settled.

"(11) If railway receipt be tendered, such to be handed to buyers 48 hours before the goods are liable to demurrage under the present term of 72 hours granted by the railway company."

P, not having, before the 31st May, goods of his own to meet the contract, arranged with *H* for certain goods of *H*'s to be delivered under it and tendered to *F*. On that day, certain railway receipts, which had been indorsed in blank by *H*, in respect of the said goods, were tendered to *F*. *F* was ready to pay for the goods; but, before tendering the

* Original Civil Suit No. 135 of 1898.

price, he insisted upon an endorsement of the railway receipts by *H* to *P* and by *P* to himself. *P* was unable to point out the goods to be delivered under the contract, nor could he indicate the wagon-numbers. *P* refused to procure the endorsements, required by *F*, and thereupon *F* declined to take delivery as proposed, though he tendered the price in exchange for the goods.

Held, that, *F* not having had an opportunity of inspecting the goods as provided by the contract, the tender made as aforesaid by *P* was not such an offer of performance of the contract as *F* was bound to accept.

Held, also, that *F* was not bound to accept a tender of railway receipt for goods subject (as some of these were) to demurrage, nor for goods on which freight had not been paid (as was the case with some of these goods), nor for goods that were not available on the 31st May, as in the present case.

In order to establish a valid tender of the goods, it was for *P* to show that had *F* taken the railway receipts, the railway company would have been bound to deliver the goods upon production of the receipts; and *F* was under no duty to point out to *P* that the tender was defective. *F*'s duty under the contract arose when a sufficient tender was made to him, and not till then.

Failure to justify an alleged breach of contract upon one ground only, which is found insufficient, does not disentitle the defendant to rely upon other grounds which his rights under the contract entitle him to rely upon. *Cowan v. Milburn* (1867) L. R., 2 Exch., 230, and *Mothoormohun Roy v. Bank of Bengal*, (1878) I. L. R. 3 Cal., 392, referred to.

On the 29th September 1896 the defendant Fulchand contracted with one Pursottom Lall to purchase from him 50 tons of linseed; and on the 23rd October he contracted to buy 100 tons of wheat. Both the linseed and the wheat were to be delivered at the Howrah Railway Station in April-May 1897.

[144] The contracts contained (*inter alia*) the clauses set forth in the foregoing head note.

Until the 30th or 31st May, the seller had no goods to deliver; but on the 29th May he sent to the defendant separate delivery orders in respect of each contract. The defendant's *gomasta* took them to Howrah, with money to pay for the goods; but the seller's *gomasta*, who attended on his master's behalf, was unable to point out the goods or give the wagon-numbers inasmuch as the delivery orders did not then, or at any subsequent time, indicate them. On the same day, however, the 29th May, a letter was written on the seller's behalf to the defendant offering that the seller's *gomasta* would point out the goods on the 31st May, and stating that the seller had made complete arrangements for delivery of the goods. The parties, accompanied by their respective attorneys, attended at Howrah accordingly, when Pursottom Lall handed over certain railway receipts covering goods belonging to one Hurdut Roy Chamaria, from whom Pursottom Lall had borrowed the goods in order to deliver them.

The plaintiff's attorney then handed over to the defendant's attorney seven railway receipts for the 100 tons wheat, and two railway receipts each for 25 tons of linseed. These receipts had been endorsed in blank by Hurdut Roy Chamaria. The defendant was ready to pay for the goods; but before tendering the price of them, the defendant's attorney required an endorsement of the railway receipt from Hurdut Roy Chamaria to Pursottom Lall and from Pursottom Lall to the defendant. The plaintiff's attorney refused to get the endorsements, saying that they were not necessary, and that the goods were deliverable on presentation of the railway receipts as they stood.

The defendant's attorney then formally tendered the price in exchange for the goods; but the plaintiff's attorney offered in return only the railway receipts, which were refused.

The goods covered by the railway receipts belonged to Hurdut Roy Chamaria who had not been paid for them; nor had the freight on them been paid.

[145] After the defendant's refusal to accept the railway receipts, Pursottom Lall assigned his cause of action in respect of both contracts, to the plaintiffs, who subsequently brought this action.

Mr. *Avetoom* and Mr. *Knight* for the Plaintiffs.

Mr. *Hyde* and Mr. *Sinha* for the Defendants.

The judgment of O'Kinealy, J., was as follows:—

In this case the plaintiffs sue to recover the sum of Rs. 852-8-0 as damages for the neglect and refusal of the defendants to take delivery of 50 tons of linseed which they had contracted to purchase on the 29th of September 1896; and to recover the sum of Rs. 213-4-6 as damages for the neglect and refusal of the defendants to take delivery of 100 tons of wheat which they had contracted to purchase on the 23rd of October 1896. The contracts were made, the plaintiffs alleged, by the defendants with one Pursottom Lall, who was the seller of the goods, and after the date of the neglect and refusal relied on by the plaintiffs, Pursottom Lall, on the 13th of November 1897, assigned his causes of action in respect of both contracts to the plaintiffs for valuable consideration. The defendants are sued as partners in the firm of Hurnand Roy Fulchand, and the only ground upon which it is sought to make Sewmukh Roy liable is as a partner in that firm. I may say at once that the evidence before me is wholly insufficient to show that he is now, or was at the time the contracts were made, a partner in the firm and, therefore, as against him (he was not represented at the trial) the suit must be dismissed with costs.

The third paragraph of the plaint sets forth the circumstances upon which, in addition to the contracts and assignment, the plaintiffs rely in support of their claim. It is as follows: "That on or about the 26th and 31st days of May 1897 the said Pursottom Lall, in accordance with the said contracts, and in pursuance thereof, duly forwarded delivery orders in respect of the goods sold under the said contracts to the defendants, and offered to deliver, and at all due times was ready and willing to deliver, the said goods to the defendants, but notwithstanding the defendants neglected and refused to take delivery of the said goods or any part thereof."

[146] In the third paragraph of his written statement the defendant Fulchand traverses every one of these allegations, but admits that "the said Pursottom Lall tendered to this defendant certain railway receipts purporting to have been granted to one Hurdut Roy Chamaria and purporting to have been blank indorsed by him."

The fourth and fifth paragraphs of the written statement are as follows: "This defendant is informed and believes that the said Pursottom Lall was, at the dates mentioned in the last preceding paragraph, in insolvent circumstances, and that he was heavily indebted to, amongst others, the said Hurdut Roy Chamaria, and that the goods for which the said receipts purported to have been granted were the goods of the said Hurdut Roy Chamaria and not the goods of the said Pursottom Lall, and that he was not in a position to deliver or transfer the same to this defendant, and that the said Hurdut Roy Chamaria had not been paid for the said goods. This defendant was always ready and willing to take delivery of the said goods contracted for as aforesaid, and to pay for the same, and he offered to do so, and demanded delivery of the said goods, but the said Pursottom Lall refused to deliver the said goods, and only offered to this defendant the said receipts, and did not even show to this defendant or

to any one on his behalf the goods for which the said receipts had been granted."

It is not necessary to refer to a further defence, having reference to the assignment of the 13th of November 1897, as that was abandoned at the hearing.

Both the linseed and the wheat were to be delivered in April-May 1897, and the whole of the evidence given in this case relates to what took place during the last week of May 1897 between Pursottom Lall and Fulchand, and with reference to the deliveries under these contracts.

It appears from this evidence that in the latter end of May Pursottom Lall's affairs became involved, and he was deeply in debt. His *gomasta* Dumun Lall, who was called, said he had paid off a sum of Rs. six lakhs by the end of May, and that he then only owed Rs. 60,000 or Rs. 70,000, and from the evidence [147] of Hurnand Roy, it is clear that Pursottom Lall was in great difficulties. He had, in fact, no goods to tender under these contracts at any time before the 31st of May. I am satisfied that this was so from the evidence of Dumun Lall and Hurnand Roy.

There is no doubt that the market was a falling market, and Pursottom Lall was anxious to obtain from his buyers the difference between the market rate and the contract rate, if he could do so without being under the necessity of making an actual tender of the goods, and he might have succeeded had he not been dealing with persons who knew he had no goods to deliver, and who were determined not to accept anything short of the actual goods contracted for.

The first action taken in respect of these contracts was by Pursottom Lall on the 26th of May. On that day he wrote to the defendant enclosing one delivery order for both the wheat and the linseed, and requesting him to send a man to the Howrah station with money to take delivery of the goods

On the 27th Pursottom Lall caused Babu A. K. Mukerjee, a pleader of the Small Cause Court, to write to the defendant pointing out that the delivery order had been sent to him, and that he had not taken delivery of and paid for the goods, and calling upon him to pay for and take delivery of them within twenty-four hours. The letter ends: "In default of compliance my client will look to you for the difference between the contract rate and the market rate." In the meantime the defendant had returned the delivery order to Pursottom Lall, enclosed in a letter, dated the 26th of May (but which Pursottom alleged he did not receive till the 28th), demanding separate delivery orders in respect of each contract, and these delivery orders were delivered to the defendant on the morning of the 29th of May. They were addressed to Dumun Lall, who was the *gomasta* of Pursottom Lall, and are in this form:—

"*Re* Contract No. 29, dated 23-10-96, for 100 tons wheat.

"Please deliver to Messrs. Hurnand Roy Fulchand 100 tons wheat under the above contract on receipt of the price thereof and of gunny bags."

[148] "*Re* Contract No. 1299, dated 29-9-96, for 50 tons linseed.

"Please deliver to Messrs. Hurnand Roy Fulchand 50 tons linseed under the above contract on receipt of the price thereof and of gunny bags."

When these delivery orders were received by the defendant, his *gomasta* took them to Howrah station with money to pay for the goods. He says: "I took more money with me than the amount that I calculated." (Shewn Exhibit B.) "This is the calculation: It amounts to Rs. 11,602-8, on the contract for 1,092 bags of wheat, and Rs. 305-12 is the price of gunny bags." (Shewn D.) "The price of the 50 tons linseed was Rs. 6,649-8-0 and Rupees 190-15-6 for the gunny bags. The total is not given. The wagon-number or

pile-number is always given in delivery orders. These particulars were not written on the delivery orders I got. I said to Dumun, 'give me the goods, give me all the particulars,' that is, as to which shed they were in, where they were. He said he had no information as to the goods. Then I went to Mr. Farr's office and had a letter written." This meeting with Luchminarain on the 29th at Howrah was put to Dumun Lall in cross-examination, but he denied that he saw Luchminarain at Howrah on that day. I have no doubt that this denial is untrue. Mr. Pugh's letter of the 29th of May contains a circumstantial account of that meeting, and had that portion of Mr. Pugh's letter been an invention of his clients, I have no doubt that Mr. Leslie would have said so in his letter in reply of the 31st May, and would not have confined himself to the colourless statement "without admitting any of the statements contained in your letter." Dumun Lall, in cross-examination, was forced to admit that he was not in a position to point out the goods on the 29th, or give the wagon or pile numbers, and I have no doubt that he admitted his inability to do so to Luchminarain at Howrah on that day.

When Luchminarain went to Messrs. Farr and Pugh's office on the 29th, he instructed Mr. Pugh to write the letter I have referred to above, in answer to the pleader's letter of the 27th, and in this letter, after detailing the interview at Howrah between the defendant's *gomasta* and Dumun Lall, he states this: "Our [149] clients' *monib gomasta* will attend at the Howrah station again on Monday morning, and will again take with him the cash for payment of the goods, and we have to request that the sellers will be good enough to be in attendance prepared to furnish the wagon, and pillar or pile numbers, and to point out the goods intended to be delivered to our clients under the contracts above mentioned in the usual and customary manner, and will be present when samples for refraction are drawn and sealed. Meanwhile we are instructed to return the two delivery orders, which we do herewith, with the request that the sellers will add thereto the wagon and pillar numbers and return the delivery orders to our clients before 5 o'clock this afternoon."

These delivery orders were not returned to the defendant till the 31st, and then they were apparently in the same condition as before. They were enclosed in a letter from Mr. Leslie to Mr. Pugh, in which he says: "We are instructed to say that if your clients will call at Howrah at any time between 12 noon and 5 P.M. to-day with the delivery orders, which we return herewith, our client Babu Pursottom Lall, or his agent Dumun Lall, will point out the goods and give your clients delivery. We may mention that our client has made complete arrangements with Babu Hurdut Roy Chamaria, one of the leading produce dealers, for delivery of the goods sold to your clients, and your clients will be expected to pay for and take delivery thereof. Should your clients, however, fail to pay for and take delivery of the goods in terms of the contract, our client will hold them liable for the difference between the market rate and contract rate, and for any other loss and damage, costs, charges, and expenses he may suffer or sustain by reason of your clients' breach of contract."

This brings us to the 31st of May, the last day for giving delivery under these contracts, and the important question in this case is whether, as the plaintiff contends, Pursottom Lall made an offer of performance of each of the contracts on that day, which the defendant was bound to accept, or whether, as the defendant contends, no such offer of performance was made to him at all.

What took place at Howrah on the 31st is deposed to by all [150] the witnesses who were called. Mr. Leslie, his assistant *Debendra Nath Ghose*, the Small Cause Court pleader A. K. Mukerjee, with Hurnand Roy and Dumun Lall, were there, with Pursottom Lall, for the purpose of enabling the latter

to perform his part of the contract. Mr. Pugh, with a Small Cause Court pleader and his clients' *gomasta* Luchminarain, went there, to enable the defendant to perform his part of the contract. It is strange that such an array of legal talent should be required to give and take delivery of 50 tons of linseed and 100 tons of wheat, if either party were really desirous of carrying out the contract, and I have no doubt that both parties were playing a game. Pursottom Lall wanted to put himself in a position to claim the difference between the contract rates and the market rates on the 31st of May without being compelled to deliver the goods covered by the contracts, and the defendant, on the other hand, was prepared to insist upon the actual delivery of the goods because he believed that Pursottom Lall had no goods to deliver.

After the interview at Howrah Station between Dumun Lall and Luchminarain on the 29th, and Mr. Pugh's letter of the same day, it became clear to Pursottom Lall that he must endeavour to procure goods for the purpose of making a tender under his contracts, and in order to do this he came to an arrangement with Hurdut Roy Chamaria, the *bawan* to Messrs. E. D. Sassoon & Co. on the 30th of May.

Hurdut Roy says of this arrangement: "Before I went to Howrah on 31st May there had been an arrangement between me and Pursottom Lall. Babu Pursottom Lall is a friend of mine. He requested me to give him some help in giving delivery of certain goods from Howrah, and he also requested me to go to Howrah for this purpose. The goods were wheat and linseed. He said to me 'I have sold goods to certain parties. If my buyers ask me for delivery of the goods, will you deliver goods to them on my behalf?' I said 'all right.'" Then, afterwards, on the 31st, he made over railway receipts for linseed and wheat to Pursottom Lall. Probably some were made over on the 30th. The goods covered by these railway receipts were not his, but the goods of the consignees who handed him the receipts on the 30th or the 31st [151] of May. He knew nothing about these goods himself, and he could not swear that the goods covered by the railway receipts had arrived on the 31st of May, or when they arrived. The receipts were handed over to Mr. Leslie, and he says that at Howrah, Mr. Pugh came to him and said that he had come on behalf of Hurnand Roy Fulehand. He then tendered to Mr. Pugh seven separate railway receipts for 100 tons of wheat in all, and two railway receipts each for 25 tons of linseed. He says: "I believe I told Mr. Pugh the goods were ready for delivery. Mr. Pugh went with his client upstairs to the Goods Superintendent. I waited for some time, and as Mr. Pugh did not return, I went upstairs and found Mr. Pugh in consultation with the Goods Superintendent. I asked him if he had not made up his mind yet. He said he wanted the railway receipts which were endorsed by Hurdut Roy Chamaria, who, I believe, was the consignee named in the receipt. He wanted these receipts to be endorsed to Pursottom Lall, and then endorsed by Pursottom Lall to his client. I told Mr. Pugh it was wholly unnecessary as the goods were deliverable on the receipts in their present condition, they being endorsed by the consignee. Mr. Pugh tendered me a bundle of notes, which he said was the price of the goods; showed me a bundle of notes, which he said was the price of the goods, which he said he would not pay till he had the railway receipts indorsed by the buyers."

Mr. Leslie says the goods were in the Howrah Station at the time he tendered the receipts, and he again says: "It is perfectly true, as stated in my day book, that the goods were ready for delivery, and would be delivered on production of the railway receipts." But it is clear that Mr. Leslie is here expressing his belief, and is not speaking from actual knowledge. He was

under the impression that the goods were Pursottom Lall's, and that they were sold to him by Hurdut Roy Chamaria on credit. That we know is not the case. He says he was taken to the godown and was shown the bags for delivery, but he did not check the bags, and I think the result of his evidence is that he believed the goods had arrived from what he was told and from the entries in the railway receipts. From the entry in receipt No. 4 (Exhibit No. 1) it appears that the goods covered by [152] that receipt were not available for delivery until the 2nd of June 1897. Mr. Leslie does not seem to have observed whether the freight was paid for the goods covered by the receipts which he tendered to Mr. Pugh; we know now that it was not paid in respect of any of the goods covered by the receipts which he tendered to Mr. Pugh, and which were put in evidence at the trial. Mr. Leslie made this further statement which I think is important in this connection: "It was not suggested that the money should be paid before the receipts were given up: but I would have refused to give the receipts without the money. I said: 'Here are the receipts, give me the money, and I will give you the receipts.' I would not have parted with the receipts without getting the money. Hurdut Roy Chamaria had not yet been paid for the goods." He was recalled the next day and asked to explain that statement, and he says this: "I meant I would not have given up the receipts for the purpose of taking delivery of the goods mentioned in them without being paid for them, but my impression is that Mr. Pugh asked me to let him take them upstairs to the Goods Superintendent for the purpose of making enquiry about them, and that I did give them to him, not for the purpose of taking delivery of the goods on them."

It does not appear that Mr. Leslie knew at this time what the terms of the contracts were, and I take the result of his evidence to be this: that he was of opinion, and that he acted upon the opinion, that the tender of the receipts in their then form and under the circumstances then existing, was equivalent to a delivery of the goods contracted for, and was sufficient to entitle him to demand immediate payment of the price of the goods.

Mr. Pugh's evidence is to the same effect. He says: "When I got to Howrah I saw Mr. Leslie. I said I had come to get delivery of the goods and had the money. He said 'Here are the railway receipts for 341 bags of linseed' and asked me to state if I would take them."

"Q. 'Take what'?"

"A. 'Take delivery.'"

"I looked at the receipts, and said they were blank-endorsed by Hurdut Roy Chamaria. I then asked Mr. Leslie if he would let [153] me have the receipts. He said: 'Yes, if you will pay for them.' I then asked him if he would wait a few minutes while I went and saw the Superintendent. He said 'All right.' Then Mr. Pugh went upstairs and saw the Superintendent, and while in conversation Mr. Leslie followed them. He then goes on to say: "Then Mr. Leslie came upstairs and asked me if I was prepared to take the receipts. Then we went downstairs, and I said 'you must have the receipts endorsed by Hurdut Roy Chamaria to Pursottom Lall, and by Pursottom Lall to my clients.' I told him that in consequence of the conversation I had with Mr. Burbridge. Mr. Leslie said, 'there is no use in doing that, you must take them as they are.' Mr. Leslie then tendered me the receipts for the wheat: seven receipts. They were in the same condition when I saw them as the linseed ones. I said 'you must have them endorsed in the same way.' He said he would not do that. On that I said, 'all right. I have got the money for all the goods here, and I will tender it to you. Do you want to take the numbers of the notes?' He said, 'no.' He then asked

me if I would take the railway receipts as they then stood. I asked him if he would wait till I had seen Mr. Burbridge again. He said, 'No.' 'You must pay for them and take them now as they are. I can't, wait any longer.' On that I said I would not take them and went away."

It appears that Mr. Pugh did not make any enquiries as to whether the goods were in the Howrah Station, and he took no objection on that ground, neither did he take any objection on the ground that the freight on the goods covered by the receipts had not been paid, though he knew that the freight had not been paid for the linseed. He insisted upon the special endorsement in consequence of the Goods Superintendent telling him that such an endorsement was necessary, as otherwise the delivery of the goods might be stopped by notice from Hurdut Roy Chamaria or the consignees. And with reference to the non-payment of freight, he says in his cross-examination: "If freight had not been paid on the goods, there would, I suppose, have been no difficulty in deducting the freight from the money, or deducting the demurrage from the money. As far as I know it has never been done."

[154] Now that being what occurred at Howrah, the question arises whether the plaintiff is right in his contention, that what Mr. Leslie did on the 31st of May was a sufficient offer of performance which the defendant ought to have accepted. This brings me to the terms of the contracts and of the railway receipts which were tendered by Mr. Leslie.

Under the first clause of the contracts the goods are to be delivered in dry, sound, and merchantable condition. Clauses 10, 11 and 12 are as follows:—

"10. The goods to be tendered fully 48 hours before the expiration of the present term of 72 hours granted by the railway company in order to enable buyers to weigh, sample, and inspect the same, and the delivery not to be considered complete until the samples have been refracted and examined, and any dispute about quality, &c., settled.

"11. If railway receipt be tendered, such to be handed to buyers 48 hours before the goods are liable to demurrage under the present terms of 72 hours granted by the railway company.

"12. Sellers must be present at the time of delivery to inspect the weighing and sampling; should they fail to do so after notice to sellers or to selling brokers, buyers will weigh and sample within usual railway working hours, and sellers must abide by the result."

It is contended by the defendant that under these clauses he was entitled to have the goods themselves delivered to him, and a sufficient opportunity given to him to examine the goods for the purpose of seeing whether what was tendered to him was of the description, quality and quantity contracted for, and that he was not bound to pay for the goods until he should have had this opportunity, and the delivery should have become complete. He says it is clear that no such opportunity was allowed him, that Mr. Leslie's procedure was intended to force him to pay the price of the goods unconditionally upon tender of the railway receipts, and that, therefore, such a tender was not an offer of performance, such as he was bound to accept.

I think the defendant's contention is sound. I gather from [155] the evidence that Mr. Leslie would not have given up the receipts in order to enable the defendant to obtain delivery of the goods without first paying the price of the goods, and I do not think he was justified in taking up that position under the terms of the contracts. Besides, even if he were justified in taking up that position on the 31st of May 1897, the plaintiff must, in order to succeed, show that the goods covered by the railway receipts tendered to

Mr. Pugh on behalf of the defendant, were goods of the description contracted for, and there is no evidence before me, upon which I can rely, to show that that was the case. •

Again, the defendant contends that he was not bound to accept a tender of railway receipts for goods subject to demurrage, nor for goods not available for delivery on the 31st of May, nor for goods in respect to which the freight had not been paid at the time the receipts were tendered to him, and I am of opinion these contentions are also sound. Now when we turn to the receipts which have been put in evidence, that is to say four of those tendered to Mr. Pugh by Mr. Leslie, we find this :

From Exhibit No. 1 which is a railway receipt for 136 bags of wheat, it appears that the goods were not available for delivery until the 2nd of June, and there was a sum of Rs. 214-4-0 chargeable for freight. "

From Exhibit No. 2, which is a railway receipt for 135 bags of wheat, it appears that there was a sum of Rs. 189-14-0 to pay for freight, and the goods were under demurrage on and before the 31st of May. These are two out of the seven receipts tendered by Mr. Leslie under the contract for 100 tons of wheat.

The other receipts have not been put in evidence and there is no evidence of their contents before me. I think the tender made under the wheat contract was wholly insufficient, even assuming that a tender would be good if made of clear receipts for available goods not subject to demurrage.

I am of the same opinion with reference to the receipts tendered in respect of the linseed contract. These show that the linseed covered by them was available on the 31st, and was not subject to demurrage, but upon one receipt there was a sum of [156] Rs. 280-10-0 payable for freight, and upon the other a sum of Rs. 316-3-0. I do not think a tender of these receipts was a sufficient tender.

The defendant objects to the tender of the railway receipts generally upon the ground that there had been no attornment to him by the railway company. He contends that, at the very least, it lay upon the plaintiff to show that had the defendant taken the receipt tendered to him, the railway company would have been bound to have delivered the goods to him on production of the receipt. I think that is a sound contention. We know that the company would not have delivered the goods without prepayment of the freight, and it appears from Mr. Pugh's evidence that the Goods Superintendent told him that, if the railway receipts were only blank endorsed, he would not deliver the goods to the defendant in case a notice to detain the goods was given him by the consignee.

It is contended by the plaintiff that the evidence of Dumun Lall shows that they were prepared to deliver on the 31st of May the goods contracted for; but I do not so read his evidence. No doubt he said the goods covered by the railway receipts were at Howrah on the 31st of May, but in his cross-examination when Exhibit No. 1 was shown to him he admitted that he could not say whether on the 31st of May there were goods ready for delivery against any of the railway receipts. He never inquired whether the freight had been paid. He states expressly that his master Pursottom Lall had nothing to do with the goods covered by the railway receipts, and his investigation of the goods, even according to his own statement, amounted to this, that, with respect to the goods mentioned in one or two of them, he compared the marks on the goods and the receipts for the goods.

The truth seems to be that neither Pursottom Lall, nor those assisting him on the 31st of May, had their attention directed to the goods themselves to

any extent. They were dealing with the railway receipts, and it is clear that it was upon the railway receipts they depended for putting the defendant in the wrong and making him liable for the differences under the contracts.

Then it was also pointed out, on behalf of the plaintiffs, that [157] on the 31st of May no objection was taken on behalf of the defendant, on the ground that the tender was not in accordance with the contract, or that the freight was not paid, or that the goods covered by some of the railway receipts were not then available for delivery, and that, if these objections had been then taken, they would have been dealt with, and the goods would have been delivered in strict accordance with the terms of the contract. Assuming those things would have been done, though the evidence does not seem to me to lend much support to those assertions, I do not think the defendant was under any duty whatever to point out to Pursottom Lall that his tender was defective, or to give him an opportunity to supplement it. His duty arose under the contracts, when a sufficient offer of performance was made to him, and not till then.

It was contended further that as the defendant, when the railway receipts were tendered to him, only required that they should be endorsed in the special manner, he was not entitled now to rely on anything but the refusal of Pursottom Lall to so endorse them, and that the plaintiff was entitled to recover if he could show that the railway company would deliver the goods without this special endorsement. I do not think he has shown that; but apart from that, I do not think the contention is a sound one. If by virtue of the contracts the defendant was entitled to have certain things done in order that the offer of performance made to him should be binding on him, then I think he is now entitled to rely upon the position which his rights under the contract empowered him to take up on the 31st of May, no matter whether he took up that position then or not. It can only be on some ground of estoppel that he is disentitled to do so, and no estoppel could arise under the circumstances of this case. That a person who justifies an alleged breach of contract upon one ground only, which is found insufficient, is not for that reason disentitled to rely upon other grounds, which his rights under the contract entitle him to rely upon, has been recognised in many cases. See *Cowan v. Milburn*, (1867) L.R., 2 Exch., 230; *Mothoormohun Roy v. Bank of Bengal*, (1878) I.L.R., 3 Cal., 392.

[158] The plaintiff also sued to recover a sum of Rs. 85-5 as assignee of Pursottom Lall under the following circumstances:—

On the 23rd of October 1896 the defendant contracted to purchase 50 tons of wheat from Pursottom Lall at Rs. 4-4-10 per bazaar maund, delivery April and May 1897; and on the 23rd of November 1896, the defendants contracted to sell 50 tons of the same quality of wheat, delivery April and May 1897, at Rs. 4-3 per bazaar maund. This portion of the claim was disputed in the defendant's written statement, but was admitted at the hearing. There will, therefore, be a decree for the plaintiff for the sum of Rs. 85-5.

I think the defendant is entitled to the general costs of the suit, but the costs incurred by the plaintiff in consequence of the defendant's not admitting the claim for Rs. 85-5 should be deducted from the general costs.*

Attorneys for the Plaintiffs: Messrs. *Leslie & Sons*.

Attorneys for the Defendants: Messrs. *Farr and Pugh*.

H. W.

* An appeal was brought in this case but was struck off for default in appearance.—*Ed.*

NOTES.

[See also (1899) 26 Cal., 585 ; (1901) 3 Bom. L.R., 260 as regards the right to rely on a ground other than that first alleged.]

[26 Cal. 158]

CRIMINAL REVISION.

The 2nd November, 1898.

PRESENT :

MR. JUSTICE STEVENS AND MR. JUSTICE PRATT.

Bajoo Singh.....Petitioner

versus

Queen-Empress.....Opposite Party.*

Public Servant—Penal Code (Act XLV of 1860), section 21 and section 186— Surveyor employed by the Collector.

The Collector acting in the management of a *khas mehal*, the property of the Government, is as much the Government within the meaning of section 17 of the Penal Code, as when he is exercising any other of the duties of his official position. A surveyor employed by the Collector in the *khas mehal* department to make a survey of a certain portion of a water course is a "public servant" within the meaning of section 21 of the Penal Code.

[159] *Reg. v. Ramajirav*, (1875) 12 Bom., H. C., 1 ; and *Chatter Lal v. Thacoor Pershad*, (1891) I.L.R., 18 Cal., 518, referred to.

ON the application of certain *ranyats* of Kamalkhap, which is a *khas mehal* estate of the Government the Deputy Collector of Gya ordered the Office Surveyor to prepare a map of a water-course within the *mehal*, which order was confirmed by the Collector. The accused came to the spot with four or five other persons and obstructed the surveyor in his work, and the latter was compelled to retire without making any survey of the water-course. He submitted his report complaining against the accused, who was convicted by the Deputy Magistrate of Gya and sentenced to pay a fine of Rs. 20, or in default to undergo rigorous imprisonment for three weeks. The accused moved the High Court and obtained a rule.

Babu *Dasrathi Sanyal* appeared on behalf of the Accused.

No one appeared on behalf of the Crown.

The judgment of the High Court (Stevens and Pratt, JJ.) was as follows :—

The petitioner in this case was convicted under section 186 of the Indian Penal Code of voluntarily obstructing a public servant in the discharge of his public functions. The officer obstructed in the present case was a surveyor employed by the Collector in the *khas mehal* department, and the functions in which he was obstructed were making a survey of a certain portion of a water-course which was in dispute. It has been contended before us that a

* Criminal Revision No. 730 of 1898, made against the order passed by Babu Trailakya Nath Bhuttacharjee, Deputy Magistrate of Gya, dated the 3rd of August 1898.

distinction must be drawn between the Government in the exercise of its functions as a proprietor of an estate and in that of its duties of general administration, and that looking to the definition of the word "Government" in section 17 of the Indian Penal Code, the surveyor obstructed in the present case was not a servant of the Government. In support of this contention, two cases have been cited to us, *Reg. v. Ramajirav*, (1875) 12 Bom. H. C., 1; *Chatter Lal v. Thacoor Pershad*, (1891) I. L. R., 18 Cal., 518. Neither of these cases is in point. Neither of them deals with the question before us. In each case it was decided that the particular person in question in that case was not a public servant within the definition in section [160] 21 of the Indian Penal Code. We think that the contention is unfounded. We think that the Collector, acting in the management of a *khas mehal*, the property of the Government, is as much the Government within the meaning of section 17 of the Indian Penal Code as when he is exercising any other of the duties of his official position. It seems to us that the 9th clause of section 21, which contains the 'definition of the term 'public servant,' is intended to include officers whose business it is to care for the pecuniary interest of the Government. We think that the Surveyor in the present case was a public servant, and that the duty upon which he was engaged, when he was obstructed, was a public duty. We therefore discharge the rule.

S. C. B.

Rule discharged.

[26 Cal. 160]

APPELLATE CIVIL.

The 15th July, 1898.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Shyama Charan Mandal.....Plaintiff

versus

Heras Mollah and others.....Defendants.*

Interest—Interest on arrears of rent—Waiver—Omission to claim rent for some years at the stipulated rate, whether amounts to a waiver—

Evidence Act (I of 1872), section 92—Evidence of Conduct, whether admissible in evidence.

The mere omission to claim interest for some years from a tenant at the rate stipulated in the lease does not amount to a waiver of the landlord's right to claim interest at such rate
Johoory Lall v. Bullab Lall, (1879) I. L. R., 5 Cal., 102, followed.

* Appeal from Appellate Decree No. 828 of 1897, against the decree of Babu Rajendra Kumar Bose, Subordinate Judge of 24 Pergunnahs, dated the 30th January 1897, modifying the decree of Babu Hari Nath Roy, Munsif of Baruipore, dated the 31st of July 1896.

Evidence of conduct, as for instance return of the lease, is admissible in evidence under section 92 of the Evidence Act to prove that such return was due to an intention to make the lease inoperative.

Premath Shaha v. Madhu Sudan Bhuiya, (1898) I. L. R., 25 Cal., 603, followed.

[161] THIS appeal arose out of an action brought by the plaintiff to recover arrears of rent with interest and cesses. The claim for interest was in accordance with a *kabuliat* executed by the defendants. The defence was that, although the *kabuliat* was executed by the defendants, they were not liable to pay interest at more than 12 per cent. per annum, inasmuch as the *kabuliat* was not made over to them, and therefore it was not intended to be operative.

The Munsif decreed the plaintiff's suit in full and allowed interest at the rate stipulated in the *kabuliat*. On appeal, the Subordinate Judge varied the decision of the Munsif, holding that the plaintiff was not entitled to the interest at the rate stipulated in the *kabuliat*, inasmuch as it became inoperative on its having been returned to the executant immediately after registration, and that the stipulation for interest was rather hard and was never enforced. From this decision the plaintiff appealed to the High Court.

Dr. Ashutosh Mookerjee, for the Appellant.

Babu Saroda Churn Mitter, for the Respondents.

The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows :—

Banerjee, J.—In this appeal, which arises out of a suit for arrears of rent, the question for consideration is, whether the court of appeal below is right in disallowing the claim for interest at the rate mentioned in the *kabuliat*, dated the 21st Bysack 1280. The learned Vakil for the plaintiff-appellant contends that the Lower Appellate Court is wrong in not allowing interest at the rate mentioned in the *kabuliat*, as the grounds upon which it has based its decision are wrong in law.

Now the grounds upon which the Lower Appellate Court has held that the plaintiff is not entitled to interest at the rate mentioned in the *kabuliat* are given in the following passage of the judgment : "The contention on the part of defendant-appellant is that this *kabuliat* became inoperative on its having been returned to the executant immediately after registration at his request by the zemindar's *naib* on the complaint of the [162] executant; that the stipulation of interest was rather hard; that this stipulation as to interest was never enforced; and that therefore the defendant is not bound to pay interest at the rate demanded. It appears to me that there is much force in this contention, regard being had to the fact that the original *kabuliat* has been produced in the case by the defendant, and to the absence of evidence on the side of the plaintiff as to interest having ever been realised at the rate specified in the *kabuliat*. There is no foundation for plaintiff's allegation that this *kabuliat* was conclusively made over by the defaulting *putindar*, Mohendra, to the present defendant, with a view of thwarting plaintiff's claim. Taking all things into consideration, I am of opinion I would not be justified in allowing the exorbitant rate of interest provided in the *kabuliat*, which is now sought to be enforced against the defendant."

It is argued that the two grounds upon which interest at the stipulated rate has been disallowed are, *first*, that there has been a waiver of the right created by the *kabuliat* by reason of the non-realization of the interest at the stipulated rate; and, *second*, that the *kabuliat* has become inoperative by reason of the return of the document to the defendants; and it is urged that both these reasons are bad in law, the first, bad in law, because mere omission

to claim interest at the stipulated rate cannot amount to waiver, as has been held in the case of *Johoori Lall v. Bullab Lall*, (1879) I. L. R., 5 Cal., 102, and the second, bad in law, because it is contrary to the provisions of section 92 of the Evidence Act, as has been held in the case of *Umedmal Motiram v. Davu bin Dhondiba*, (1878) I. L. R., 2 Bom., 547.

No doubt, the case of *Johoori Lall v. Bullab Lall*, (1879) I. L. R., 5 Cal., 102, is authority for the contention that the mere omission to claim interest for past years from a tenant cannot amount to a waiver of the landlord's right to claim interest at the stipulated rate. The decision of the Lower Appellate Court is, however, based, not merely upon the omission of the plaintiff to claim interest at the stipulated rate, but is based upon another ground besides, *viz.*, the [163] return of the *kabuliat* to the tenant-defendant, the validity of which will be considered presently.

It was further argued that, in the absence of anything to show that any occasion arose for claiming interest at the stipulated rate, the Court of Appeal below was wrong in attaching any weight to the mere absence of evidence on the side of the plaintiff as to interest having ever been realised at the rate specified in the *kabuliat*. But this objection is met by the finding of the first Court on point No. 1—a finding which has not been displaced by the Appellate Court, from which it would appear that occasions did arise for claiming interest.

This brings us to the consideration of the second branch of the appellant's contention. No doubt section 92 of the Evidence Act would exclude the evidence of any oral agreement or statement to rescind or to contradict the document in this case, having regard to the provisions of proviso 4 of that section. But as we understand the contention of the defendant and the judgment of the Lower Appellate Court, what has been given effect to as making inoperative the *kabuliat* relied upon by the plaintiff in this case is not any oral agreement or statement rescinding the *kabuliat*, but the evidence of conduct amounting to waiver of the right created in favour of the plaintiff by the *kabuliat*; and such evidence is not, in our opinion, excluded by the provisions of section 92 of the Evidence Act. The view we take is in accordance with the decision of the Full Bench in the case of *Preonath Shaha v. Madhu Sudan Phuiya*, (1898) I. L. R., 25 Cal., 603, where it was held that oral evidence of the acts and conduct of parties, such as oral evidence that possession remained with the vendor, notwithstanding the execution of a deed of out and out sale, is admissible to prove that the deed was intended to operate only as a mortgage.

Last of all it is contended that the Lower Appellate Court has not distinctly found any waiver of the right created by the *kabuliat*, and that in fact it does not find that the stipulation relating to interest contained in the *kabuliat* has become inoperative, all that it says being that it would not be justified in allowing the exorbitant rate of interest provided for in the *kabuliat*.

[164] The language of the Subordinate Judge may not be very happy, but his meaning, taking his judgment as a whole, is, in our opinion, very clear. For he sets out the contention of the defendant that by reason of the return of the *kabuliat* the stipulation about interest became inoperative; he observes that the contention has much force; and he comes to the conclusion that the rate of interest provided for in the *kabuliat* was not one that the plaintiff was entitled to enforce. He also finds that the case set up by the plaintiff that the return of the *kabuliat* was a fraudulent act on the part of the defaulting *putnidar* was unfounded.

Taking all this into consideration, we think that the Lower Appellate Court has, in effect, come to the conclusion that the stipulation in the *kabuliat* regarding interest has become inoperative.

The result is that the contentions urged before us fail, and the appeal must be dismissed with costs.

S.C.G.

Appeal dismissed.

[26 Cal. 164]

The 13th December, 1898.

PRESENT :

MR. JUSTICE O'KINEALY AND MR. JUSTICE HILL.

Sheodeni Tewari and others.....Plaintiffs

versus

Ram Saran Singh and others.....Defendants.*

Transfer of Property Act (IV of 1882), section 99—Sale of mortgaged property--Zuripeshgi mortgage—Purchase by the mortgagee.

Section 99 of the Transfer of Property Act (IV of 1882) applies to *zuripeshgi* mortgages, and a purchase of the mortgaged property by the mortgagee in execution of a decree for rent due by the mortgagor under a *katkina* lease of the property, was held to be not merely irregular, but absolutely void.

THE facts material to this report and the arguments on both sides appear from the judgment of the High Court.

The plaintiffs appealed to the High Court.

Dr. *Rash Behari Ghose* and Babu *Jogendra Chandra Ghose* for the Appellant.

[165] Babu *Saligram Singh* and Babu *Raghunandan Prasad* for the Respondents.

The judgment of the High Court (O'Kinealy and Hill, JJ.) was as follows:—

In this case one Kunj Behari Singh executed a mortgage in favour of the predecessor of the plaintiffs. He nevertheless held under a *katkina* lease, which was granted on the same day, and which covered the mortgaged property. The plaintiffs brought a suit for arrears of rent on the *katkina* lease, sold a 2 annas share of the mortgaged property, and purchased it themselves. They now sue for possession of the property as auction-purchasers.

Among other defences that have been raised in the suit is one that under section 99 of the Transfer of Property Act the plaintiffs are prohibited from buying the equity of redemption in respect of the property over which they hold

* Appeal from Appellate Decree No. 605 of 1897, against the decree of F. H. Harding, Esq., District Judge of Shahabad, dated the 8th of February 1897, affirming the decree of Babu Madhub Chundab Chakravarti, Subordinate Judge of that District, dated the 20th of December 1895.

a mortgage, and that the remedy, if any, must be the remedy given by that section. This contention has received the approbation of both the lower Courts, where the suit has been dismissed.

In second appeal it has been argued that section 99 of the Transfer of Property Act is a section of procedure, and the property in this case having been sold by a Court of competent jurisdiction 'at the instance of the plaintiffs and bought by them, the sale is not void or voidable; and, secondly, it has been contended that as the mortgage in question is a purely usufructuary mortgage the mortgagees have no right to sell under section 67 of the Transfer of Property Act, and consequently it is unreasonable to suppose that the provisions of section 99 of the Act apply to such a mortgage.

Section 99 of the Transfer of Property Act runs as follows :—"Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43."

[166] This section is to be found in Chapter IV of the Act, which, as may be seen from section 58, applies to all mortgages, a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, and an English mortgage. There are no words in the section limiting the word "mortgagee" to a mortgagee holding under a particular form of mortgage; and the ordinary meaning of the language of section 99 would be that it prohibits the sale of the property mortgaged in all cases save in a suit brought under section 67. Nor does there appear to us to be anything in the argument that section 99 does not apply if a suit to sell does not lie under section 67. The words of the section are general and uncontrolled. To accept the contention would be that we should be compelled to read into the section the words "that if under the terms of the mortgage no suit can be brought under section 67, the mortgagee can sell the equity of redemption." There are no such words in the section, and if we were to add them, instead of interpreting the law, we should be legislating. Nor do we think that the section contemplates merely a matter of procedure, and that a sale wrongly made would be merely irregular. The tenor of the decisions of the different High Courts is that the sale is void, and we are of the same opinion.

The appeal is dismissed with costs.

S. C. C

Appeal dismissed.

NOTES.

[A sale in contravention of the provisions of sec. 99, Transfer of Property Act, 1882, has been held to be not void but voidable :—(1907) 35 Cal., 61 F.B. : 11 C.W.N., 1011 : 6 C.L.J., 320; (1907) 30 Mad., 313; (1905) 27 All., 517; (1904) 32 Cal., 296; (1905) 8 O.C., 327. In (1905) 33 Cal., 113; (1905) 33 Cal., 283; (1903) 33 Cal., 463, such a sale, as in this case, had been held to be void.

As regards the applicability to usufructuary mortgages, see also (1905) 33 Cal., 113; (1910) 32 All., 377.]

[26 Cal. 166]

The 23rd August, 1898.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE RAMPINI.

Lal Behary Singh and another.....Judgment-debtors
versus
 Habibur Rahman and others.....Decree-holders*.

Decree—Form of Decree Mortgage Decree—Transfer of Property Act (IV of 1882), decree regarded as mortgage-decree under—Sale of mortgaged property in execution of decree.

In a suit for recovery of mortgage money by sale, brought after the Transfer of Property Act (IV of 1882) had come into force, the decree of the Court was: "that a decree be passed in favor of the plaintiffs in respect [167] of Rs. 5,387-10-13, together with costs and interest at the rate of 6 per cent. per annum up to the date of realization, and that the mortgaged properties be made liable (*pae band kea jae*) for realization of the decretal money."

Held, that the decree was to be regarded as a mortgage-decree governed by the Transfer of Property Act, though not made in the form prescribed by that Act; and it followed that it was not open to the decree-holder to proceed against properties other than the mortgaged properties before exhausting the latter, and without obtaining an order under section 90 of the said Act.

Jogemaya Dassi v. Thackomoni Dassi, (1896) I. L. R., 24 Cal., 473; and *Fazil Howladar v. Krishna Bandhoo Roy*, (1897) I. L. R., 25 Cal., 580, referred to. *Chundra Nath Dey v. Burroda Shoodury Ghose*, (1896) I. L. R., 22 Cal., 813, distinguished.

THE facts material to this report and the arguments on both sides appear sufficiently from the judgments of the High Court. The judgment-debtors appeared to the High Court.

Babu Karuna Sindhu Mukerjee for the Appellants.

Moulvie Syed Shamsul Huda for the Respondents.

The judgments of the High Court (GHOSE and RAMPINI, JJ.) were as follows:—

Ghose, J.—The question raised in this appeal is what may be the true effect of a decree passed between the parties on the 21th June 1896. The suit, in which this decree was passed, was a suit for a certain amount of money, as rent based upon a mortgage bond. In execution of the decree, the decree-holder asked that certain properties, other than those mentioned in the mortgage should be sold in satisfaction of his claim. The judgment-debtors opposed the application upon the ground that, as this was a mortgage-decree, it was not open to the decree-holder to sell these properties without exhausting the mortgaged properties.

The Court below has acceded to the prayer of the decree-holder, and the judgment-debtor has preferred this appeal impugning the correctness of that order.

It has been argued before us by the learned Vakil for the decree-holder that the decree should be construed to be a simple [168] money-decree, a lien being declared on the properties mortgaged. The contention on the other side is that it should be regarded as a mortgage-decree under the Transfer of Property Act though not in the form prescribed by that Act.

* Appeal from Original Order No. 127 of 1898, against the order of Babu Hemango Chunder Bose, Subordinate Judge of Patna, dated the 13th of April 1898.

The suit was instituted upon the mortgage after the Transfer of Property Act came into force; and there can be no doubt that so far as the mortgagee, the plaintiff in the suit, was concerned, he asked for the reliefs indicated in that Act, one of the reliefs being "that the mortgaged properties be sold for satisfaction of his claim, if the mortgagor fails to pay up within the time which the Court may allow." But the Subordinate Judge, who made the decree, did not apparently follow the clear directions in the Act; and he worded the decree as follows: "It is ordered and decreed that a decree be passed in favour of the plaintiff in respect of the sum of Rs. 5,387-10-13, together with costs and interest at the rate of six per cent. per annum up to the date of realization, and that the mortgaged properties be made liable (*pae bund kea jae*) for realization of the decretal money." It is to be regretted that the Subordinate Judge should, in spite of the clear directions in the Transfer of Property Act, not have taken care to draw up a decree as the law directs. But, however that may be, the question that we have to consider in this appeal is whether the decree, as made, can be regarded as a mortgage-decree governed by the Transfer of Property Act, or whether it is a simple money-decree, with a lien only being declared upon the mortgaged properties.

In the case of *Jogenaya Dassi v. Thackomoni Dassi*, (1896) I. L. R., 24 Cal., 473, which was decided by a Bench of three Judges of this Court, a question similar to that which arises in this appeal was discussed; and the learned Chief Justice in delivering judgment, referring to the terms of the decree which then came before the Court for consideration, expressed himself as follows: "In my opinion this was a mortgage-decree, though not in the form prescribed by the Transfer of Property Act, which came into force on the 1st July 1882, but in the form in which, as I understand, such decrees had been for many years, and were drawn up in the Mofussil Courts. [169] The decree provides for the payment of the mortgage debt, for the realization of the mortgaged property and payment thereof of the mortgage debt. The claim in this suit, it may be observed, asks that the claim, i.e., the money claim, should be realized out of the mortgaged property, and failing that, from any other property of the defendant. I think the decree of 1882 was a mortgage-decree, i.e., a decree made in a suit to enforce the mortgage in which the mortgagee asked, not merely for a personal judgment against his debtor, but for the realization of the mortgaged property to satisfy his claim." The terms of the decree which the learned Judges in that case were called upon to consider were as follows: "It is ordered that the suit be decreed, and that the defendant do pay to the plaintiff the amount claimed with interest thereon at the rate of 1 per cent. per month during the pendency of the suit and costs of this case; the whole to bear interest at the rate of $\frac{1}{2}$ per cent. per month from this date to the date of realization, to be realized from the property mortgaged and other properties of the defendant." Mr. Justice MACPHERSON, who concurred with the Chief Justice in the view that he adopted, said as follows: "But it seems to me that the decree of 1882 is in substance a decree for the sale of the mortgaged properties. It sets out those properties, and directs that the sum decreed should be realized from them, which can only mean by the sale of them, and that was the relief asked for in the suit. Assuming that sections 88 and 89 of the Transfer of Property Act, which came into force while the suit was pending, applied to the suit, the decree was not, it is true, made in conformity with them, as, instead of making a decree *nisi* followed by a decree absolute, the Court at once made a decree absolute. But the decree has never been questioned, and is now a final decree as between the parties. The case of *Chundra Nath Dey v. Burroda Shoondury Ghose*, (1895)

I. L. R., 22 Cal., 813," (to which I shall have to refer presently), "is distinguishable, as the Court there in effect held that there was no decree for sale," and so on. In a subsequent case before the learned Chief Justice and Mr. Justice BANERJEE, *Fazil Howladar v. Krishna Bandhoo Roy*, (1897) I. L. R., 25 Cal., 580, the learned Judges [170] had also to consider the effect of a decree in somewhat similar terms; and they agreed with the decision come to in the case of *Jogemaya Dassi v. Thackomoni Dassi*, and held that the decree was a mortgage-decree. The terms of the decree ran as follows: "It is ordered that the suit be decreed *ex parte*, and the sum of Rs. 323 claimed (in the suit), and the costs of this suit Rs. 34-8, with interest at six per cent. per annum from this day till the date of realization, plaintiff do get from the hypothecated property. If insufficient, defendant to remain personally liable." And it was held, as I have already said, that this ought to be regarded as a mortgage-decree in terms of the Transfer of Property Act.

In the case of *Chundra Nath Dey v. Burroda Shoondury Ghose*, (1895) I. L. R., 22 Cal., 813, referred to in the judgment of MACPHERSON, J., in *Jogemaya Dassi v. Thackomoni Dassi*, (1896) I. L. R., 24 Cal., 473, and upon which reliance has been placed by the learned Vakil for the decree-holder, the terms of the decree which had to be considered by the Court were: "The suit is decreed *ex parte*. The plaintiff to obtain the amount of his claim and costs of the suit with interest at six per cent. per annum until the date of realization, and the mortgaged property to remain liable for the satisfaction of the debt, etc." And it was held that this was not a mortgage-decree, and that it was not, therefore, governed by the Transfer of Property Act.

It seems to me upon a consideration of the different rulings that the question for consideration in a case like this is, whether there is an order in the decree for sale of the mortgaged properties, or the decree simply declares a lien upon those properties. As already stated, the mortgagee in the present case unquestionably asked for a decree in terms of the Transfer of Property Act and for the sale of the properties mortgaged. The Court, however, did not make a decree in exact terms of that Act. But there can be no doubt that what the Court really meant to do, and did, was to make a decree ordering that the properties mortgaged be sold for the realization of the amount decreed to the mortgagee. The terms of the decree are more similar to those in the cases of [171] *Jogemaya Dassi v. Thackomoni Dassi* and *Fazil Howladar v. Krishna Bandhoo Roy*, to which I have already referred, than the terms which had to be considered in the case of *Chundra Nath Dey v. Burroda Shoondury Ghose*.

In this view of the matter, the decree in question should, in my opinion, be regarded as a mortgage-decree governed by the Transfer of Property Act, though not made in the form prescribed by that Act. It follows from this that it is not open to the decree-holder to ask in the first instance for the sale of properties other than the properties mortgaged before exhausting the mortgaged properties, and without obtaining an order such as is prescribed by section 90 of the Transfer of Property Act.

The result is that this appeal must be allowed, the decree-holder being at liberty to proceed against the mortgaged properties in the first instance, and then to take such steps as he may be advised, to sell the other properties of the judgment-debtor.

Rampini, J.—I cannot think that the decree in this case can properly be said to be a decree under the provisions of the Transfer of Property Act. The decree is to the effect that, "the mortgaged property shall be made liable (*paie bandh*) for the realization of the decretal amount." The vernacular expression

pac bandh means "tied by the leg" or "fettered"—that is "*incumbered*." It does not seem to me to imply *sale*. No doubt the decree directs that the mortgaged property shall be "*made*" liable. But this is certainly not a clear direction that the property is to be sold. The mortgagee undoubtedly in para 3 of his plaint asked for a decree under the provisions of the Transfer of Property Act, but the Court, whether intentionally or through inadvertence, does not appear to me to have given him such a decree as he sought for. I am supported in this view by the case of *Chundra Nath Deij v. Burroda Shoondury Ghose*, (1895) I. L. R., 22 Cal., 813. The decree in that case was to the effect that the property was "to remain liable for the satisfaction of the debt." On the other hand the cases of *Jogemaya Dassi v. Thackomoni Dassi*, and *Fazil Howladar v. Krishna Bandhoo Roy*, have been referred to on behalf of the appellant. These are no doubt authorities for holding that a [172] decree, such as the present one, though not in form a decree under the provisions of the Transfer of Property Act, may yet be regarded and given effect to as such.

Personally, I am most reluctant to put any obstacle in the way of decree-holders who seek to recover monies, which Courts after full enquiry have held them to be entitled to. But in the face of the two last mentioned rulings, I do not think I would be justified in dissenting from the conclusion at which my learned brother has arrived in this case. I, therefore, concur in decreeing this appeal.

S. C. C.

Appeal allowed.

NOTES.

[See the notes to 26 Cal., 164 as regards the scope of sec. 99, T.P.A., 1882. As regards similar construction of inartistically drawn mortgage-decrees, see also (1900) 22 All., 401; (1906) 4 C.L.J., 533; (1898) 22 Mad., 372.]

[26 Cal. 172]

The 7th September, 1898.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE RAMPINI.

Rajbuns Sahai.....Defendant No. 2

versus

Kameshar Prosad (Plaintiff) and anotherDefendants.*

Public Demands Recovery Act (Bengal Act VII of 1880), section 8, clause (b) and section 12—Suit to set aside certificate and sale—Limitation.

A certificate was issued under the Public Demands Recovery Act (Bengal Act VII of 1880) and notice under section 10 of the Act was served on the 12th December 1895. The debtor objected under section 12 on the ground that no arrears were due, but the objection was overruled on his failure to produce evidence, on the 7th August 1895, and the sale took place on the 10th August 1895. In a suit brought on the 8th August 1896 to set aside the certificate and the sale,

* Appeal from Appellate Order No. 343 of 1897, against the order of H. Holmwood, Esq., District Judge of Gya, dated the 24th of August 1897, reversing the order of Moulvie Abdul Barri, Munsif of Gya, dated the 27th of February 1897.

Held, that the terms of section 8, clause (b), providing the limitation of one year from the date of service of notice are peremptory, and in no way controlled by the provisions of section 12, and the suit in respect of the certificate was, therefore, barred by limitation.

Held, also, that if the certificate cannot be cancelled, the sale held in execution of it also cannot be cancelled.

THE respondent Kameshar Prosad brought this action against the Secretary of State for India in Council and one Rajbuns Sahai, the appellant, to set aside a certificate under the Public Demands Recovery Act (Bengal Act VII of 1880), and the [173] sale in execution of the certificate, at which Rajbuns purchased the property sold. The facts material to this report appear from the judgment of the High Court. The question argued was whether the suit was barred by limitation.

The defendant Rajbuns Sahai appealed to the High Court.

Babu *Durga Das Dutt* for the Appellant.—The plaintiff's case was based on the objection that no arrears were due; but the District Judge overruled the plea of limitation on the ground of informalities in the certificate—a ground not taken by the plaintiff in the plaint and not relevant to the decision of the plea of limitation. The certificate, however, substantially complied with the requirements of law. The suit is barred whether it is governed by section 8, clause (b) of Act VII of 1880 or by section 15 of Act I of 1895.

Moulvie *Mohomed Yusuf* (Babu *Unakali Mukerjee* with him), on behalf of the respondent Kameshar Prosad, contended that the suit was not barred. Section 8, clause (b) should be read with section 12 of Act VII of 1880. The question of liability was not decided either in February or in August 1895, as required by section 12, and the provision of limitation in section 8, one year from service of notice, does not apply to the present case. The suit having been instituted within one year from the date of sale is within time. The case of *Bajinath Sahai v. Ramgut Singh*, (1896) I.L.R., 23 Cal., 775: L.R. 23 I. A., 45, was cited.

Babu *Ram Charan Mitra* and Babu *Lal Mohan Das* appeared for the Secretary of State for India.

The judgment of the High Court (**Ghose and Rampini, JJ.**) was as follows:—

This appeal arises out of a suit to set aside a certificate issued by the Collector under the provisions of the Public Demands Recovery Act (Bengal Act VII of 1880), and the sale which took place in execution of that certificate. It appears that the certificate in question was issued on the 12th November 1894, and notice was served upon the plaintiff in terms of section 10 of the Act on the 12th December 1894. Subsequently, on [174] the 9th January 1895, the plaintiff applied to the Collector, apparently under the provisions of section 12 of the Act, to have the certificate cancelled upon the ground that no arrears were due from him. An order was recorded on this application on the 28th February 1895, which may be taken to imply that the Collector meant to hold that the plaintiff was liable to pay the arrears demanded. But, however that may be, the matter was again placed before the same authority on the 7th August 1895, when the order recorded was that, no evidence having been produced on behalf of the petitioner, the objection must be overruled. Thereupon the property, which had been attached in pursuance of the provisions of the Act, was ordered to be sold, and the sale took place on the 10th August 1895. The present suit, however, was not instituted until the 8th August 1896, that is to say, within a year from the date of sale, but after a year from the date when notice under section 10 of the Act was served upon the plaintiff.

The Munsif dismissed the suit. The learned District Judge on appeal has reversed the Munsif's decree, being of opinion that the certificate issued by the Collector was not in accordance with the form prescribed by the Act itself; that therefore it ought not to be treated as a decree under the provisions of the Act, and that necessarily the sale that took place in execution of it was a bad sale, and should therefore be set aside.

It appears to us, however, that the plaintiff is not entitled to the remedy he seeks in this case, and for this simple reason: Referring to section 8, clause (b), of Bengal Act VII of 1880, it will be found that a "judgment-debtor may at any time within one year after service upon him of such notice as is mentioned in section 10 bring a suit in the Civil Court to contest his liability to pay the amount stated in the said certificate, and to have such certificate cancelled, but no such suit shall be entertained unless such judgment-debtor has stated in a petition presented to the Collector under section 12 the ground upon which he claims to have such certificate cancelled, or unless, having omitted to state such ground in such petition as aforesaid, he can satisfy the Civil Court that there was good reason for [175] such omission. If no such suit is instituted within the said period of one year, or if any such suit having been instituted is decided against such judgment-debtor, such certificate shall become absolute, and shall have, to all intents and purposes, the same force and effect as a final decree of a Civil Court."

The law seems to us to be clear enough. It provides that if the judgment-debtor desires to contest the propriety of the certificate served upon him under section 10 of the Act, he must bring a suit for that purpose within a year from the date of the service of such certificate; but if he fails to do so, the certificate shall have the force and effect of a final decree of a Civil Court. In the present case the plaintiff did not bring his suit to have the certificate cancelled within a year as provided in clause (b), section 8, and therefore it seems to be obvious that it is not open to him to ask the Civil Court to determine any question as to the propriety or otherwise of the certificate.

The learned Vakil for the respondent, however, has contended that section 8, clause (b) should be read as controlled by section 12 of the same Act, and that unless there be a determination as prescribed by that section, it is not incumbent on the judgment-debtor to bring a suit within a year from the date of service upon him of the certificate.

There are, we think, two answers to this argument: *first*, there was a determination of the matter that was placed before the Collector by the plaintiff on the two dates that we have already mentioned, namely, the 28th February and 7th August 1895. It may be that the Collector did not fully give his reasons for thinking that the arrear demanded was due by the plaintiff, but that would not make his order in any way less a determination of the matter that was before him upon the petition made by the plaintiff. We think that there was a determination in accordance with the requirements of section 12. The *second* answer to the respondent's argument is this: Supposing that there was no determination in accordance with the provisions of section 12, still the terms of section 8, clause (b) are peremptory, when it prescribes that, unless a suit is brought within a year from the date of service upon the judgment-debtor of the notice issued under [176] section 10, the certificate shall have the force and effect of a final decree of a Civil Court.

It appears to us that section 8 is in no way controlled by the provisions of section 12 of the Act. That being so, it seems to us that the adjudication of the matter which the plaintiff has asked for in the present case is barred by the provisions of section 8, clause (b) of Bengal Act VII of 1880. So far as the

sale is concerned, it depends upon the question of the propriety of the certificate issued by the Collector on the 12th November 1894. If that certificate cannot be cancelled, the sale which was held in execution of it cannot equally be cancelled.

We set aside the order of the Lower Appellate Court and restore that of the Court of First Instance dismissing the suit of the plaintiff.

We make no order as to costs.
S. C. C.

• *Appeal allowed.*

[26 Cal. 176]

The 15th August, 1898.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Karuna Moyi Banerjee.....Decree-holder
versus

Surendra Nath Mockerjee and another.....Judgment-Debtors.*

*Bengal Tenancy Act (VIII of 1885), section 148, clause (h)—Rent-decree—Decree
for arrears of rent—Application for execution by the assignee
of such a decree—Code of Civil Procedure
(Act XIV of 1882), section 316.*

An application for execution, by the assignee of a decree which was obtained by a landlord against a defaulting tenant, for arrears of rent which accrued due, between the date of the sale of the tenure in execution of a previous decree for arrears of rent, and the date of the confirmation of such sale, is barred by clause (h) of section 148 of the Bengal Tenancy Act, as being one for the execution of a decree for arrears of rent.

THIS appeal arose out of an application for execution by the assignee of a decree. The decree was obtained by the landlord against a defaulting tenant for rent which accrued due between [177] the date of the sale of the tenure in execution of a previous decree for arrears of rent, and the date of the confirmation of such sale. The judgment-debtors objected to the execution on the ground that it was barred by clause (h) of section 148 of the Bengal Tenancy Act, being an application for execution of a decree for arrears of rent. The Court of First Instance dismissed the application for execution as being barred. On appeal to the District Judge, he confirmed the decision of the Court below. Against this judgment the decree-holder appealed to the High Court.

* Appeal from Order No. 1 of 1898, against the order of F. F. Handley, Esq., District Judge of 24-Pergunnahs, dated the 13th of August 1897, affirming the order of Babu Bollarom Mullick, Subordinate Judge of that District, dated the 11th of May 1897.

Babu Saroda Churn Mitter and Babu Atul Krishna Ghose for the Appellant.

Babu Uma Kali Mookerjee and Dr. Asutosh Mookerjee for the Respondents.

Babu Saroda Churn Mitter for the appellant contended that the decree was not one obtained by a landlord against a tenant, and as such it was not a decree for arrears of rent. The relationship of landlord and tenant ceased, after the sale of the tenure in execution of a previous decree for arrears of rent. It was simply a money-decree; and that being so, the execution of such decree by the assignee is not barred by clause (h) of section 148 of the Bengal Tenancy Act. He referred to clause (c) of section 169 of the Bengal Tenancy Act, and also to the cases of *Adhur Chunder Banerjee v. Aghore Nath Aroo* (2 C. W. N., 589); and *Dagdu v. Pancham Singh Gangaram*, (1892) I. L. R., 17 Bom., 375.

The respondents were not called upon.

The judgments of the High Court (MACLEAN, C.J., and BANERJEE, J.) were as follows:—

Maclean, C.J.—All we have to determine is whether the decree in this case is or is not a decree for arrears of rent or a mere money-decree, and, if the former, what is the effect of sub-section (h) of section 148 of the Bengal Tenancy Act. In my opinion this is a decree for arrears of rent. Then what is the effect of the sub-section in question which says in effect, [178] that any application to execute a decree for arrears of rent cannot be made by an assignee of the decree unless the landlord's interest in the land has become vested in him. The latter event has not happened, and the decree-holder is the assignee from the landlord of the arrears of rent. This being so, I think the judgment of the Court below is right, and the appeal must be dismissed with costs.

Banerjee, J.—I am of the same opinion. The only question raised in this appeal, which arises out of an application by the appellant, who is the assignee of a decree, to execute the same, is, whether the application is barred by clause (h) of section 148 of the Bengal Tenancy Act. The Courts below have held that the application is barred, under the clause referred to; and the only way in which the learned Vakil for the appellant seeks to take this case out of the operation of that clause is by contending that the decree in this case was not one for arrears of rent obtained by a landlord within the meaning of the clause. The decree was on the face of it one for arrears of rent claimed by the landlord against a defaulting tenant, as having accrued due between the date of the sale of the tenure in execution of a previous decree for arrears of rent and the date of confirmation of such sale, and it is argued that what was claimed as due to the landlord for the period intervening between those two dates was not an arrear of rent within the meaning of the Bengal Tenancy Act.

It is difficult to accept this contention as correct. What was decreed was decreed in favour of the landlord: of that there can be no question. The sum claimed was what was payable in respect of the tenure which was held by the defendant, and the only ground upon which it could possibly be said that the amount decreed was not an arrear of rent would be by maintaining that the defaulting tenant's connection with the tenure ceased with the sale and not with the confirmation of the sale. But section 316 of the Code of Civil Procedure, which governs the case, is express on the point and as between the parties to the suit, that is, as between the landlord and the defaulting tenant, the title to the property sold vested in the purchaser from the date of the certificate, that is the date of confirmation of sale, and not before.

[179] That being so, the defaulting tenant still continued to be the holder of the tenure, and what was claimed from him must be treated as an arrear of rent.

It was argued by Babu Sarada Charan Mitter that the language of clause (c) of section 169 of the Bengal Tenancy Act would go to show that the Legislature intended the landlord's claim against the defaulting tenant for rent accruing due subsequent to a previous suit for arrears of rent to extend up to the date of sale of the tenure in execution of his decree, not up to any later date. I do not think that the language of clause (c) of section 169 can afford any sufficient basis for such a contention.

Then we were referred to the cases of *Adhur Chunder Banerjee v. Aghore Nath Aroo*, (2 C. W. N., 589), and *Dagdu v. Pancham Sing Gangaram*, (1892) 1. L. R., 17 Bom., 375, as showing that even before the date of confirmation of sale, an auction-purchaser acquires an inchoate right, which dates from the date of sale, the confirmation of sale relating back to such date. I think that the cases cited are quite distinguishable from the present, as there the question arose, not between the parties to the suit in execution of the decree in which the sale took place, but as between some of the parties to the suit and third parties.

S. C. G.

Appeal dismissed.

NOTES.

[There must have been an assignment of the landlord's interest, (1905) 10 C.W.N., 44; see also (1904) 1 C.L.J., 500, *per* MOOKERJEE, J.]

[26 Cal. 179]

REFERENCE UNDER STAMP ACT.

The 2nd August, 1898.

PRESENT :

SIR FRANCIS W. MACLEAN, K. C. I. E., CHIEF JUSTICE, MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Sambhu Chandra Bepari.....Plaintiff

versus

Krishna Charan Bepari and others.....Defendants*

Stamp Act (I of 1879), section 23—Bond—Interest.

A bond for a loan of Rs. 100 stipulated that the obligor should "pay twice the amount, including Rs. 100 for interest, total Rs. 200, in eight years from 1801 to 1808, according to *kists* given in the schedule."

[180] *Held*, that the amount secured by the bond was Rs. 200 and the bond must be stamped accordingly. Section 23 of the Stamp Act (I of 1879) did not apply to the instrument.

* Civil Reference under section 49 of Stamp Act (I of 1879) from Babu Sarat Chander Ghose, Officiating Munsif of Sudharam, dated the 18th of March 1898.

THIS was a reference to the High Court under section 49 of the Indian Stamp Act (I of 1879) by the Munsif of Sudharam in the district of Noakhali. The statement of the case and the opinion of the Munsif were as follow :—

“In suit No. 285 of 1898 (money) of this Court the plaintiff Sambhu Charan Bepari seeks to recover Rs. 220 on a registered instalment (simple) bond, dated the 25th Chaitra 1800 (7th April 1894). The suit was instituted on the 17th February 1898. In the plaint it is stated that the whole amount, including interest up to date of suit, is Rs. 271. But the plaintiff having given up his claim to Rs. 51, he sues to recover Rs. 220 only. The bond is written upon an impressed stamp paper for eight annas only. That part of the bond, which is necessary so far as this reference is concerned, runs as follows : ‘ We borrowed from you on the 29th day of Bhadra 1294 B. S., by a registered bond, the sum of Rs. 70 ; now in the account thereon we are indebted to you for interest and principal together the sum of Rs. 208-4 ; out of that deducting Rs. 108-4 for claim relinquished and Rs. 5 for payment in cash, total Rs. 108-4. We keep a loan of the balance Rs. 100 and execute this bond (and agree) to pay twice this amount including Rs. 100 for interest, total Rs. 200 in eight years from 1301 to 1308 according to the *kists* given in the schedule ; if we make default in payment of *kist* we shall pay interest at the rate of 4 per centum per month ; if instead of paying according to the *kistbundi* we make default in paying any one *kist*, instead of waiting for a future *kist* you shall be entitled to recover from us, and our heirs, either amicably or by suit, the whole amount due on all the *kists* with interest for default of *kists*.’

“I doubt if the bond has been ‘duly stamped’ as a bond. The question in this case principally is whether or not the sum of Rs. 100, the debt acknowledged to be subsisting at the date of the bond, or the sum of Rs. 200 agreed to be repaid in eight years for principal and interest, is to be considered the amount or value secured by the bond as stated in No. 13, schedule I, of the Indian Stamp Act, 1879.

“If the former view be taken the bond has been duly stamped, but if the latter view be taken it is not duly stamped, and the document cannot be admitted in evidence until the provisions of section 34 of the said Act are complied with.

“In this case the amount of interest is *ascertained*, and not *to be ascertained* as in ordinary bonds. The plaintiff could sue for the whole of Rs. 200 even if default was made in payment of the first instalment, which fell due in Ashwin [181] 1301 B. S. A case—*In the matter of Gajraj Singh*, (I. L. R. 9 All., 585)—of a somewhat similar nature came up before their Lordships of the Allahabad High Court, and it was decided by a Full Bench. Taking the view expressed therein by his Lordship Justice OLDFIELD, I am of opinion that the amount secured, or in other words the amount limited to be ultimately recovered, ‘under this bond’ is Rs. 200, and it requires to be stamped accordingly. * * *

The judgment of the High Court (MACLEAN, C.J., and BANERJEE and STEVENS, JJ.) was delivered by

Maclean, C. J.—In this case we are of opinion that the view taken by the Munsif is correct, namely, that the amount secured by the bond is Rs. 200, and that the bond must be stamped accordingly. In arriving at this conclusion we are not unmindful of the provisions of section 23 of the Stamp Act, I of 1879. The case referred to in the reference decided by the High Court at Allahabad does not appear to us to have any bearing upon the matter.

S. C. C.

• NOTES.

[See also (1901) 3 Bom., L.R., 133 ; (1907) 11 C.W.N., 1123 ; (1908) 4 N.L.R., 90.]

[26 Cal. 181]

CRIMINAL REFERENCE.

The 17th November, 1898.

PRESENT :

MR. JUSTICE STEVENS AND MR. JUSTICE PRATT.

Bachu Lal.....Complainant

versus

Jagdam Sahai and three others.....Accused.*

Compensation—Sanction to prosecute and award of compensation—Criminal Procedure Code (Act V of 1898), section 250 and section 476—Magistrate, Discretion of.

It is an improper exercise of his discretion by a Magistrate to award compensation to the accused under section 250 of the Criminal Procedure Code and also to direct or sanction the prosecution of the complainant under section 211 of the Penal Code for bringing a false charge. *Shib Nath Chong v. Sarat Chunder Sarkar*, (1895) I. L. R., 22 Cal., 586, followed. *Queen v. Rupan Rai*, (1871) 6 B. L. R., 296 : 15 W. R. Cr., 9, referred to.

THIS was a reference under section 438 of the Criminal Procedure Code by the Sessions Judge of Tirhoot.

[182] The facts of the case appear from the following portions of the letter of reference :—

“The complainant Bachu Lal prosecuted Jagdam Sahai and others for forcibly taking his children and Raghunandan's wife from them, when Bachu and Raghunandan were going to study the Bible. The Magistrate of Hajipur Sub-Division, who is admittedly a Magistrate of the 1st class, heard the evidence for the prosecution and acquitted the accused without calling on the accused for evidence. He then called on the complainant Bachu to pay Rs. 40 compensation under section 250 of the Criminal Procedure Code to each of the accused, and on his failing to show cause why he should not pay the compensation condemned him in default of payment to thirty days' simple imprisonment. The Magistrate then passed the following order : ‘Bachu Lal will be prosecuted under section 211 of the Penal Code and his witness under section 198 of the Penal Code. Bail of Rs. 100 each. Draw up proceedings and send to Sudder.’ This last order was made without an application by the accused to prosecute, and must apparently therefore have been made under section 476 of the Criminal Procedure Code. Bachu and Raghunandan have appealed against both orders, *vis.*, those under section 476 and section 250 of the Criminal Procedure Code. As, however, there is no appeal against the latter order, it can only be interfered with by way of revision.

“With regard to the order under section 250 of the Criminal Procedure Code it has been held in the case of *Shib Nath Chong v. Sarat Chunder Sarkar*, (1895) I. L. R., 22 Cal., 586, that if the Magistrate thought there was a case in which a prosecution under sections 211 and 198 of the Penal Code should be sanctioned, he ought not to take action under the provisions of section 560 of the Criminal Procedure Code and the same ruling applies to the provisions of section 250 of the new Criminal Procedure Code. The Sub-Divisional Magistrate has referred to rulings, inconsistent apparently with the ruling quoted, but they are of earlier date. It is, therefore, recommended that the order of the Magistrate under section 250 of the Criminal Procedure Code be set aside.”

* Criminal Reference No. 257 of 1898, made by A. E. Staley, Esq., Sessions Judge of Tirhoot, dated the 11th of October 1898.

The judgment of the High Court (**Stevens and Pratt, JJ.**) was as follows :—

In dismissing a case under section 363 of the Penal Code the Joint Magistrate of Hajipur directed the complainant Bachu Lal to pay each of the four accused persons Rs. 40 as compensation under section 250 of the Code of Criminal Procedure and further ordered his prosecution on a charge under section 211 of the Penal Code.

[183] The learned Sessions Judge of Tirhoot has reported the case to this Court with a recommendation that the order for payment of compensation be set aside, and he refers for authority to the case of *Shib Nath Chong v. Sarat Chunder Sarkar*, (1895) I. L. R., 22 Cal., 586.

In the case of *Queen v. Rupan Rai*, (1871) 6 B. L. R., 296 : 15 W. R., Cr., 9, which is referred to by the Joint Magistrate in his explanation as supporting the legality of his proceedings, JACKSON, J., remarked : "It appears to me that in this case the Magistrate was competent to award compensation to the persons accused by Rupan, notwithstanding that he afterwards committed, and even if he had then made up his mind to commit, Rupan to take his trial on the charge of giving false evidence;" . . . but he added : "whether the Magistrate in making this order exercised a proper discretion is a different question, on which I think we need not give an opinion."

In the case of *Shib Nath Chong v. Sarat Chunder Sarkar*, (1895) I. L. R., 22 Cal., 586, the learned Judges observed : "We are of opinion that it was never intended that recourse should be had to the provisions of section 560 (now section 250) of the Code of Criminal Procedure in a case in which the trying Magistrate is of opinion that the complaint was wilfully and maliciously false, and that the complainant should be prosecuted for an offence under section 211 of the Penal Code. If, therefore, the Joint Magistrate thought that this was a case in which a prosecution for an offence under section 211 of the Penal Code should be sanctioned, he ought not to have taken action under the provisions of section 560 of the Code of Criminal Procedure. To sanction or direct a prosecution, and also to proceed to award compensation under section 560 of the Code of Criminal Procedure, was, we think, an improper exercise of his discretion. By such action the Joint Magistrate was, in point of fact, prejudging the issue of the charge which he was submitting for trial."

These authorities are not in conflict, but are quite reconcilable. While, on the one hand, there is nothing in the Code of Criminal Procedure which makes it illegal for a Magistrate [184] both to award compensation to the accused and also to direct or sanction the prosecution of the complainant for bringing a false charge, yet a Magistrate who adopted this course would be exercising his discretion improperly.

The reason why the learned Judges who disposed of the case of *Queen v. Rupan Rai* confined themselves to dealing with the question of the strict legality of the orders before them was doubtless because they were proceeding under Act XXV of 1861, the Code of Criminal Procedure which was then in force. A reference for revision could under section 434 of that Act be made only where the referring Court was of opinion that a sentence or order was "contrary to law," and similarly under section 404 of the Act the general revisional powers of this Court were limited to "determining any point of law arising out of the case and thereupon passing such order as to the Court might seem right."

In the present case we understand that the direction to prosecute is in full force, and we therefore set aside the order awarding compensation to the accused persons. The compensation, if paid or levied, will be refunded.

S. C. B.

[26 Cal. 184]
APPELLATE CIVIL.

The 26th August, 1894.

PRESENT :

MR. JUSTICE AMEER ALI AND MR. JUSTICE PRATT.

Sariatullah Sarkar and others.....Defendants
versus
Pran Nath Nandi and others.....Plaintiffs.*

Right of Occupancy—Transfer of occupancy rights—Bengal Tenancy Act (VIII of 1885), sections 178, 183—Usage or custom—Evidence Act (I of 1872), section 48—Admissibility of opinion as to existence of custom or usage.

In this suit the plaintiffs by virtue of *putni* settlements sought to obtain *khas* possession of certain *jote* lands which purported to have been conveyed by the *jotedars*, the first set of defendants, to the second set of defendants, although there was no custom or usage in the village recognising the transferability of occupancy rights.

[185] *Held*, that in order to establish *usage* under sections 178, 183 of the Bengal Tenancy Act, it was not necessary to require proof of its existence for any length of time.

Held, also, that the statements made by persons who were in a position to know of the existence of a custom or usage in their locality were admissible under section 48 of the Evidence Act. *Dalglish v. Guzuffer Hussain*, (1896) I. L. R., 23 Cal., 427, followed.

THE facts of this case are sufficiently set out in the judgment of the High Court.

Babu Dwarkanath Chuckeravarti and Babu Joygopal Ghose for the Appellants.

Babu Gyanendra Mohun Das for the Respondents.

The judgment of the High Court (Ameer Ali and Pratt, JJ.) was as follows :—

This appeal arises out of a suit brought by the plaintiffs under the following circumstances. The plaintiffs own a twelve-anna share of Mouzah Mobouli by virtue of *putni* settlements, some acquired in 1297 (1890) and some in the year 1300 (1893), and they seek in this action to obtain *khas* possession of certain *jote* lands, on the ground that the defendants Nos. 8 and 9, who were

* Appeal from Appellate Decree No. 939 of 1897, against the decree of K. N. Roy, Esq., District Judge of Pubna and Bogra, dated the 26th of February 1897, reversing the decrees of Babu Brinala Charan Mozumdar, Munsif of Serajgunge, dated the 14th of December 1895.

the holders of the *jotes* in question had conveyed, or rather purported to convey, the same to the defendants 1 to 7, although there was no custom or usage in the village recognising the transferability of occupancy rights, and that consequently the plaintiffs were entitled to obtain *khas* possession of the said lands.

The principal defendants, who had obtained the transfer of the *jotes*, averred in their written statements the existence of a custom of transferability in that village and other villages in its vicinity, and contended that the plaintiffs' suit should be dismissed. It is unnecessary to refer to the other pleas taken in their answers.

The Munsif framed several issues and, in a careful and, as it seems to us, a well considered judgment, came to the conclusion that the defendants had successfully established the custom or usage alleged by them recognizing the transferability of occupancy *jotes*. In dealing with this question, he relied not only [186] upon the evidence adduced on the defendants' side, but also on certain *kohalas* executed in favour of the plaintiffs themselves by which they had obtained transfer of occupancy *jotes*, and in conclusion he added: "As the tenants do not pay rent at the rates demanded by the plaintiffs, the latter have betaken to themselves the contrivance of harassing the tenants and coercing them to submission by such suits like the present, which unfortunately have become too common in this part of the country."

The plaintiffs appealed to the Officiating Judge of Pubna who has, in an elaborate judgment, dealing with a variety of questions which do not seem to us to be really pertinent to the matter, come to the conclusion that the plaintiffs were entitled to recover in this action. The grounds upon which he held against the defendants seem to be of a three-fold character: *firstly*, he is of opinion that the evidence given by the defendants regarding the custom or usage of transferability being limited to only ten or twelve years or even less is worthless; *secondly*, that the evidence, which the defendants purported to give under section 48 of the Evidence Act, was inadmissible; and, *thirdly*, regarding that portion of the case upon which the Munsif relied with some reason, namely, the transactions in favour of the plaintiffs themselves, he was of opinion that they could not support the allegation of custom or usage, inasmuch as the plaintiffs were themselves the proprietors, and might be supposed to have assented to the transfers in their own favour.

The question which the District Judge had to try was dealt with in the case of *Dalglish v. Guzufer Hassain*, (1896) 1. L. R., 23 Cal., 427, by TREVELYAN and BEVERLEY, JJ., and although he does not seem to approve of that decision, we consider ourselves bound to follow the principle enunciated by those learned Judges. In that case also the Munsif had held against the plaintiffs, who were seeking to recover *khas* possession. He had held that the defendants as *ryots* had sufficiently established that there was a usage in the neighbouring villages, recognizing the transferability of occupancy *jotes*. In that case also the Subordinate Judge had thought that the evidence regarding [187] usage, being limited to a very short period of time, was of no value. This Court in construing sections 183 and 178 of the Tenancy Act, held in effect that in order to establish "usage" at all events it was not necessary to require proof of its existence for any length of time. With that view we desire to express our entire concurrence. They say "the word 'usage,' at any rate, would include what the people are now or recently in the habit of doing in a particular place. It may be that this particular habit is only of a very recent origin, or it may be one which has existed for a long time. If it be one regularly and ordinarily practised by the inhabitants of the place where the tenure exists,

there would be 'usage' within the meaning of the section. The evidence which the learned Subordinate Judge has excluded on the ground that it does not refer to ancient custom, is, we think, evidence which requires consideration, inasmuch as it may establish local usage."

The Judge, in the present case, has done exactly what the Subordinate Judge had done in the case before TREVELLYAN and BEVERLEY, JJ., and we think that the evidence which the District Judge thinks to be of little or no value, required consideration in connection with the other circumstances and facts appearing in the case.

In the second place the District Judge is of opinion that, in order to make a statement admissible under section 48 of the Evidence Act, it must relate to custom. The learned Judges in *Dalglish v. Guzuffer Hassain*, (1896) I. L. R., 23 Cal., 427, held that the evidence to which they were directing their minds, and which related to usage, was admissible under section 48 of the Evidence Act. We think in the present case also the statements made by persons who were in a position to know of the existence of a custom or usage in their locality were admissible. For example, a person, who had been in the habit of writing out deeds of sale, or one who had been seeing transfers frequently made, would certainly be in a position to give his opinion whether there was a custom or usage in that particular locality, and we think that the opinion of such persons [188] would be admissible, as pointed out by the learned Judges, under section 48 of the Evidence Act.

Then, again, it seems to us the District Judge is in error in putting aside from consideration the transfers made in favour of the plaintiffs on the ground that they may be supposed to have been assented to by the plaintiffs by virtue of their being proprietors. Admittedly one of the *kobalas*, namely, that of the year 1296, was executed prior to the *putni* settlement obtained by them in 1297. On the whole, therefore, we think that the judgment of the District Judge ought to be set aside, and the case sent back to him for a determination of the question at issue in the light of the observations we have made. Costs to abide the result.

N. C.

NOTES.

[See also (1903) 8 C.W.N., 235 (237).]

[26 Cal. 188]

CRIMINAL REVISION.

The 2nd December, 1898.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE AMEER ALI.

Hurbullubh Narain Singh.....2nd Party, Petitioners
versus
 Luchmeswar Prosad Singh.....1st Party, Opposite Party.*

*Superintendence of High Court—Charter Act (24 and 25 Vic. Cap. 104),
 section 15—Criminal Procedure Code (Act V of 1898), sections 145-
 145—Dispute concerning a ferry including the land and water
 over which it plies—Order purporting to be made under
 section 145.*

The local Legislature has power to overrule a statutory power conferred on the High Court; but this was not the object and result of the legislation expressed in section 145 of the Criminal Procedure Code of 1898. *Empress v. Burah*, (1878) 1 L. R., 4 Cal., 172; L. R., 5 I. A., 178, referred to.

The terms of section 145 mean that orders under the exempted sections mentioned in clause (3) must have been passed with jurisdiction. If such orders are challenged as made without jurisdiction, the mere fact of their purporting to be passed under the exempted sections would not bring them within those sections so as to debar the exercise of powers by the High Court under section 15 of the Charter Act.

[189] *Abayeswari Debi v. Sudheswari Debi*, (1888) I.L.R., 16 Cal., 80.; *Ananda Chandra Bhattacharjee v. Stephen*, (1891) I.L.R., 19 Cal., 127; *Roop Lal Das v. Manook*, (1898) 2 C. W. N., 572, and *Queen-Empress v. Pratap Chunder Ghose*, (1898) I.L.R., 25 Cal., 552, followed.

The right to a ferry, i.e., the right to carry passengers to and fro, cannot be treated apart from the possession of the lands used on either side of the stream for the purpose of landing them. It is a proper case to be dealt with under section 145 of the Criminal Procedure Code (Act V of 1898) where the subject-matter of dispute is a ferry including the land and water upon which the right of ferry is exercised.

THIS case related to a dispute regarding the possession of certain lands and water over which a ferry was plied. On a previous occasion proceedings under section 145 of the Criminal Procedure Code (Act X of 1882) with regard to the disputed property had been taken by the Deputy Magistrate of Bhagulpur and an order was passed in favour of the first party, which was set aside on revision by the High Court on the ground that the Magistrate of Purneah had no jurisdiction. The High Court also expressed an opinion that disputes regarding a ferry came more properly within the scope of section 147 of the Code of 1882.

The subject-matter of the dispute was situated in the vicinity of the common boundary between the districts of Purneah and Bhagulpur. On the 6th of August 1898 the District Magistrate of Purneah again took proceedings and passed an order under section 145 of the Criminal Procedure Code (Act V of 1898), also declaring the first party to be in possession. The second party moved the High Court and obtained a rule.

* Criminal Revision No. 647 of 1898, made against the order passed by P. H. O'Brien, Esq., District Magistrate of Purneah, dated the 6th of August 1898.

The *Advocate-General* (Sir Charles Paul), Mr. Jackson, and Babu Jogendro Chunder Ghose, for the Petitioners.

Mr. J. T. Woodroffe, Sir Griffith Evans, Mr. Garth and Babu Ram Churn Mitter, for the Opposite Party.

Mr. Woodroffe.—The High Court has no longer any power to revise orders under clause [chapter ?] XII of the Code. The language used in clause (3) of section 435 makes it quite clear. The Magistrate's order in such cases is final, and the aggrieved party [190] must seek his remedy in the Civil Courts. [PRINSEP, J.—But may not cases of this kind come under section 530, and can we not interfere under the Charter Act ?] Section 530 deals only with irregularities which vitiate proceedings, such as want of local jurisdiction. As to the power of the High Court to interfere, the Privy Council have held in *Queen v. Burah*, (1878) 1 L. R., 4 Cal., 172; L. R., 5 I. A., 178, that the exercise of the power under the Charter Act by the High Court was meant to be subject to, and not exclusive of, the general legislative power of the Governor-General in Council. As to the facts the Magistrate has found that the subject-matter of dispute is a ferry including the land and water upon which the right of ferry is exercised. This comes clearly within the scope of section 145 as it now stands. The section no longer relates to disputes concerning "tangible immoveable property," but to disputes concerning "any land or water or the boundaries thereof."

The *Advocate-General*.—The order passed in this case is without jurisdiction. The dispute is about the right to use a ferry. The owner of a ferry need not be the owner of the land and water over which it plies. The case does not fall under section 145; the proceedings should have been drawn up under section 147 of the new Code. If an order purports to be made under section 145 in a case where such order ought not to be made, then nothing contained in section 435 of the new Code can deprive the High Court of its power of interference under section 15 of the Charter Act. See *Abayeswari Devi v. Sidheswari Devi*, (1888) 1 L. R., 16 Cal., 80; *Ananda Chandra Bhattacharjee v. Stephen*, (1891) 1 L. R., 19 Cal., 127; *Roop Lal Das v. Manook*, (1898) 2 C. W. N., 572, and *Queen-Empress v. Pratap Chunder Ghose*, (1898) 1 L. R., 25 Cal., 852.

The judgment of the High Court (Prinsep and Ameer Ali, JJ.) was as follows:—

A rule was granted by a Bench of this Court requiring the [191] Maharaja of Durbhunga to show cause why an order passed under section 145 of the Code of Criminal Procedure should not be set aside—*first*, on the ground that that section was not applicable to the subject of the dispute between the contending parties, and, *secondly*, on the ground that the Court had no jurisdiction to make the order under section 145. Proceedings under that section were instituted by the District Magistrate of Purneah in consequence of a dispute between the Maharajas of Durbhunga and Sonbarsa which, he found, was likely to cause a breach of the peace, arising out of claims to use certain land for the purposes of a private ferry; and the objection taken, on which that rule was granted, may be shortly stated to be that a claim to a ferry is not cognizable under section 145 of the Code of Criminal Procedure, the Magistrate's action, therefore, being without jurisdiction, and that consequently the proceedings should be set aside under section 15 of the Charter Act, irrespective of the Code of Criminal Procedure, which, as expressed by section 435 of the Code of 1898, ordinarily bars the exercise of revisional powers by this Court. The subject-matter of dispute is said to be on the boundary of the districts of Bhagulpore and Purneah, and we find that, in the earlier part of this year,

and before the Criminal Code of 1898 became law, proceedings under section 145 of the Code of 1882 were instituted by a Magistrate of the District of Bhaugulpore, and an order passed in favour of the Maharaja of Durbhunga was set aside by a Bench of this Court as a Court of Revision, on the ground that the dispute regarding possession of a ferry was not a dispute regarding tangible immoveable property within the terms of section 145 of the Code of 1882. The Court at the same time expressed an opinion that questions relating to disputes regarding ferries were intended to come within the scope of section 147. The Court also held that the order under section 145 was bad on the ground that on the affidavit of the Maharaja of Sonbarsa, which was not contradicted, the land on both banks was outside the jurisdiction of the Magistrate of Bhaugulpore, and that, therefore, he had no jurisdiction to deal with the matter. An application was subsequently made to this Court for a correction of this finding as erroneous as a statement of fact. It was then held by the Court that it had no power to reconsider the [192] order, even if erroneous, and that the point was immaterial, since the finding of the Magistrate was to the same effect, so that in either case the Magistrate had no jurisdiction. The present proceedings have been taken in Purneah under the Code of 1898, and section 145 of that Code has been amended, in so far that it has been differently expressed in some respects from the corresponding section of the former Code of 1882. It does not limit the action of the Magistrate to disputes relating to the possession of "tangible immoveable property," but it empowers him to take cognizance of disputes likely to cause a breach of the peace "concerning any land or water or the boundaries thereof," and it gives an explanation of the meaning of the expression "land or water."

We have consequently now to consider whether this dispute falls within section 145 of the Code of 1898. But Mr. *Woodroffe*, who appears against the rule for the Maharaja of Durbhunga, contends that, by reason of the terms of section 435 of the Code of 1898 in amendment of the former law, this Court has no jurisdiction as a Court of Revision, or even under section 15 of the Charter Act, inasmuch as section 435 as amended removes any power that this Court may have had under the latter. Mr. *Woodroffe* relies on the well-known case of *Queen v. Burah*, (1878) L.R., 5 I. A., 178; I.L.R., 4 Cal., 172, in which it was held that the local Legislature had power to overrule a statutory power conferred on this Court, and he contends that this was the object and result of the legislation expressed in section 435 of the Code of 1898. Of the power of the local Legislature we have no doubt, but we do not agree that the power has been exercised as contended by Mr. *Woodroffe*, or that the terms of section 435 must be so understood. Matters under Chapter XII of the Code, that is, under section 145, such as the case now before us, are by section 435 placed in the same category as orders under section 143 and section 144, in respect of which section 435 of the Code of 1898 is expressed in the same terms as in the same section of the Code of 1882; and in regard to an order under section 143 or section 144, it has been held in many cases, so as to have become [193] settled law, that though powers as a Court of Revision under the Code cannot be exercised, still, if an order challenged be without jurisdiction, that is to say, if it be outside those sections, the mere fact of the order purporting to be so passed would not bring it within those sections, so as to debar the exercise of powers under section 15 of the Charter Act to set it aside as null and void and without jurisdiction. The terms of section 435 have, in this respect, been held to mean that an order must have been passed under the exempted sections with jurisdiction. As the most recent cases on this subject, we need only refer to *Abayeswari Debi v. Sidheswari Debi*, (1888) I. L. R.,

16 Cal., 80; *Ananda Chandra Bhattacharjee v. Stephen*, (1891) I. L. R., 19 Cal., 127; *Roop Lall Das v. Manook*, (1898) 2 C. W. N., 572, and *Queen-Empress v. Pratap Chunder Ghose*, (1898) I.L.R., 25 Cal., 852. The matter for consideration then is—is the subject-matter of dispute within the terms of section 145 of the present Code? We may first of all observe that, with every respect to the learned Judges who decided the former case, we do not feel bound by the expression of the opinion that the matter properly comes within section 147, inasmuch as it relates to what may be shortly termed an easement, for that was not a matter properly coming under consideration in that case, and their finding was *obiter*. At the same time we are bound to give that opinion every consideration and respect in dealing with this case.

The proceedings taken show that the dispute has arisen, because the river has gradually altered its course, and the Magistrate has found as a fact that the two landing places are in the possession of the Maharaja of Durbhunga. The right to the ferry, that is, the right to carry passengers to and fro, cannot be treated apart from the possession of the lands used on either side of the stream for the purpose of landing them. No such question as has been attempted to be raised on the judgment of this Court in the previous proceedings, relating to section 147, therefore, arises in this case. As we understand the Magistrate's preliminary order, he meant to deal with the dispute in this manner; for he describes [194] the subject-matter as the ferry, "including the land and water upon which the right of ferry is exercised," &c. It is not described as a right to use the ferry, and it cannot, therefore, be so regarded.

We are of opinion that the rule should be discharged, inasmuch as the proceedings have been properly taken under section 145 of the Code of Criminal Procedure, 1898.

S. C. B.

Rule discharged.

NOTES.

I. As regards powers of the High Court to interfere in cases of this kind, see also (1902) 30 Cal., 112; (1900) 27 Cal., 892; (1903) 25 All., 537; (1903) 26 All., 144.

II. As regards the powers of the Indian Legislature, see also *Secretary of State for India v. Momen* (1912) 40 Cal., 391 P.C.

III. As regards jurisdiction under sec. 145, Cr. P.C., see also (1899) 27 Cal., 259.

IV. As regards the right to ferry falling within sec. 145, Cr. P.C., 1898, see also 3 C.W. N., 148.]

[26 Cal. 194]

APPELLATE CIVIL

The 26th August, 1898.

PRESENT:

MR. JUSTICE AMEER ALI AND MR. JUSTICE PRATT.

Mahomed Nasim..... Defendant No. 8

versus

Kasi Nath Ghose and another.....Plaintiffs.*

Assam Land and Revenue Regulation (Act I of 1886), section 65, section 68, section 70, sub-section (2), sub-section (3), and section 71—Act XI of 1859, section 37—"Estate"—"Property"—Shikmi haziram rights.

A purchaser of a part of a permanently settled estate is entitled to the benefit of section 71 of the Assam Land and Revenue Regulation, inasmuch as in section 71 the words used are "property sold under section 70," and the property to which reference is made in section 70 includes both an estate as well as a share in respect of which revenue has been separately apportioned.

The object of section 37, Act XI of 1859, is the same as that of section 71, Regulation I of 1886. Those sections cannot be said to have different meanings, for if it were to be held that the incumbrance which could be set aside under section 71 of the Regulation I of 1886 must be an incumbrance actively created by the previous holder, it would amount to this, that any acquiescence or laches, either wilful or arising from pure negligence on the part of the holder, by which the *taluk* or estate becomes incapable in the hands of the purchaser of yielding the Government revenue, would be outside the scope of that section.

THIS suit was with respect to 16 plots of land, the area of which amounted to 2 *hudas*, 6 *khadas* and odd, said to be comprised in that portion of *taluk* No. 1, Rai Gour Hari Singh, which [195] subsisted after separate accounts had been opened. It was brought on the allegation that the plaintiffs had purchased that portion of the *taluk* sold for arrears of Government revenue and local rates due thereon on the 14th September 1892, and that they were consequently entitled to set aside the *shikmi haziram taluk* alleged by the defendants to be held by them under the said *taluk* Gour Hari Singh. The defendants contended that their *shikmi haziram taluk* had been in existence from the time of the Permanent Settlement.

The Munsif found that the defendants had succeeded in establishing their *shikmi haziram* rights in respect of 7 *kanis* odd of the lands in their possession, and passed a decree in respect of plots Nos. 1 to 13 in favour of the plaintiffs, dismissing the suit relative to plots Nos. 14 to 16 which came within 7 *kanis* odd.

The plaintiffs and the defendants both appealed to the Subordinate Judge, and the Subordinate Judge dismissed both appeals. The defendant No. 8, Mahomed Nasim, alone appealed to the High Court from the judgment of the Subordinate Judge.

Dr. Ashutosh Mookerjee for the Appellant.

Babu Tara Kishore Chowdhry for the Respondents.

* * Appeal from Appellate Decree No. 791 of 1897, against the decree of Babu Shoshi Bhushan Sen, Additional Subordinate Judge of Sylhet, dated the 29th of January 1897, affirming the decree of Babu Nistaran Banerjee, Munsif of Moulavi Bazar, dated the 28th of February 1895.

The judgment of the Court (Ameer Ali and Pratt, JJ.) was as follows:—

This is an appeal from the decision of the Additional Subordinate Judge of Sylhet, affirming the judgment of the Munsif of Moulavi Bazar, by which the plaintiffs' suit has been in part dismissed and in part decreed. The suit was brought by the plaintiffs upon the allegation that they had purchased a *taluk* called Rai Gour Hari Singh at a revenue sale, and that they were consequently entitled to set aside the *shikmi haziran taluk* alleged by the defendants to be held by them under the said *taluk* Gour Hari Singh.

The defendants contended that their *shikmi haziran taluk* had been in existence from the time of the Permanent Settlement.

The area held by the defendants amounted to 2 *hudas*, 6 *khadas* odd. Without entering into a detailed statement of all the facts [196] of the case, we may mention that the Munsif found that the defendants had succeeded in establishing that they held a *shikmi haziran taluk* within *taluk* Gour Hari Singh from the time of the Permanent Settlement in respect of 7 *kanis* odd of the lands in their possession, but inasmuch as they failed to show that the remaining portions of the land included in plots Nos. 1 to 13 had been in their possession as part and parcel of their said *shikmi haziran taluk* from the time of the Permanent Settlement, he made a decree in respect of those plots in favour of the plaintiffs, dismissing their suit with respect to plots Nos. 14 to 16 which comprised 7 *kanis* odd.

The plaintiffs as well as the defendant appealed to the Subordinate Judge, who dismissed both the appeals.

The defendant No. 8, Mahomed Nasim, has preferred a second appeal to this Court from the judgment of the Subordinate Judge, and Dr. Ashutosh Mookerjee has taken three points on his behalf. He contends, in the first place, that the plaintiffs, who were admittedly the purchasers, not of the entire estate but only of a part thereof, were not entitled to maintain this action in respect of the lands of the *taluk* which the defendants failed to show had been in their possession by virtue of *shikmi haziran* rights from the time of the Permanent Settlement; secondly, that, upon the words of section 71 of the Assam Land and Revenue Regulation, the plaintiffs were not entitled to a decree in respect of the lands covered by plots Nos. 1 to 13, inasmuch as the right under which the defendants claim to hold them does not amount to an incumbrance created by any person other than the purchaser; and, thirdly, that the defendants had, at least, acquired an occupancy right in respect of these lands.

With reference to the first contention, it is to be observed that there is a great difference in the language of the Act in force in Bengal and the Assam Regulation. Chapter V of the Assam Land and Revenue Regulation (I of 1886) declares the joint and several liability of all persons in possession of an estate or any part thereof for land revenue. Section 65 provides that when there are several recorded proprietors of a permanently-settled estate, any one of them, whether he is [197] entitled to a share of the estate or to particular lands comprised therein, may, by a written application to the Deputy Commissioner specifying his share of the estate or the particular lands therein to which he is entitled, get his revenue apportioned. Section 68 declares what is to be done when an arrear has accrued, and section 70 proceeds to provide that, when an arrear has accrued in respect of a permanently-settled estate or of an estate in which the settlement-holder has a permanent heritable right of use and occupancy, the Deputy Commissioner may sell the estate by auction. Sub-section 2 of that section runs as follows: "If the arrear has accrued on a separate account opened under

section 65, only the shares or lands comprised in that account shall in the first place be put up to sale, and if the highest bid does not cover the arrear, the Deputy Commissioner shall stop the sale and direct that the entire estate shall be put up for sale at a future date, to be specified by him; and the entire estate shall be put up accordingly and sold." Sub-section (3) says: "No property shall be sold under this section for any arrear which may have become due in respect thereof while it was under the management of the Court of Wards." From sub-section (3) it would appear that the word 'property' was used intentionally to cover both the entire estate as well as the shares or lands in respect of which separate accounts had been assigned.

Section 71 provides that property sold under section 70 shall be sold free of all incumbrances previously created thereon by any person other than the purchaser. It will be noticed that, in Act XI of 1859, the word used is "estate." In section 71 of the Assam Regulation the words used are "property sold under section 70," and the property to which reference is made in section 70 includes both an estate as well as a share in respect of which revenue has been separately apportioned. In view, therefore, of the express term "property" used in section 71, we are unable to accede to the contention put forward by Dr. *Ashutosh Mookerjee* that the purchaser of a part of a permanently-settled estate is not entitled to the benefit of section 71. In this particular case, what seems to have happened is that revenue in respect of certain lands had been separately apportioned, arrears fell due in respect of the remaining portion of *taluk* Gour Hari Singh, [198] and the *taluk* minus those lands was put up to sale and purchased by the plaintiffs. Having regard to the terms of section 71, it seems to us that the view taken by the lower Court is correct, and that the plaintiffs are entitled to maintain this action.

We now come to the second contention, namely, that the right, under which the defendants hold the lands in respect of which their claim has been disallowed, does not come under the expression "incumbrances previously created thereon by any other person than the purchaser." This contention proceeds upon the difference in the language of section 37, Act XI of 1859, and of section 71, Regulation I of 1886. Section 37 of Act XI of 1859 says that "the purchaser of an entire estate, sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all incumbrances which may have been imposed upon it after the time of settlement." In section 71 of the Assam Regulation the words are "incumbrances previously created thereon." It is contended that as it has been found in this case the defendants had obtained possession of these extra lands over and above what they held from the time of the Permanent Settlement as their *shikmi haziran taluk*, by adverse possession against the owners of the *taluk*, it could not be said that it was an incumbrance created thereon. Now, in considering this matter, we have to keep in view the purpose of the provision that an auction-purchaser at a revenue sale shall get the estate free from incumbrances. The object as we understand it, is that he should get the estate in such a condition that he may be able to pay the Government revenue assessed thereon at the time of the settlement, and that no act on the part of the holders of the property or estate after the settlement by which the estate becomes deteriorated or rendered incapable of yielding the revenue fixed upon it at the time of the settlement, should be allowed to affect him. The words of Act XI of 1859 and of Regulation I of 1886 cannot be said to have different meanings. If we were to hold that the incumbrance which could be set aside under section 71 must be an incumbrance actively created by the previous holder, it would amount to this, that any acquiescence or laches, either

wilful or arising from pure negligence on [199] the part of the holder, by which the *taluk* or estate becomes incapable, in the hands of the purchaser, of yielding the Government revenue, would be outside the scope of this section. As at present advised, it seems to us that we cannot acquiesce in that view. We think that the conclusion of the Subordinate Judge was right and we must accordingly overrule this contention.

As regards the occupancy right claimed by the defendants, it is to be observed that this claim was never put forward in their written statement, nor, so far as we can gather, at any previous stage of this suit. They claimed to hold the lands covered by plots Nos. 1 to 13 as part and parcel of their *shikmi haziran taluk*, and not as cultivating *raiyyats*. It seems to us therefore that it would not be right to allow them to change their ground in this Court. Such a contention requires to be dealt with upon evidence, and it does not seem that there is any fact shown in the case which would enable us to come to the conclusion that the defendants hold or cultivate these lands as *raiyyats*. We accordingly dismiss the appeal with costs.

N. C.

Appeal dismissed.

NOTES.

[The word '*property*' in the Assam Land and Revenue Regulation, 1886, sec. 71, includes the share in an entire estate :—(1905) 3 C.L.J., 387.

Adverse possession is an encumbrance within sec. 70 :—(1914) 23 I. C., 119 : 20 C.L.J. 210.]

[26 Cal. 199]

The 29th July, 1898.

PRESENT :

MR. JUSTICE AMEER ALI AND MR. JUSTICE PRATT.

Guru Dass Shut.....Plaintiff

versus

Nand Kishore Pal and another.....Defendants.*

*Bengal Tenancy Act (VII of 1855), section 48, clause (a), sections 66 and 79—
Under-Raiyats—Permanent mokurari lease—Ejectment.*

Section 48, clause (a) of the Bengal Tenancy Act is retrospective.

Ram Kumar Jugi v. Jafar Ali Patwari †, approved of.

* Appeal from Appellate Decree No. 911 of 1897, against the decree of Babu Probode Chandra Dutta, Subordinate Judge of Tipperah, dated the 24th of February 1897, affirming the decree of Babu Tara Charan Sen, Munsif of Chandpur, dated the 31st of July 1896.

† PRESENT.

MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Ram Kumar Jugi.....Defendant

versus

Jafar Ali..Plaintiff.†

In this appeal the plaintiff (respondent) sued the defendant (appellant) for the rents of under-*raiyyati* holding upon a registered *kabuliat*, which was executed after the Bengal

† Appeal from Appellate Decree No. 508 of 1897, against the decree of Babu Srinath Pal, Subordinate Judge of Backergunge dated the 14th December 1896, modifying the decree of Babu Pankaja Kumar Chatterjee, Munsif of that District, dated the 2nd March 1896.

[200] Where a suit is brought before the expiry of the Bengali year in respect of the arrears of rent for that year, the landlord is not entitled to eject the tenant under section 66 of the Bengal Tenancy Act.

THE facts of this case appear sufficiently from the judgment.

Babu Basanta Kumar Bose for the Appellant.

Moulvie Serajul Islam for the Respondents.

The judgment of the High Court (Ameer Ali and Pratt, JJ.) was as follows:—

This appeal arises out of a suit brought by the plaintiff for arrears of rent for the years 1299-1302, and the facts upon which he bases his claim are shortly these: On the 20th Kartick 1291, the plaintiff acquired by purchase a *raiya* holding bearing the [201] annual rent of Rs. 14-1. On the same date, the plaintiff leased out the holding he had purchased to defendant No. 1 who executed in his favour a *kabuliat* which is on the record of this suit. Some four or five years after the execution of the *kabuliat*, the defendant No. 1 sold his under-*raiya* holding to defendant No. 2, and the plaintiff states that he has accepted the defendant No. 2 as his tenant, but he sues both the defendants for the rent of the years 1299-1302.

Tenancy Act was passed, but before it became law or came into operation. The Munsif held that section 48 of the Bengal Tenancy Act had a retrospective effect, but on appeal the Subordinate Judge held that section 48 of the Bengal Tenancy Act had not a retrospective effect, and decreed the appeal. From this judgment the defendant appealed to the High Court.

Moulvie Zahadur Rahim Zahid for the Appellant.

No one appeared for the Respondent.

The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows:—

Banerjee, J.—This appeal arises out of a suit for arrears of rent claimed by the plaintiff as a *raiya* against the defendant who is a *dar-raiyat* or under-*raiya* under the terms of a written lease, and the only question that arises for consideration is, whether section 48 of the Bengal Tenancy Act limits the claim in this suit.

The first Court held that the section applied to the case, and it accordingly gave the plaintiff a decree for an amount less than that stipulated for in the lease, and being within the limits prescribed by section 48. On appeal by the plaintiff, the Lower Appellate Court has reversed that decree and given the plaintiff a decree in full, on the ground that section 48 of the Bengal Tenancy Act was not applicable to this lease, the lease having been granted previous to the date on which the Bengal Tenancy Act came into operation, though subsequent to the date on which the Act was passed.

In second appeal it is contended, for the defendant, that the Lower Appellate Court was wrong in holding that section 48 does not govern the case; and in our opinion this contention is correct. Section 48 says: "The landlord of an under-*raiya* holding at a money rent shall not be entitled to recover rent exceeding the rent which he himself pays by more than the following percentage of the same, namely, when the rent payable by the under-*raiya* is payable under a registered lease or agreement, fifty per cent."

The suit was brought after the Bengal Tenancy Act had come into operation, and the plaintiff seeks to recover rent from his under-*raiya*. Can he do so, except within the limits prescribed by section 48? We think that the question must be answered in the negative. The objection urged on behalf of the defendant, appellant, does not seek to give to the section any retrospective operation beyond what its language expressly provides for. It only seeks to confine the plaintiff's right to recover rent by suit within the limits within which alone the same can be recovered under section 48 in a suit brought after that section came into operation. We may add that the language of section 178, sub-section 3, clause (e), gives support to the view we take.

As for the cases cited by the Lower Appellate Court in support of its decision, namely, *Profullah Chunder Bose v. Samiruddin Mondul*, (1895) I. L. R., 22 Cal., 337, and *Tejendra Narain Singh v. Bakai Singh*, (1895) I. L. R., 22 Cal., 658, they relate to provisions of the Bengal Tenancy Act, the language of which is very different from that of section 48.

For these reasons we think that the decree of the Court of Appeal below is wrong, and it must be set aside, and that of the first Court restored, with costs in this Court and in the Court below.

The defendants took several objections to the plaintiff's suit and the Munsif framed issues covering those objections. The third issue practically involves the question which has been argued in this appeal, namely, whether the rent payable to [202] the plaintiff by the defendants or either of them is liable to be reduced under section 48, clause (a) of the Bengal Tenancy Act. The Munsif found that the defendant No. 1 was not liable, but that defendant No. 2, having been accepted by the plaintiff as his tenant, was liable for the rent of the under-*raiyati* holding. He also found that the plaintiff was a *raiyat* and defendant No. 2 an *ausut-raiyat*, in other words an under-*raiyat* under the plaintiff, and that the entire *raiyati* of the plaintiff was covered by the defendants' *ausut-raiyati*. It was admitted before the Munsif that the rent of the plaintiff's *raiyati* was only Rs. 14-1. And that officer being of opinion that under section 48, clause (a) of the Bengal Tenancy Act, the defendants' rent could not exceed 50 per cent. of the plaintiff's rent, he made a decree in favour of the plaintiff at Rs. 21-1-6 per year.

The plaintiff appealed to the Subordinate Judge, and the four points raised before him are thus stated in the judgment of the learned Subordinate Judge: *First*, whether plaintiff is entitled to get rent for the period claimed at the rate of Rs. 37-1 per year; *second*, whether the lower Court is wrong in awarding damages instead of the interest claimed; *third*, whether the defendants can be ejected from the holding in arrears; *fourth*, whether the lower Court is wrong in not decreeing the suit against both defendants Nos. 1 and 2?

In this appeal we are only concerned with points one and three. Before the learned Subordinate Judge it was admitted that the plaintiff's was a *raiyati* holding, and that defendant No. 2 held under him as an under-*raiyat*. The learned Subordinate Judge states that in express terms, and he was of opinion that section 48, clause (a) was retrospective in its effect, and that the plaintiff was not entitled to recover more than 50 per cent. in excess of the rent payable by himself to the zemindar. He also held that section 66 of the Tenancy Act requires for the purpose of ejectment that the arrears of rent should remain due at the end of the Bengali year, and as in the present case the plaintiff did not wait till the end of the year 1302 to institute his suit for the arrears of that year, the defendant could not be ejected from his holding for those arrears. He accordingly [203] upheld the decree of the first Court, giving to the plaintiff what had been found by the Munsif to be properly recoverable by him.

In second appeal to this Court two points have been raised by the learned pleader for the plaintiff-appellant. In the first place it is contended that section 48 (a) is not retrospective in its effect. This question came up before this Court in another case—*Ram Kumar Jugt v Jafar Ali Patwari*—decided by BANERJEE and STEVENS, JJ., on the 14th July 1898, (*ante*, p. 199 *note*). There the learned Judges held that section 48, clause (a) was retrospective and operated as a bar to a *raiyat* recovering from his under-*raiyat* rent more than 50 per cent. in excess of the rent payable by him to his own landlord. Suffice it to say that we are entirely in accord with that judgment, and we, therefore, overrule this objection taken by the appellant to the judgment of the Court below.

It was next contended that this was a permanent *mokurari* lease coming under section 179 of the Bengal Tenancy Act. In our opinion this contention is wholly untenable. In the first place, the plaintiff is not the holder of a permanent tenure. He never alleged himself to be such. His suit is founded upon the allegation that he was only a *raiyat*, and his holding was a *raiyati*

holding. Nor is the defendant the holder of a permanent *mokurari* lease, for throughout the proceedings he has been mentioned as being only an under-*raiyat*.

It was also argued that under section 66 of the Tenancy Act, the plaintiff was entitled to eject the defendant, inasmuch as the rent of the previous years had not been paid. We agree with the Subordinate Judge that as the suit was brought before the expiry of the year 1302 in respect of the arrears for that year, the plaintiff is not entitled to eject the defendant from his holding under the provisions of section 66. On these grounds we think that the careful and well-considered judgment of the Lower Appellate Court should be upheld, and this appeal dismissed with costs.

N. C.

Appeal dismissed.

NOTES.

[Sec. 48, Bengal Tenancy Act, 1885, is retrospective :—(1900) 28 Cal., 166 ; (1900) 2 C.L.J., 540.]

[204] ORIGINAL CIVIL.

The 22nd, 23rd, 24th, 27th, 28th & 29th June, and 13th July, 1898.

PRESENT :

MR. JUSTICE P. O'KINEALY.

Rungo Lall Lohea and others

versus

Wilson and others.*

Landlord and tenant—Nature of Tenancy—Lease for construction of permanent works—Permanent Tenure—Conduct of lessor—Suit for rent—Alternative claim for compensation for use and occupation of land—Suit for land—Jurisdiction of High Court—Limitation—Acknowledgment of debt—Limitation Act (XV of 1877), section 19, and Schedule II, Art. 110.

The defendants and their predecessors in title held of the plaintiffs and their predecessors certain land under a *pottah*, which, though not expressly stated to grant a permanent lease, was granted for the purpose of constructing "a brick-built dock, buildings, &c., and workshops." The works were constructed; and during a period of 42 years the interest of the lessees was from time to time transferred, without any conduct on the part of the lessors or their successors indicating that they regarded the interest of the lessees as not permanent. Some years after the construction of the dock it ceased to be used as such.

Held, that the tenure created by the *pottah* was of a permanent nature.

A suit by a landlord against a tenant for rent at a rate agreed upon for one period, and for rent on the basis of use and occupation for a subsequent period is not a suit for land; and therefore the High Court may have jurisdiction to try such a suit even when the land is situate outside the local limits of its jurisdiction.

* The plaintiffs sued the defendants for arrears of rent from the 4th December 1899 to the 31st July 1894, relying upon the following letter as an acknowledgment sufficient to take

* Original Civil Suit No. 531 of 1894.

their demand out of the Limitation Act: "As we have informed your client, we are quite willing to pay him the rent due under our *mourasi pottah* if he can show a title to give us a good receipt for it that will satisfy our lawyers. If he is in the same position that his father was up to the time of his death, unable to produce a perfect title, we are still willing to pay him the rent on his giving us a substantial indemnity similar to that which we had from his father."

Held, that this was a sufficient acknowledgment within section 19 of the Limitation Act.

Secretary of State for India v. Luchmeswar Singh, (1888) I. L. R., 16 Cal., 223: L. R., 16 I. A., 6, distinguished.

[205] THE following are the main facts of this case:—

The defendants, Messrs. Anderson, Wright and Co. (represented by the defendant Wilson) and their predecessors were for many years tenants to the plaintiffs and their predecessors in title of certain premises known as No. 7, Haripore Lane, Sulkea, in the suburbs of Howrah, at a monthly rent of Rs. 60-10-9 until the end of December 1889. The plaintiffs in this suit alleged that they duly determined the tenancy by a notice in writing on the 4th December 1889; but those defendants, claiming that they held a permanent lease, and that their rent could not be enhanced, continued in occupation of the said premises. The defendants had constructed a dock and other permanent works on the land in their occupation, under the terms of the *pottah* granted to them.

On the 31st July 1894 the plaintiffs brought this suit, claiming rent for the month of December 1889 at the rate of Rs. 60-10-9, and for the subsequent period to the end of June 1894 at the rate of Rs. 150 a month as a reasonable rent for the defendants' use and occupation of the said premises. A portion of the claim would, therefore, be barred by limitation unless the Court should hold that a sufficient acknowledgment of liability was contained in a letter, dated 5th November 1891, written by the defendants to the plaintiffs' solicitor, containing the following terms:—

"As we have informed your client, we are quite willing to pay him the rent under our *mourasi pottah*, if he can show a title to give us a good receipt for it that will satisfy our lawyers. If he is in the same position that his father was up to the time of his death, unable to produce a perfect title, we are still willing to pay him the rent on his giving us a substantial indemnity similar to that which we had from his father."

In June 1893 the defendants' attorney satisfied himself that there was no flaw in the plaintiffs' title, and offered to pay the rent from December 1889 if the plaintiffs would sign a receipt admitting that the defendants held a *mourasi pottah*; but this the plaintiffs refused to do. The defendants on their part refused to give the plaintiffs inspection of their *pottah*.

[206] On the 24th January 1898, Rajah Sew Bux Bogla was added as a defendant on the allegation that he had purchased the premises from the plaintiffs at a Registrar's sale held on the 7th August 1897.

When the case came on for hearing, the plaintiffs applied for and obtained leave to amend the prayer of the plaint by claiming in the alternative a decree for the rent from the beginning of 1890 to the end of June 1894 at the rate of Rs. 60-10-9 per month. The facts will be found stated at length in the judgment of the Court.

Mr. Sinha (with him Mr. R. N. Mittra) for the Plaintiffs.

Mr. Hill and Mr. J. G. Woodroffe for the Defendants, Messrs. Anderson, Wright and Co.

Mr. Pugh and Mr. Chuckerbutty for the Defendant Rajah Sew Bux Bogla.

Mr. *Sinha* having opened the case,—

Mr. *Hall* objected that the Court had no jurisdiction to try the suit, inasmuch as it was, in effect, a suit for land situated beyond the territorial limits of the Court's jurisdiction. He argued as follows:—

If the plaintiff sues for damages for the use and occupation of the land, the question of the title arises; because one can only claim compensation for use and occupation on the basis of a claim that the land is his. This, therefore, is a suit for land; and, if so, the Court has no jurisdiction, and the plaintiff gets nothing. [O'KINEALY, J.—At least he gets Rs. 60-10-9 for which he sues.] That is doubtful. Can he, on a suit for compensation for use and occupation, get a decree for rent? A suit for rent is a suit on a contract; whereas a suit for compensation for use and occupation is a suit in tort, on the ground that the landlord has been deprived of the land to which he is entitled. A claim for rent of land cannot be changed into one for compensation for use and occupation; and we submit that a claim based on use and occupation cannot be changed into one for rent.

Next, the claim is barred by limitation, unless the plaintiff can prove an acknowledgment within section 19 of the [207] Limitation Act. True, the defendants offered to pay the rent; but on the condition that the plaintiff showed a good title to give a sufficient receipt. That was merely a statement that they would pay the rent upon the happening of an uncertain event, and was not an acknowledgment of a debt, but a mere allegation of an incident out of which a debt may arise, *Young v. Mangalapilly Ramayya*, (1865) 3 Mad., H. C., 308. It was not an acknowledgment that the rent was due. It does not come within section 19 of the Limitation Act, for it is not in any sense an acknowledgment of any such liability as is set forth in the plaint. It was simply a promise to make a payment in a certain contingency, not an admission such as is contemplated by section 19. The claim is, therefore, barred as to a large part of it.

As regards the nature of the holding, these defendants claim to have a permanent lease. There are numerous decisions of this Court showing from what data a permanent tenure may be inferred. Where land is leased for the construction of permanent works, it is a fair inference that the lease was intended to be a permanent one.

Mr. *Sinha* for the plaintiffs.—A conditional promise to pay does not prevent the promise from being an acknowledgment within section 19 of the Limitation Act. An acknowledgment need not specify the amount of the debt acknowledged; indeed it need not specify anything at all, and need not be made to the person to whom liability is acknowledged, and therein it differs from a promise to pay. The defendants' letter is clearly an admission of their liability to pay rent, or compensation for use and occupation, to the person entitled to it. They say: "We are quite willing to pay the rent due under our *mourasi pottah*"; but that is their statement of how the liability arises, the admission of liability is there just the same. The admission is clear; the only question is, to whom are they to pay the rent? And it may reasonably be held that there is an admission of liability to pay compensation for use and occupation. The case of *Young v. Mangalapilly Ramayya*, (1865) 3 Mad. H. C., 308, does not apply; because there the plaintiffs had to do something to create a liability, whereas, in the present case, the existence of the [208] liability is admitted; but the defendants want proof of the plaintiffs' title. In former legislation as to limitation the word "promise" was used; in the present Act the word "acknowledgment,"—a much wider term—is substituted. The English doctrine that an acknowledgment, in order to be effectual, must amount to a fresh

promise to pay has never been adopted by the Indian Legislature. And if the debtor accompanies his acknowledgment with a promise to pay upon a condition, it is not necessary to prove fulfilment of that condition—*Mohesh Lal v. Busunt Kumaree*, (1880) I. L. R., 6 Cal., 340 (353).

As to the notice to quit, we rely upon section 106 of the Transfer of Property Act. This is not a lease for agricultural or manufacturing purposes, and a lease for any other purpose is deemed to be a lease from month to month; this tenancy was, therefore, terminable on fifteen days' notice. And the words of the notice were sufficient for the purpose—*Ahearn v. Bellman*, (1879) L. R., 4 Ex. D., 201.

The defendants, therefore, by holding over, impliedly agreed to pay the enhanced rent—*Janoo Mundur v. Brijoo Singh*, (1874) 22 W. R., 548.

[Mr. Sinha on a subsequent day abandoned his position as regards the sufficiency of the notice.]

Mr. Pugh, on behalf of the defendant Raja Sew Bux Bogla, contended that this suit was a suit for land, and that the Court had no jurisdiction to try it. The suit is for rent up to a certain date; the plaintiff says that as he gave due notice to quit, he is entitled to compensation for use and occupation of the land. Now, however, the contention as to the sufficiency of the notice has been abandoned. There is therefore an end to the suit. [O'KINEALY, J.—There is no need to go into the question of notice if I find for the other defendants on the title.] But if upon the question of title the Court has no jurisdiction, the parties would not be bound by its decision. [O'KINEALY, J.—That is, if this is a suit for land.] Yes, and undoubtedly the claim for Rs. 60-10-9 is a claim for rent. Apart from the question of notice, I submit the Court cannot dispose of the question of title between the plaintiffs and the [209] defendants, Anderson, Wright & Co. It cannot, under colour of decreeing damages, decide the question of title to land outside the local limits of its jurisdiction. The question of title is purely an issue between the co-defendants; and this defendant is here simply to see that no decree is passed which would confirm as against him a permanent tenure in favour of the other defendants. [Mr. Sinha: If Mr. Pugh now goes into his case as to this, the plaintiffs ought not to be kept here; or, if so, I shall ask for the costs subsequent to this day. O'KINEALY, J.—I cannot decide anything on that point yet; nor can I decide whether I have jurisdiction until I have heard Mr. Pugh.] A purchaser would no doubt have notice of the ordinary incidents of the tenure. But in this case it is not an incident; because a permanent lease would be more in the nature of an alienation, and this defendant could hardly be affected with notice of that. He is not bound by any equities that may have arisen between the other defendants and the plaintiffs; that is all that he is concerned about.

Further, the *pottah* does not cover the whole of the premises in suit; but only two annas of it. The other defendants claim through Newaz Bibee, the widow of Sheik Imam Bux. According to the lady's own statement, what she took on the death of her husband was only a two-annas share of the land,—which, indeed, was all that she could take according to Mahomedan law. So that, as regards the other 14 annas of the land, the defendants were, at best, but monthly tenants. Moreover, the lease was granted to them only for the purpose of constructing a dock and works connected with it. Many years ago, the defendants ceased to use the dock as such, and filled up a part of it. Therefore the lease has determined—*Secretary of State for India v. Luchmeswar Singh*, (1888) I. L. R., 16 Cal., 223 · L. R., 16 I. A., 6.

[A discussion arose as to the costs of the suit.]

Mr. Hill.—The plaintiffs could easily have ascertained that the defendants Anderson, Wright & Co. held this land as building land, and that it had passed from hand to hand under a number of recent transactions. They have not made any such inquiries and are [210] not entitled to the costs. This was a suit for rent to which they are not entitled. It might have been different if they had claimed the original rent and not an enhanced one. They denied our *mokurari* title; and now that we have proved it as against them, we ought to have our costs. [O'KINEALY, J.—They may succeed on their amendment, and it would be hard to give costs against them.] That was not the case we came to meet.

Mr. Sinha.—The defendants are not entitled to the costs. The issues they raised were (1) as to the jurisdiction; (2) as to whether the plaintiffs were entitled to the sums claimed or any portion thereof. The written statement was filed three years after their attorney had satisfied himself of the plaintiffs' right to receive the rent; and yet in it they denied the plaintiffs' right to any portion of the rent claimed. Further they say they will only pay Rs. 728 per annum subject to the law of limitation, and if this Court shall hold that the plaintiffs are entitled thereto. They have all along refused to give inspection of their *pottah* and have driven the plaintiffs into Court. They have never paid any sum into Court, and the offer they made was no offer at all. In England, a tender without payment into Court is no defence,—Order XXII, rule 3.

C. A. V.

The judgment of the Court was as follows:—

O'Kinealy, J.—In this case the plaintiffs claim to have been the owners of the premises No. 7, Haripore Lane, in Sulkea, in the suburbs of Howrah. They alleged that the defendants Messrs. Anderson, Wright & Co. had been tenants under them in occupation of those premises at a monthly rent of Rs. 60-10-9 down to the end of the month of December 1889; that the plaintiffs by a notice to quit, dated the 4th of December 1889, determined the tenancy then existing between them and the defendants at the end of that month; but that the defendants nevertheless continued in the occupation of the premises down to the time of the institution of this suit, that is to say, the 31st of July 1894. The plaintiffs claimed Rs. 150 per month for use and occupation of the premises from the end of December 1889 to the filing of the plaint.

The plaintiff Rungo Lall Lohea is one of four brothers, the [211] others being Nahrnull, Sew Bux and Bhaniram, who constituted a joint Hindu family, and it appears that they carried on business in Calcutta under the style of Nahrnull Bhaniram, and while carrying on business under that name they purchased the premises No. 7, Haripore Lane. The other plaintiffs are the representatives of the three brothers of Rungo Lall Lohea.

The plaintiffs state that the defendants had paid the rent of the premises for the period ending with the month of November 1889 only, and they claim to recover the rent for the month of December 1889 at the rate of Rs. 60-10-9 per month and the rent for the subsequent months down to the end of June 1894 at the rate of Rs. 150 a month, which rent was claimed by them as a fair and reasonable rent for the defendants' use and occupation of the premises during that period.

It is apparent from the above statement that a portion of the plaintiffs' claim would under ordinary circumstances be barred by the law of limitation, as the suit was not instituted till the 31st of July 1894. The plaintiffs, to obviate this difficulty, relied upon a letter written by the defendants to the plaintiffs' attorney on the 5th of November 1891, to the terms of which I shall hereafter refer.

With regard to the claim put forward by the defendants the plaintiffs say, in the fifth paragraph of the plaint, that the defendants objected to the notice claiming,—to use the words of the plaint,—“that the rent payable in respect of the said lands could not be enhanced by reason of some rights which they,” the defendants, “said they possessed under an alleged deed which they stated to be a perpetual *pottah*, but though endeavours have been made by and on behalf of the plaintiffs to ascertain from the defendants the nature of the said rights claimed, and to obtain an inspection of the said document, the defendants have persistently refused to give any such information or any such inspection.

The defendants in their written statement took a variety of objections: *firstly*, they said this Court had no jurisdiction to try this suit; *secondly*, they did not admit the title upon which the plaintiffs relied to maintain this suit; *thirdly*, they claim to hold [212] the premises under a *mourasi potta* or permanent lease granted in the year 1847 to their predecessor in title, and they allege in the fifth paragraph of their written statement that they had paid the rent under this *pottah* down to the end of November 1889, but that from the month of September 1881 they had paid the rent “to a person as they believe named Nahrnull Bhaniram, but they state that they did so without admitting the title of the said Nahrnull Bhaniram to the said premises and only upon an indemnity granted to them by one Sew Bux, a broker in their employ, inasmuch as the said Nahrnull Bhaniram was unable or unwilling to satisfy them that he had a complete or valid title to the said premises.”

In the 6th paragraph of their written statement the defendants say “that they had no personal knowledge as to whether the said Nahrnull Bhaniram was in fact a person as they believe or a firm as alleged in the 2nd paragraph of the plaint, but in any case they do not admit that if a firm it was composed of the members therein mentioned, or that the persons on whose behalf the plaintiffs purport to sue are the legal representatives of the members of the said firm,” that is to say, the defendants in this paragraph again raise the question of the plaintiffs’ title to maintain the suit which they had previously done in the 3rd paragraph of their written statement.

The defendants admitted the receipt of the notice to quit relied upon by the plaintiffs, but they did not admit that it emanated from the plaintiffs. They say they have always been ready and willing to pay rent at the rate of Rs. 60-10-9 per month, but they do not say to whom; they allege that this rent, though tendered, was refused, they do not say by whom; and they also say in the 9th paragraph of the written statement that “they are willing to pay the said rent at the rate of Rs. 728-2-10 per annum (subject to the law of limitation) if this Hon’ble Court should hold that the plaintiffs are entitled thereto;” that is to say, the defendants avow themselves willing to satisfy the decree of this Court in case they are not successful in preventing the plaintiffs from obtaining a decree against them.

In the 10th paragraph of their written statement the [213] defendants say this: “The defendants deny that they have refused to disclose to the plaintiffs the nature of the rights claimed by the defendants under the *pottah* above mentioned or that they have declined to allow inspection of the said *pottah* as alleged.” It will be seen from the evidence, which I shall deal with hereafter, that the defendants made no attempt to support this paragraph of their written statement. Indeed, that evidence shows that the statements in this paragraph are not correct.

This written statement was filed on the 13th of June 1896, nearly two years after the filing of the plaint, and the suit remained as then constituted.

until the 24th of January 1898, when by an order of this Court Rajah Sew Bux Bogla was added as a defendant, he alleging himself to be the purchaser of the premises in question from the plaintiffs at a sale held by the Registrar of this Court on the 7th of August 1897.

Hitherto in stating the questions, which have arisen between the parties, I have treated the case as if Messrs. Anderson, Wright & Co. were the sole defendants, and I shall continue to do so until I come to deal specifically with the claim put forward by Rajah Sew Bux Bogla. It is convenient in this case that I should in the first instance determine the questions which arise between the plaintiffs and the original defendants in the suit.

When the case came on for hearing I gave the plaintiffs leave to amend the prayer of the plaint by claiming in the alternative a decree for the rent from the beginning of the year 1880 to the end of June 1894 at the rate of Rs. 60-10-9 per month. In this position of matters the questions, which arise between the plaintiffs and the defendants, [leaving aside for the moment the question of jurisdiction which I shall deal with in considering the case of Rajah Sew Bux Bogla] are these:—

1st.—Did the relation of landlord and tenant exist between the plaintiffs and the defendants?

2nd.—If so, what was the nature of the tenants' interest in the land. That is to say, was it a monthly tenancy as contended for by the plaintiffs, or a perpetual lease as contended for by the defendants?

[214] *3rd.*—If the tenancy were a monthly tenancy was that tenancy put an end to by the notice to quit, dated the 4th of December 1889?

4th.—Is the plaintiffs' claim under the plaint, as amended, or any portion thereof, barred by the law of limitation?

Upon the first question Byjnath Lohea, one of the plaintiffs, was called. He is the adopted son of Nahrnull, and from his evidence it appears that Nahrnull and his three brothers Rungo Lall, Bhaniram, and Sew Bux formed a joint Mitakshara family. They carried on business in Calcutta under the name of Nahrnull Bhaniram.

[His Lordship proceeded to discuss the evidence bearing on the first issue, and stated his reasons for coming to the conclusion on the facts that the relation of landlord and tenant did exist between the parties in 1889. He then went on to say:—]

I am of opinion therefore that the plaintiffs have shown that the relation of landlord and tenant did exist between them and the plaintiffs in 1889, or at least they have shown sufficient to entitle them to call upon the defendants to prove that such a relation did not exist between them, and this the defendants have not done.

The next question which I have to consider is what was the nature of the tenancy between the plaintiffs and the defendants, and upon this question I have come to the conclusion that it was a permanent tenure not subject to be determined by the notice of the 4th of December 1889, assuming that to be a valid notice in other respects.

The defendants have produced a document, dated 27th of Assin 1254, corresponding with the 12th of October 1847. This purports to be a *pottah* of ten *bighas* of land in Sulkea granted by Mussamut Newaz Bibee to James Cockrell, Thomas Gladstone, Alexander Robert, and Pitamber Banerjee. The defendants show by a series of title deeds that the premises covered by the *pottah* were mortgaged and conveyed from time to time by the lessees for the

time being, and these deeds show that about the year 1861 those premises were known by the name of the Albion Docks and conveyed as such. The defendants also show that the premises [215] covered by the *pottah* were conveyed to the West's Patent Press Company by a conveyance of the 22nd of July 1876. The defendants were the managers of that Company, and Mr. Anderson proves that under that conveyance he got possession of the premises in question in this suit, and he also swears that these same premises were known in former days as the Albion Docks. There is, therefore, no doubt whatever that the lands covered by the *pottah* are the lands in question in this suit, and the next question I have to determine is, what interest does the *pottah* purport to convey from the lessor to the lessees. The *pottah* is expressed to be granted for the purpose of the lessees constructing "a brick-built dock, buildings, &c., and workshops," and after stating the boundaries of the land goes on to say: "You shall, without excuse, pay the rent hereof into my *sarkar* year by year at the rate of Rs. 90 (ninety rupees) per *bigha* per annum (amounting to) the sum of company's 900 (nine hundred rupees) for 10 *bighas* by instalments according to the details of instalments. If there be default in (payment of) *kist*, you shall pay interest according to law. Further if there be (any) alluvial accretion of land over and above the land aforesaid in future, you will duly make (arrangement) with regard to the same separately. To this effect, I grant this lease in writing after taking (a) *kabuliat*." The details of instalments show that the rent was payable yearly in six instalments of Rs. 150 each.

The conveyances and mortgages, which were put in evidence by the plaintiffs, show that the dock and other permanent buildings were erected on the land, and that the land was dealt with by the original lessees and their successors as if their interest therein were a permanent one. Mr. Anderson states the value of the pucca buildings on the land when he took possession of the premises in 1873 to be about a lakh of rupees. There is no direct evidence of the cost of building the dock, but there is no doubt it must have been very large. In the year 1870 there was a suit for rent instituted by the heirs of Newaz Bibee against the then holders of the *pottah*, and the occupiers of the premises. In this suit the original *kabuliat* was filed by the plaintiffs, and from the record it appears that after the *pottah* had been granted a decree was obtained, apparently by the owner of some land adjacent [216] to the premises covered by the *pottah* for possession of a portion of those premises, and in consequence of that decree and by an arrangement between the lessor and the lessees the yearly rent of Rs. 900 payable under the *pottah* was reduced to Rs. 728-10-9, and this reduced rent continued to be paid to Newaz Bibee and after her death to her son-in-law and her grandsons Sadut Ally and Futteh Hossain, and subsequently to these grandsons alone down to the year 1880 by the lessees for the time being. During the whole of this time there is no trace of any conduct or any assertion on the part of the lessors for the time being inconsistent with the fact of the *pottah* being a permanent one, which the lessees show from their dealings with it they considered it to be. In fact, the arrangement come to between the lessors and the lessees in 1861 for the reduction of the rent owing to the loss of a portion of the land would rather show that the lessors at that time did not consider they could eject the lessees by means of a notice to quit. If such an idea had entered their minds, it is extremely unlikely that they would agree to any reduction. We have therefore a lease of this land for the purpose of erecting structures of a permanent and costly character thereon. This of itself would, according to the decisions of this Court, be sufficient to stamp this lease as a permanent lease. But we have more than that here: we have a uniform payment of rent based on the *pottah*

for a period of over forty-two years, and transfers of the lessees' interest to various persons within that period, while no conduct or assertion of the lessors during that period can be pointed to as indicating that they looked upon the lease as not a permanent one. I do not think the form of the receipts can be taken as such an indication. It is true that in the receipts of 1874, 1875, 1876, the names of the original tenants appear, and there is nothing to indicate that the tenancy is permanent, but there is a distinct admission in each of them of the transfer by purchase to West's Patent Press Co., or to the defendants Anderson, Wright and Co. The receipts given by Nahrmull Bhaniram seem to me to carry the matter no further. I have no doubt, therefore, that the tenancy from its inception was and was intended to be a permanent one, and that the plaintiffs could not determine it by a notice to quit.

[217] I am also of opinion that even if the tenancy were only a monthly tenancy, the notice given by the letter of the 4th of December 1889 was not sufficient to determine such a tenancy. The result, therefore, is that the plaintiffs are not entitled to a decree for anything except the rent from the month of November 1889 down to the filing of the plaint at the rate of Rs. 60-10-9 per month, and I think they are entitled to that, as the defendant's letter of the 5th of November 1891 is sufficient to prevent any portion of this claim being barred by the law of limitation.

The next question is as to the costs of this suit. The defendants did not admit the plaintiffs' title to the rent from November 1889. They did not agree to pay the rent to the plaintiffs unless the latter would admit their *pottah* to be a *mourasi mokurari pottah* at a time when the plaintiffs had not had inspection of that *pottah*. It is true that the plaintiffs made no claim for the rent from the beginning of the year 1890 at the rate of Rs. 60-10-9 until this case came on for hearing, but this part of the claim stands in the same position as the claim for the rent of December 1889, to which the defendants, in their written statement, do not admit the plaintiffs are entitled. That written statement is not a very candid document, and I do not think the defendants were justified in taking up the position which they did. I shall therefore give the plaintiffs a decree for the costs of this suit up to and including the first day's hearing from the defendants Messrs. Anderson, Wright & Company. I make no order as regards the costs of the remaining days of the hearing, except the costs of the last day, which I shall deal with hereafter.

I have now to consider the case with reference to the claim of Rajah Sew Bux Bogla. He claims to be the owner of the premises, and he makes out his title in this way.

He has produced a certificate of sale, dated the 17th of March 1893, which shows that Rungo Lall Lohea on the 17th of April 1887, purchased at a sale in execution of a decree obtained by him against Sadut Ally and Futtch Hossain (passed in Original Suit No. 59 of 1880 in the Court of the Subordinate Judge of Hooghly) for a sum of Rs. 850, a 2 annas share in [218] five parcels of land, one of which is stated to be the premises in question.

He has also produced a certificate of sale, dated the 10th of June 1880, which shows that Jogeeram Agurwalla purchased at a sale in execution of a decree obtained by Annoda Prosad Chowdhry and others against Sadut Ally and Futtch Hossain (passed in Original Suit No. 59 of 1880 in the Court of the Subordinate Judge of Hooghly) for a sum of Rs. 31,800, a 14 annas share in three parcels of land, one of which is alleged to be the premises in question. This 14 annas share was afterwards purchased by Nahrmull Bhaniram in 1881.

It is in this way, according to Rajah Sew Bux Bogla, that the premises in question came into the possession of the plaintiff family.

He has also produced a certificate of sale, dated the 20th September 1897, which shows that Rajah Sew Bux Bogla purchased at a sale held by the Registrar of this Court under a decree obtained by Pokur Mull and others against the plaintiffs (passed in Suit No. 414 of 1894) for a sum of Rs. 24,000 two parcels of land one of which is alleged to be the premises in question.

He thus claims to be the owner of these premises, and he was made a party defendant in this suit at his own instance in order to see that his interest should not be prejudiced by any collusive proceeding on the part of the original parties to the suit.

He contended, as did the original defendants, that this was a suit for land, and that I had no jurisdiction to entertain it on that ground. But it seems to me that where, in a suit by a landlord against his tenant for rent at a rate agreed upon for one period and for rent on the basis of use and occupation for a subsequent period, it becomes necessary to determine what the nature of the tenancy was, I think that that fact does not make the suit a suit for land. There is no relief claimed in respect of the land, nor is it sought to deal with it in any way whatever, and I think the contention of the defendants involves what appears to me to be an undue extension of the phrase "a suit for land" as used in [219] clause 12 of the Letters Patent, see *Juggernaut Doss v. Brynath Doss*, (1878) I.L.R., 4 Cal., 322, and *Land Mortgage Bank v. Sudurudeen Ahmed*, (1892) I. L. R., 19 Cal., 358.

It was also contended on behalf of Rajah Sew Bux Bogla that the lease was granted for the purpose of building a dock only, and that the evidence shows that the defendants filled up the greater portion of the dock and have been using the unfilled portion merely as a water tank. Under these circumstances he urged that the lease had determined, and he cited in support of this contention the case of the *Secretary of State for India v. Luchmeswar Singh*, (1888) I. L. R., 16 Cal., 223: L. R., 16 I. A., 6. In that case the Maharajah of Durbhanga brought a suit against the Government to recover possession of lands which had been in their possession from the year 1798. The defendants were admittedly tenants of the plaintiff, and it therefore lay upon them to show that their tenancy was still existing at the institution of the suit, or in other words that it was a permanent tenancy. There was no written lease, nor any evidence as to what were the terms which were agreed upon at the beginning of the tenancy, and all that the Government could rely upon to support their claim to a permanent tenancy was the fact that the rent was uniform throughout the whole period of their possession. The Privy Council held that that fact was of no weight under the circumstances of that case and dismissed the appeal. In the course of their judgment their Lordships say this: "But even if the *onus probandi* did not lie so clearly on the defendants, their Lordships think that the reasonable explanation has been given by the Courts below, and that there probably was some understanding, which might have amounted to an agreement, that the Government should have this land for the purposes of a stud, not that they should have it for ordinary agricultural or commercial purposes, to make what money they could of it. Thus the moment it ceased to be occupied for the purposes of a stud, the rights of the landlord would revert, and it was he, and not the Government, who would have the benefit of the increased value the land."

[220] Now, in the *pottah* of 1847, there is nothing to indicate that the duration of the lease is to be commensurate with the use of the proposed dock.

It appears to me the land was given to the lessees for commercial purposes "to make what money they could out of it," to use the words of the Privy Council, and I therefore think the case cited does not govern the present one.

It was stated on behalf of Rajah Sew Bux Bogla that the land belonged to Newaz Bibee's husband: that he died leaving her and one daughter surviving; and that this daughter married Hossain Ali, and by him had two sons, Sadut Ally and Futteh Hossain. Upon this state of facts Mr. Pugh contended that Newaz Bibee could only grant a 2 annas share in the land, and that therefore the *pottah* of the defendants only covered a 2 annas share of the premises in question, and that therefore the defendants were at most only temporary tenants of the other 14 annas share. No proof has been given of the facts stated, but assuming them to be correct I do not think the conclusions sought to be drawn from them are sound. The *pottah* purports to be a *pottah* of the whole 16 annas interest in the land. The agreement for the reduction of the rent consequent on a loss of a portion of the land was come to on that basis, and the rent suit, which I have before mentioned, was a suit for the rent of the whole land and not a fractional share of it, and was instituted by the persons entitled to the whole 16 annas of the reversion on the lease. Furthermore the rent receipts given by Sadut Ally and Futteh Hossain are receipts for the rent of the whole of the land and not of a fractional share of it. The rent was paid on this footing for a period of forty-two years, and it seems to me that the only natural conclusion to be drawn from these circumstances is either that Newaz Bibee had full power to deal with the entire interest in this piece of land, or if she had not originally that power, that her action was confirmed by her and her husband's heirs.

It was also stated that the title to the 2 annas share has been kept distinct from the title to the 14 annas share from the year 1864, but that mode of dealing with the reversion of the *pottah* of 1847, even if it were proved, which it has not been, is no evidence whatever as against the holders of this *pottah*, and I therefore think there is nothing in this contention [221] which has been put forward, not by the plaintiffs, but by Rajah Sew Bux Bogla on the plaintiffs' behalf.

I do not propose to decide any questions which arise between Rajah Sew Bux Bogla and the other defendants, save in so far as they are questions which also arise between the plaintiffs and Messrs. Anderson, Wright & Co. Any ground of attack and defence not available both to the plaintiffs and himself, as against the claim of Messrs. Anderson, Wright & Co. to have a permanent lease of these lands, remains untouched by me, and for that reason I decline to enter into the question as to the effect of Rajah Sew Bux Bogla's claim to be a *bona fide* purchaser for value of the premises in question without notice of any claim on the part of Messrs. Anderson, Wright & Co. to a permanent lease.

The whole of the last day of the hearing and a portion of the previous day were taken up in placing the case of the defendant Rajah Sew Bux Bogla before the Court. The plaintiffs protested against receiving any assistance from Rajah Sew Bux Bogla and against the prolongation of the trial, which would be caused by hearing him. The other defendants also protested against his being heard, but I did not see my way to yield to those objections. He must, however, pay the costs of the last day's hearing to the plaintiffs, and to Messrs. Anderson, Wright & Co., and he must also pay them their costs of the

application which he made to become a party to this suit, those costs having been reserved.*

Attorney for the Plaintiffs: Mr. Chick.

Attorneys for the Defendants: Messrs. Orr, Robertson and Burton.

H. W.

NOTES.

[If an acknowledgment is coupled with a condition, it takes effect when the condition is fulfilled:—(1906) 33 Cal. 1047 P.C.*

As regards the question of the suit being one for land in a rent suit, see also (1908) 36 Cal. 59.]

[222] APPELLATE CIVIL.

The 22nd August, 1898.

PRESENT:

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Sonatun Shaha and others.....Decree-holders

versus

Dino Nath Shaha.....Objector.†

Civil Procedure Code (Act XIV of 1882), sections 108 and 253—Ex parte decree—Surety—Liability of a surety, after a decree passed in the original suit—Surety bond purporting to hypothecate immoveable property—

Transfer of Property Act (IV of 1882), section 59—

Evidence Act (I of 1872), section 68.

An *ex parte* decree was set aside on condition that the defendant should find a surety, who would be responsible for any amount that might be found due from the defendant by any decree to be subsequently made in the suit.

Held, that under section 108 of the Code of Civil Procedure, a Court has jurisdiction to set aside an *ex parte* decree on these terms.

On an application to execute the decree, which was subsequently made against the defendant by the decree-holder, both against the defendant and the surety, objection was taken by the surety to the execution and was allowed by the Court below.

Held, that under section 253 of the Code of Civil Procedure the decree-holder was entitled to take out execution against the surety.

Held, also, that where a surety bond purported to hypothecate immoveable property, though it was not registered and attested by two witnesses, a personal decree could be passed on it against the surety inasmuch as the document was evidence of a money debt.

Madras Deposit and Benefit Society v. Oonnamalai Ammal, (1894) I. L. R., 18 Mad., 29 dissented from.

* An appeal was brought in this case but was struck off for default in appearance.

† Appeal from order No. 116 of 1898, against the order of Babu Shyam Chand Dhur, Subordinate Judge of Backergunge, dated the 15th of January 1898, reversing the order of Babu Shyama Charan Ukil, Munsif of Barisal, dated the 24th of November 1897.

THIS appeal arose out of an application for execution of a decree. The facts were briefly these: One Govind Chundra Shaha and others obtained an *ex parte* decree against one Bhugwan Chunder Shaha. An application to set aside the *ex parte* decree was made by the judgment-debtor under section 108 of the [223] Code of Civil Procedure, and the said decree was set aside on the petitioner giving security for the satisfaction of any decree that might eventually be passed in the case. One Dino Nath Shaha stood surety for the said petitioner, and pledged some immoveable property as security. The case was heard *de novo* and a decree was ultimately made against the aforesaid Bhugwan Chunder Shaha. The decree-holder transferred his decree to one Sonatun Shaha, who applied to execute the decree both against the judgment-debtor and the surety. Objection was taken by the surety to the execution, *inter alia*, on the grounds, *first*, that the Court had no jurisdiction to take security under section 108 of the Code of Civil Procedure, and that proceeding was illegal; *second*, that the Court ought not to have set aside the *ex parte* decree simply on taking security and without enquiring whether there was any good legal ground for setting aside the decree; and, *third*, that the security bond, being for more than Rs. 100, and creating a right to immoveable property and not being registered, was not admissible in evidence, and was invalid. The Court of First Instance disallowed the objections, and granted the decree-holder's petition. On appeal to the Subordinate Judge he reversed the decision of the first Court and decreed the appeal. Against that judgment the decree-holder appealed to the High Court.

Babu Sri Nath Das and Babu Nund Lall Sarkar for the Appellant.

Dr. Rash Behary Ghosh and Babu Dwarka Nath Chuckerbutty for the Respondent.

The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.):—

Maclean, C.J.—In this case the plaintiffs obtained an *ex parte* decree against the defendant. The decree was set aside at the instance of the defendant, and it was set aside on terms, one of the terms being that the defendant should find a surety, who would be responsible for any amount that might be found due from the defendant by any decree to be subsequently made in the suit. The plaintiffs did not object, and the surety gave a bond to be so responsible.

I think the Court had ample jurisdiction under section 108 [224] of the Code of Civil Procedure to set aside an *ex parte* decree on those terms. A decree was subsequently made against the defendant at the hearing of the suit, and the decree-holders sued out execution both against the defendant and the surety, relying on section 253 of the Code of Civil Procedure.

The Court below has refused execution against the surety, hence the present appeal by the present decree-holders.

Dr. Rash Behary Ghosh for the objector argues that section 253 does not apply to the case, because the surety here did not become liable before the passing of a decree in the original suit, but became surety only after the *ex parte* decree was pronounced. I think this contention is not well founded, for the words, in my judgment, mean “before the decree in the original suit” which had not been made but which would be made if the litigation proceeded, and for the performance of which the surety became liable. He became liable for a decree in an original suit which had not been passed when he became surety. I think then that the decree-holders were entitled to take out execution against the surety.

A further point is taken that the surety-bond was a mortgage of immovable property, and that, having regard to the terms of section 59 of the Transfer of Property Act, such a mortgage could only be enforced if it had been registered and attested by at least two witnesses. I understand this document has not been either registered or attested by two witnesses. The decree-holders answer this argument by saying that they do not rely on the document as a mortgage; they are not setting up any right to a charge on the property mentioned in the mortgage, but they say it is evidence of a money debt for which the surety made himself personally liable. The surety then contends that section 68 of the Evidence Act is a conclusive answer to this argument, and relies on a decision of the Madras High Court in the case of *Madras Deposit and Benefit Society v. Oonnamalai Ammal*, (1894) I. L. R., 18 Mad., 29. Section 68 says: "If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has [225] been called for the purpose of proving its execution," and so forth.

But the document in this case, as far as it creates a mere money or personal liability, does not, so far as I am aware, require to be attested, and, if so, section 68 does not apply. It is not set up as a mortgage. In this view, speaking with every deference, I am not disposed to agree with the case which has been cited.

Upon these grounds the order of the Lower Appellate Court must be reversed, and execution must be proceeded with against the surety.

The appellants will get costs in this and in the Lower Appellate Court.

Banerjee, J.—I am of the same opinion. The Lower Appellate Court has set aside the order of the first Court allowing execution to proceed under section 253 of the Code of Civil Procedure against the person who became liable as surety for the performance of the decree, on the ground that the surety-bond was taken by the Court under circumstances under which it had no authority to take the bond.

It is contended by the learned Vakil for the appellants that this view of the Lower Appellate Court is wrong, and that the Court, which took the surety-bond, had ample authority to do so under section 108 of the Code.

The only objection to the taking of the bond that the Lower Appellate Court points out is that the bond was taken by the Court without satisfying itself that the summons was not duly served, or that the defendant was prevented by any sufficient cause to appear, when the case was called on for hearing. It is said that the "terms as to costs, payment into Court or otherwise," can be imposed under section 108 of the Code, only if the Court is satisfied that the summons was not duly served, or that the defendant was prevented by sufficient cause from appearing. Granting that this is so, there is nothing to show that the Court was not satisfied on these points before the surety-bond was taken. It is true that the *ex parte* decree was set aside by consent, but if [226] the petitioner's adversary consented to the decree being set aside on the ground either that the summons was not duly served or that the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing, that would be the best method of satisfying the Court that the ground alleged was well founded.

I am clearly of opinion, therefore, that the ground upon which the Lower Appellate Court has held the surety-bond to have been irregularly taken is wholly untenable.

The learned Vakil for the respondent does not seek to support the judgment on that ground, but he contends, first, that under section 253 of the Code there

is nothing to warrant the decree being executed in this case against the surety ; and, secondly, that the bond is altogether bad being in contravention of section 59 of the Transfer of Property Act read with section 68 of the Evidence Act.

As to the first point, what is urged in support of it is, that the respondent did not become liable as surety " before the passing of a decree " in the original suit within the meaning of section 253 of the Code, an *ex parte* decree having been made in that suit, and having been in force at the time when he became surety.

I do not think this contention is sound.* Though an *ex parte* decree had been made, it was set aside, and we must take it that it was set aside simultaneously with the order for taking security, so that it could not be said that the respondent became liable as surety after the passing of a decree in the original suit which was then in force, or which has remained in force. The setting aside of that decree must have the same effect as if no such decree had been made at all.

As to the second point urged in support of the order of the Lower Appellate Court I have nothing to say in addition to what has been said by the learned Chief Justice.

S. C. G.

Appeal allowed.

NOTES.

[I. The words '*before the passing of a decree in an original suit*' were removed in sec. 145, C.P.C., 1908, and clauses (b) and (c) which have been newly added have widened the scope of the section, beyond the limits in the previous Code.

II. As regards the requirement as to attestation, see also (1909) 32 Mad., 410 : 19 M.L.J., 584.]

[227] PRIVY COUNCIL.

The 28th and 30th June, and 26th November, 1898.

PRESENT :

LORDS WATSON, HOBHOUSE AND DAVEY, AND SIR R. COUCH.

Ram Narain.....Representative of Plaintiff

versus

Muhammad Hadi and others.....Defendants.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Benami Transaction—Benami purchase --Whether property was held benami for the claimant or was a gift to the holder—Evidence of ownership—Source of purchase-money.

The claimant, having supplied the purchase-money on the sale of the village in suit, took the transfer by sale deed in the name of the first defendant who remained in possession of it, receiving rents. The claim was for proprietary possession by the purchaser, on the ground that the property was held benami for him. The first Court decreed the claim. The Appellate Court reversed this decision.

The first Court had attributed too much to the fact that the plaintiff had supplied the purchase-money ; an important fact in most of the cases raising the question of benami, or not benami, but not the only test of ownership.

Here the source of that money was consistent with the claimant's having, as the defence alleged, intended to make a gift of the property to the holder of it; and the right inference from the facts was that it was not held benami for the claimant, but belonged to the defendant.

APPEAL from a decree (14th January 1890) of the Additional Judicial Commissioner, reversing a decree (28th September 1889) of the District Judge of Lucknow.

This suit was brought on the 21st December 1886 for the proprietary possession, valued at Rs. 6,382, with mesne profits Rs. 4,042, of *mauza* Habibpur in the Lucknow District, held by the defendant, and subject to certain interests, either with or under him, of ten other persons, co-defendants with him. The claim arose out of the sale of this *mauza*, which at the time, by registered sale deed, was transferred from a third party, one Haro Nath, into the name of the first defendant, Maulvi Muhammad Hadi; and afterwards *dakhil kharij* to him was effected. The plaintiff, the late Pandit Raj Narain, supplied the purchase-money, Rs. 2,220. He died in 1890, and his brother, the appellant Ram Narain, succeeded him on the record, obtaining leave to appeal.

[228] The plaint alleged that the possession by Muhammad Hadi was benami for Raj Narain, in whose employment Hadi then was. The written answer of the latter was that the transfer, taken in his name, was not benami for Raj Narain, but was really to him, the purchase having been designed for his benefit as a gift from his employer Raj Narain, "in consideration of his, the defendant's, faithful and important service extending over some forty years."

The principal issue questioned this defence, and the Courts having differed upon it, the question was again raised by the present appeal, on which Muhammad Hadi alone appeared as respondent.

The District Judge, on the conflict of testimony, was of opinion that the fact of the plaintiff's having provided the purchase-money was the criterion of ownership: and that the only direct evidence as to the alleged gift having come from the defendant, the Court could not rely upon it; so that the weight of the evidence was in favour of the plaintiff. The judgment referred to Agnew on the Law of Trusts (1882), Tagore Law Lecture, 1881, IV, on the subject of how far there was a presumptive character in a benamidar's holding, and to Mayne's Hindu Law and Usage, para. 367.

That decision was reversed by the Judicial Commissioner, whose judgment was that the evidence led him to conclude for the defence.

Although Habibpur had yielded a profit of over Rs. 400 a year, yet for nine years and a half from the date of the purchase to the institution of the suit the plaintiff had without question or objection allowed the retention of the rents without requiring any account. The defendant had been in possession, and held the document of title, the sale deed of 1877, and the receipts for fees paid at the mutation of names. The judgment referred to an expression in *Imbandi Begum v. Kamleswari Pershad*, (1894) I. L. R., 21 Cal., 1005: L. R., 21 I. A., 118, that "where there are benami transactions, and the question is who is the real owner, the actual possession, or receipt of the rents, is most important. There were other dicta tending to show that [229] the person impugning the character of a transfer should show something to establish that it was a benami transaction. Lastly, there was the probability that the defendant would have been reasonably rewarded for his long and arduous services to Raj Narain.

On this appeal,—

Mr. C. W. Arathoon, for the appellant, contended that it having been admitted that the plaintiff paid the purchase-money it was for the defendant to show that he had been made the beneficial owner. Due weight should be given to the plaintiff's statement that the purchase had been made *ism farzi* on account of the quarrels of persons who were entitled to maintenance out of the estate, Khalispur, of which this village was part.

Mr. J. H. A. Branson, for the respondent Muhammad Hadi, argued that the Appellate Court below had rightly held that the plaintiff had failed to prove enough to get rid of the presumption of ownership attending this particular deed. The allegation that it was benami merely grounded on the fact, admitted throughout, that the purchaser had produced the purchase-money, was insufficient to displace the case, which was a reasonable and provable one, that the village had been bought for the purpose of making a gift to reward a servant for valuable services extending over many years.

Mr. C. W. Arathoon replied.

Afterwards, on the 26th November 1898, their Lordships' judgment was delivered by

Sir R. Couch.—The suit which is the subject of this appeal was brought by Pandit Raj Narain against the respondents for possession of a village called Habibpur in pargana Malihabad, district Lucknow. He having died after the admission of the appeal is now represented in it by his heir and successor the present appellant. The plaint stated that Raj Narain was the absolute owner of the village and had purchased it under a sale deed, dated 27th July 1887, for Rs. 2,225 *ism farzi* (fictitiously) in the name of his agent and steward, the first defendant. This defendant (first respondent) in his written statement denied that the deed of sale was executed fictitiously in his name. The [230] other defendants, except the 7th and 8th, claimed under a deed of gift by him, and the latter two under a mortgage alleged in the plaint to be collusive, which was denied. In the view which their Lordships take of the principal question it is not necessary to go into this matter, and it will be convenient hereafter to call the first defendant the defendant. The District Judge made a decree in the plaintiff's favour, which was reversed by the Additional Judicial Commissioner on appeal.

It was proved that the consideration-money for the sale was paid by Raj Narain. Two of the three witnesses who attested the execution by the seller were examined. One deposed that Raj Narain said he should get the document executed in another man's name, the other said that for five or six days there was discussion. Raj Narain said he was having the deed executed *farzi* in the name of an agent; he did not name him. Also Raj Narain was called by the defendant as his first witness, the plaintiff having previously called the first defendant as his first witness—a proceeding of which there appears to be no explanation. Raj Narain said: "I forget if defendant No. 1 was here when I purchased Habibpur. My papers show that he was. The purchase was *ism farzi*. The reason is clear; it was because of the quarrels of the maintenance holders. I have purchased other Khalispur villages at auctions in my own name. There are the same maintenance holders in them." On this statement there was apparently no reason for this village being bought *ism farzi*. It is difficult to learn from the judgment of the District Judge what is the ground of his decision in the plaintiff's favour. He says: "The true criterion is to ascertain from whose funds the purchase-money proceeded. In the present case it is allowed that the funds for the purchase of Habibpur were supplied by the plaintiff." In many,—it may be said in most,—cases of alleged benami

this is a very important fact. But it is not the only criterion. Here it is consistent with the defendant's case, which is that the plaintiff purchased the village for him and intended it to be a gift in return for his services. In such a case a much more important fact is the actual possession or receipt of the rents of the property. The plaintiff himself said that the defendant was "in possession of the [231] collections" and had not accounted for them for nine and a half years. His statement that he said to the defendants five or seven times "give me the accounts of Habibpur," and the defendant said that money was due to him, is not, if true, a sufficient reason for not requiring accounts.* It is rather the reverse. The defendant in his evidence had said that the plaintiff never asked him for accounts. The plaintiff's father died in 1867. The defendant had been in his service for some years, and after his death continued in the plaintiff's service till 1886, receiving for his pay only 10 rupees per month. After making full allowance for exaggeration by the defendant of the value of his services their Lordships do not doubt that he performed some valuable services for the father and for the plaintiff during the ten years previous to the purchase of Habibpur, especially in managing an estate in the Sunderbunds which had been bought by the father for between Rs. 4,000 and Rs. 5,000, and was sold by the plaintiff for Rs. 39,000 or Rs. 40,000. The defendant had clearly some claim upon the plaintiff's generosity. It is true that benami transactions are very common in India, but this deed of sale appears to their Lordships not to be of that character, and they will humbly advise Her Majesty to dismiss the appeal and to affirm the decree of the Assistant Judicial Commissioner dismissing the suit. The appellant will pay the costs.

Appeal dismissed.

Solicitors for the Appellant : Messrs. *T. L. Wilson & Co.*

Solicitor for the Respondent : Mr. *J. F. Watkins.*

C. B.

NOTES.

[The source of purchase-money is not the only test of *benami* ; the actual possession and receipt of rents furnish a test of the benami character :—(1904) 29 Bom., 306 ; 6 Bom. L.R., 975 ; (1909) P.R., 37 ; (1908) P.L.R., 158 ; 7 N.L.R., 159 ; 30 All., 258 ; 33 Cal., 773.]

• [232] CRIMINAL REVISION.

The 5th December, 1898. •

PRESENT.

MR. JUSTICE O'KINEALY AND MR. JUSTICE BANERJEE.

Kanai Das Bairagi and another.....Petitioners

•
versus

Radha Shyam Basack.....Opposite Party. •

Penal Code (Act XLV of 1860), section 486—Selling books with counterfeit property mark—Goods—Indian Merchandise Marks Act (IV of 1889).

Books are the subject of trade and are goods within the meaning of section 2, clause (4) of the Indian Merchandise Marks Act (IV of 1889) ; therefore when a person sells books with a counterfeit property mark, he commits an offence under section 486† of the Indian Penal Code.

THE facts of 'this rule and the arguments, for the purposes of this report, appear sufficiently from the judgment of the High Court.

Mr. *E. P. Ghose* and Mr. *J. R. Percival* for the Petitioner.

Mr. *C. P. Hill*, Mr. *P. J. Roy*, and Mr. *Grimley* for the Opposite Party.

The **judgment** of the High Court (**O'Kinealy** and **Banerjee, JJ.**) was as follows :—

This is a rule calling upon the District Magistrate to show cause why the conviction and sentences in this case should not be set aside on the ground that the facts found do not amount to the offences of which the petitioners have been convicted, or why the sentences passed should not be reduced or otherwise altered.

It appears that there is a well known Bengali Primer by one Ram Sundar Basack, and it has been found that this book has a property mark. The applicants are found to have sold large numbers of this book with a perfect knowledge that the book they sold was not the real book, but a book purporting to be the real one, and they were convicted of offences under sections 482 and 486 of the Penal Code, and also of abetment of those offences under section 109.

It has been argued in this Court that books are not goods under Act IV of 1889. "Goods" is defined in that Act to be [233] anything which is the subject of trade or manufacture ; and although it was not argued that in ordinary language books are not the subject of trade, yet it was said that they were not the subject of trade within the meaning of that Act. "Trade" is not defined, and we must, therefore, take the ordinary dictionary meaning of

* Criminal Revision No. 724 of 1898, made against the order of S. J. Douglas, Esq., Sessions Judge of Dacca, dated 9th September 1898.

† [Sec. 486 :—Whoever sells any goods with a counterfeit property or trade mark, whether public or private, affixed to or impressed upon the same or upon any case, wrapper, or receptacle in which such goods are packed or contained, knowing that such mark is forged or counterfeit, or that the same has been affixed to, or impressed upon, any goods or merchandize not manufactured or made by the person

or at the time or place indicated by such mark, or that they are not of the quality indicated by such mark, with intent to deceive, injure, or damage any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.]

that word. That being so, there can hardly be any doubt that books are the subject of trade and of a very large trade in Bengal, therefore books are covered by the word "goods."

The convictions entered up against the accused are of three kinds: One for using a counterfeit property mark, the second for selling the book with a counterfeit property mark, and the third for abetment of those offences. But we think that the conviction in this case ought simply to be a conviction under section 486, and we accordingly set aside the convictions under sections 482 and 109.

The result, therefore, is that the applicants will remain convicted under section 486 and will suffer rigorous imprisonment for three months; and they will have to be taken into custody and serve out the remainder of the sentence.

S. C. G.

Rule discharged.

[26 Cal. 233]

APPELLATE CIVIL.

The 10th January, 1899.

PRESENT:

MR. JUSTICE BANERJEE AND MR JUSTICE RAMPINI.

Satish Chundra Giri.....Plaintiff

versus

Kabiraddin Mallick and another.....Defendants.*

Bengal Tenancy Act (VIII of 1885), section 29—Enhancement of rent by registered contract—Increase in the amount of rent by reason of increase of area—Applicability of section 29 in such cases.

Section 29 of the Bengal Tenancy Act applies only to an increase in the rate of rent, and not to an increase in the amount of rent by reason of an increase of the area.

THIS appeal arose out of an action for arrears of rent due to the plaintiff for the years 1299 to 1302 B.S. The allegation of [234] the plaintiff was that the rent was payable at a certain amount; and in support of his claim he produced evidence to show that the rent was increased once in the year 1288 B. S., and again in the year 1295 B.S., there having been an increase in the area of the holding of the defendants. The defence was that the amount was not what was claimed by the plaintiff but less. The Court of First Instance decreed the suit of the plaintiff in part in accordance with the admission of

* Appeal from Appellate Decree No. 1146 of 1897, against the decree of Babu Kali Prasanna Mukerjee, Subordinate Judge of Hooghly, dated the 31st of March 1897, affirming the decree of Babu Kali Prasanna Roy, dated the 28th of September 1896.

the defendant. An appeal by the plaintiff to the Subordinate Judge was dismissed, the Judge holding that inasmuch as an enhancement could only be made by a contract in writing and registered, and as in this case there was no such contract, the plaintiff was not entitled to any enhancement at all. From this decision the plaintiff appealed to the High Court.

Babu Saroda Charan Mitter and *Babu. Satis Chandra Ghose* for the Appellant.

Babu Gyanendra Nath Bose for the Respondents.

Babu Saroda Charan Mitter for the Appellant.—Section 29 of the Bengal Tenancy Act does not apply to a case where there has been an increase of rent on account of an increase in the area of the holding. Here, there is not an enhancement of rent, but only an alteration of the rent on account of the alteration in the area; therefore section 29 has no application. There is a finding of the Court of First Instance that upon a measurement there was an alteration in area.

Babu Gyanendra Nath Bose for the Respondents.—Section 29 applies to this case. There is no finding by the Court below that there was an alteration of rent on account of any alteration in area.

The judgment of the High Court (*Banerjee* and *Rampini, JJ.*) was as follows:—

This appeal arises out of a suit for rent.

The plaintiff's allegation was that the rent was payable at a certain amount. The defence was that the amount was less; and the plaintiff in support of his allegation, that the rent was what was claimed, sought to show that the rent was increased in 1288, and once again in 1295.

[235] The first Court found for the defendants, and gave the plaintiff a decree at the admitted rate. Certain other objections were urged by the defendants, which it is not necessary to consider. On appeal by the plaintiff, the Lower Appellate Court has held that the alleged increase in the rent in 1288 was not proved, and that the increase in the rent said to have been effected in 1295 could not be given effect to, because it was not by a contract registered as required by section 29 of the Bengal Tenancy Act.

In second appeal it is contended that the Lower Appellate Court was wrong in holding that the increase in the rent that is said to have been effected in 1295 came within the scope of section 29 of the Bengal Tenancy Act. It is argued that section 29 applies only to an increase in the rate of rent, and not to an increase in the amount of rent by reason of increase of the area, and that the increase of 1295 was an increase of this latter description, as would appear from the judgment of the first Court.

We are of opinion that this contention is correct. Section 29 of the Bengal Tenancy Act applies only to cases of increase in the rate of rent, which is ordinarily designated "enhancement of rent"; whereas increase in the rent by reason of increase in area is not called "enhancement of rent" but is styled "alteration of rent" in the Act; and there is reason to think that the increase in the rent in 1295 was due, partly at any rate, to increase in the area. Whether that is so or not it would be for the Lower Appellate Court to determine, it being a question of fact which we cannot enter into in second appeal.

The decree of the Lower Appellate Court is accordingly set aside, and the case sent back to that Court in order that it may dispose of the appeal after determining the question whether there was any increase in the rent in 1295 by reason of increase in the area; and if there was any such increase what was the extent thereof. The costs will abide the final result.

It is admitted that this judgment will govern second appeals Nos. 1238 and 1239 of 1897.

S. C. G.

Appeal allowed. Case remanded.

[236] *The 1st December, 1898.*

PRESENT :

SIR FRANCIS W. MACLEAN, K. C. I. E., CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Chandra Nath Roy.....Defendant

versus

Nilmadhab Bhattacharjee and others.....Plaintiffs.*

Evidence Act (I of 1872), section 32, clause (5)—Statement relating to the existence of any relationship contained in a document signed by several persons, some only of whom are dead.

A statement relating to the existence of any relationship contained in a document signed by several persons, some only of whom are dead, is admissible in evidence under clause 5 of section 32 † of the Evidence Act.

THIS appeal arose out of an action brought by the plaintiffs to recover possession of certain immoveable property by establishment of their title by inheritance. The plaintiffs' allegation was that they were the great grandsons of the maternal grandfather of one Raj Narayan Roy, and therefore they were the preferential heirs. The defendant denied the relationship of the plaintiffs to Raj Narayan Roy, and he claimed the property in dispute as being the heir. The plaintiffs, in support of their claim, put in a copy of a *potta* containing certain statements of the daughters of Raj Narayan to prove the existence of their relationship with Raj Narayan. Some only of the several executants of the

* Appeal from Appellate Decree No. 1383 of 1897, against the decree of Babu Mohim Chandra Ghose, Subordinate Judge of Faridpur, dated the 8th of March 1897, confirming the decree of Babu Aghore Chandra Hazrah, Munsif of Goalundo, dated the 27th of January 1896.

† [Sec. 32 :—Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :—

Cases in which statement of relevant fact by person who is dead or cannot be found, &c., is relevant.

(5) When the statement relates to the existence of any relationship between persons as to whose relationship the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.]

potta were dead. The Munsif, having admitted this document in evidence, and considering other evidence in the case, decreed the plaintiffs' suit. On appeal to the Subordinate Judge, he affirmed the decision of the first Court. Against this judgment the defendant appealed to the High Court, on the ground that the statement made in the *potta* was not admissible in evidence.

Babu *Promotha Nath Sen* for the Appellant.

Dr. *Rash Behary Ghosh* and Babu *Sarat Chandra Roy Chowdhry* for the Respondents.

Babu *Promotha Nath Sen* for the appellant.—The recitals in the *potta* are not admissible in evidence, as they are not statements of a person who is dead. In this case all the executants are not dead, [237] and as "person" includes "persons," section 32 of the Evidence Act does not apply.

The respondents were not called upon.

The judgments of the High Court (MACLEAN, C.J., and BANERJEE, J.) were as follow :—

Maclean, C.J.—In this case the statements in the *potta*—statements by way of recital—were properly admitted, in my opinion, as relevant facts under section 32, sub-section 5 of the Indian Evidence Act. The statements were recitals as to pedigree, and they supported the plaintiffs' case. The *potta* was executed by three sisters, two of whom are dead, and one of whom is still living. It was urged for the appellant that these recitals were not admissible, because they were not statements made by a person who was dead, but the joint statements of three persons, two of whom only were dead, and consequently that section 32 did not apply. This argument was based entirely upon that provision of the General Clauses Act which says that "person" shall include "persons," and it was contended that "person" in section 32 must be read "persons." I do not think this ingenious argument is entitled to succeed. Each of the sisters executed the *potta* and each of the sisters made the statement in that *potta*, and that statement was as much the statement of each sister who is dead as the statement of the sister who is now living. I do not see why, because there is one sister still living, and who might be called as a witness, the recitals become, on that account, any the less a statement, in the case of the other sisters, made by a person who is dead. It may be matter for legitimate comment in arguing the case that those statements must be received with caution, as the plaintiffs had not called the surviving sister to depose to their accuracy, but I do not think the matter could be placed higher than that. My view is consistent with the ordinary meaning of the language used in the section: and it would, in my opinion, be narrowing seriously the useful operation of that section if we were to place upon it the construction urged by the appellant.

The appeal must be dismissed with costs.

Banerjee, J.—I am of the same opinion. The question raised in this case is whether a statement relating to the existence [238] of any relationship contained in a document signed by several persons, some only of whom are dead, is admissible in evidence under clause 5 of section 32 of the Evidence Act. The contention of the learned Vakil for the appellant is, that it is not admissible, because all the persons who joined in making that statement are not dead, and therefore the preliminary condition required by the section to be fulfilled is not satisfied. I am of opinion that this contention is not sound. The contention proceeds upon the assumption that the statement is but one statement, whereas the correct view is, that each of the executants must be taken to have made the statement for himself or herself, and if any of the

executants of the document is dead, the statement made by that person would be admissible under section 32, if it comes under one or other of its clauses, as being the statement of a person who is dead.

S. C. G.

Appeal dismissed.

[26 Cal. 238]

The 2nd December, 1898.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE RAMPINI.

Shama Charan Misser and others.....Defendants

versus

Chuni Lal Marwari..... ..Plaintiff.*

Interest—Compound Interest—The Santhal Parganas Settlement Regulation (III of 1872), section 6—The Santhal Parganas Justice Regulation (V of 1893), section 24—Contract Act (IX of 1872), sections 23 and 24—

“ Unlawful ” consideration, Meaning of.

There is no law or regulation laying down that an agreement between any two persons living in the Santhal Parganas to pay compound interest upon the amount borrowed is “ unlawful ” within the meaning of section 23 of the Contract Act. All that the law provides is that compound interest will not be decreed by any Court.

Referring to the Santhal Regulations, section 6 of Regulation III of 1872, and section 24 of Regulation V of 1893, it was held in respect of an agreement to pay interest on an amount composed partly of the principal and interest due on a former debt, that such agreement is not void under section 24 of the Contract Act, and that the obligee may recover such sums of money as he is entitled in law to recover, notwithstanding that part of the consideration is compound interest.

[239] THIS was an action on two mortgage bonds executed in favour of the plaintiff by the defendant Shama Charan Misser against him and his sons on the ground that they belonged to a Hindu family governed by the Mitakshara law, of which Shama Charan, the father, was the *karta* or master. As regards one of the bonds (dated 17th Asar 1302 F. S., corresponding to 24th June 1895), one of the pleas taken in defence was that the amount of the bond having been made up partly of principal and interest due on account of a previous debt, the stipulation for payment of interest was really for payment of compound interest, which was not allowed by law in the Santhal Parganas, and that

*Appeal from Appellate Decree No. 599 of 1897, against the decree of R. Carstairs, Esq., Deputy Commissioner of Dumka in the Santhal Parganas, dated the 12th of January 1897, modifying the decree of H. Heard, Esq., Subordinate Judge of Deoghur, dated the 5th of October 1896.

therefore under the general law (Contract Act, sections 23 and 24) the stipulation was unlawful and the contract void. The Deputy Commissioner held :—

"I do not, however, consider that compound interest is forbidden as illegal in section 6 of Regulation III of 1872. It may be taken and given without the breaking of any law, but it cannot be decreed by the Court, an entirely different matter."

The defendants appealed to the High Court.

Babu Sris Chandra Chaudhuri and Babu Joygopal Ghosh for the Appellants.

Babu Karuna Sindh Mukerjee and Babu Akhoy Kumar Banerjee for the Respondent.

The judgment of the High Court (Ghose and Rampini, JJ.) was as follows :—

The suit out of which this appeal has arisen was based upon two bonds ; but there is no question raised before us as regards the first of them. The learned Vakil for the appellant has confined his remarks to the second bond. It appears that this bond was for a certain sum of money, a part of which was interest upon the amount covered by the first bond, and it was agreed between the parties that the whole amount of the consideration as mentioned in the bond should bear interest, the result being that the obligor promised to pay interest upon the interest which was due upon the first bond. The Courts below have given a modified decree to the plaintiff.

[240] It has been contended on behalf of the defendant-appellant that, inasmuch as a part of the consideration for this bond was unlawful according to section 23 of the Contract Act, the plaintiff obligee is not entitled to recover, having regard to the provisions of section 24 of that Act, any portion of the money covered thereby.

Reference has been made to section 6 of the Santhal Regulation III of 1872, as also to section 24 of Regulation V of 1893, which modified to some extent the former Regulation. Section 6 provided that "all Courts having jurisdiction in the Santhal Parganas shall observe the following rules relating to usury, namely, interest on any debt or liability for a period exceeding one year shall not be decreed at a higher rate than two per cent. per mensem, notwithstanding any agreement to the contrary, and no compound interest arising from any intermediate adjustment of account shall be decreed," and so forth. Section 24 of the other Regulation provides that to "section 6 of the Santhal Parganas Settlement Regulation the following shall be added, namely : *Explanation.*—The expression 'intermediate adjustment' of account in clause (a) of this section means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise when without the passing of fresh consideration the original claim is increased by such renewal. *Illustration.*—A bond is given for Rs. 75, of which Rs. 25 are interest. Unless the obligee can prove to the satisfaction of the Court that he gave such consideration for the bond as rendered the transaction fair and equitable, of the Rs. 75, Rs. 50 only will bear interest, and the limit of the claim on the bond will be Rs. 100." There is no law or regulation laying down that an agreement between any two persons living in the Santhal Parganas to pay compound interest upon the amount borrowed is unlawful within the meaning of section 23 of the Contract Act. All that the law provides is that compound interest will not be decreed by any Court. And it appears to us that the illustration to section 24 of Regulation V of 1893, which we have just adverted to, shows clearly that a contract of this character may be so treated as to allow the obligee such sums of money as in law he is entitled to recover,

notwithstanding that part of the consideration is [241] compound interest. We are of opinion that the argument of the learned Vakil for the appellant on this head cannot be sustained, and that the plaintiff is entitled to recover the sums of money for which the Court below has given him a decree, barring compound interest.

Another point has been raised before us, and it is this: No decree ought to have been given in this case binding the minor son of the obligor at any rate charging the mortgaged property. It appears to us that the Judicial Commissioner has found that the bond was given by the father of the family in his representative capacity, and in that view of the matter the plaintiff is entitled to the relief which he asks for, it not being shown by the defendant that the debt was contracted for any immoral purpose.

For these reasons we think that the appeal fails and must be dismissed with costs.

S. C. C.

Appeal dismissed.

NOTES.

[See also (1904) 1 C.L.J., 181.]

[26 Cal. 241]

The 6th July, 1898.

PRESENT:

MR. JUSTICE AMEER ALI AND MR. JUSTICE PRATT.

Kumar Nath Bhattacharjee and others.....Defendants

versus

Nobo Kumar Bhattacharjee and others.....Plaintiffs.*

*Limitation Act (XV of 1877), Sch. II, Art. 120—Contribution, Suit for—
Liability created by ekrarnama—Suit upon a covenant in the
ekrarnama for money paid—Cause of action.*

A suit upon a covenant in an *ekrarnama* (executed by some of the defendants who were adults, and by the guardian of the others who were minors at the time when the *ekrarnama* was executed) was brought by the plaintiffs for the purpose of obtaining from the defendants contribution in respect of a debt which had been realized by the sale of the property mortgaged by the father of the plaintiffs. The defence mainly was that the suit was barred by limitation, inasmuch as it was not brought within six years from the date when the *ekrarnama* was executed, or from the date when the mortgage debt became repayable upon the mortgage bond.

Held, that the cause of action in the case arose when the plaintiffs were damnified, *i.e.*, when they paid the mortgage debt, and as the suit was brought within six years from that date it was not barred by limitation.

[242] THE material facts of this case, as stated in the plaint, were as follows: The plaintiffs' father and the defendants were members of a joint Hindu family.

* Appeal from Original Decree No. 146 of 1897, against the decree of Babu Kali Prosunno Mukerjee, Subordinate Judge of Hooghly, dated 12th of March 1897.

A dispute having arisen between the members of the family it was amicably settled by two agreements, one executed by the father of the plaintiffs in favour of the defendants and the other by the defendants in favour of the plaintiffs. By one of these agreements, the plaintiffs' father relinquished a certain share of the joint family property in favour of the defendants, and by the other the defendants agreed to pay one-half of the amount which the plaintiffs' father borrowed by a mortgage^d deed from one Raja Srinath Roy, for the necessity of the joint family. At the time of the execution of the agreement by the defendants some of them were adults and some were minors, and the mother of the minors signed^d the agreement on their behalf. Raja Srinath Roy, after the death of the father of the plaintiffs, instituted a suit against them, obtained a decree, and in execution thereof caused the mortgaged property to be sold on the 2nd September 1893, and appropriated the money realized by the sale in liquidation of the debt due to him. The plaintiffs, thereupon, brought this suit upon the terms of the agreement executed by the defendants for recovery of half the money so realized, and also claimed compensation at the rate of 12 per cent. from the date of the sale till the institution of the suit. The defendants, *inter alia*, pleaded that the suit was barred by limitation, and that the plaintiffs were not entitled to compensation. The Court below holding that the suit was not barred by limitation, and that the plaintiffs were entitled to interest as claimed by them, decreed the suit. From this decision the defendants appealed to the High Court.

Babu Saroda Churn Mitter and Babu Hara Kumar Mitter for the Appellants.

Babu Boidya Nath Dutt for the Respondents.

The judgment of the High Court (Ameer Ali and Pratt, JJ.) (so far as it was material for the purpose of this report) was as follows:—

This appeal arises out of a suit brought by the plaintiffs in the Court of the Subordinate Judge of Hooghly under the following circumstances.

[243] The plaintiffs' father Upendra Nath Bhuttacharjee formed at one time with the defendants a joint Hindu family, but he appears to have separated from them in or about the year 1291, for we find that on the 31st of Assar of that year, corresponding with the 14th of July 1884, an *ekrarnama* was executed in his favour by some of the defendants, who were adults at the time, and by the guardian of the others who were minors, by which practically a partition was made of the joint estate and liabilities. It would appear from that document that, whilst the family was joint, Upendra Nath had the management of the entire property. It also appears that he had borrowed upon a mortgage executed by him in his own name from one Srinath Roy a sum of over Rs. 11,000. After the division in 1884 Upendra died, leaving the plaintiffs as his heirs. The exact date of his death is not disclosed upon the evidence; but it is said that it took place about six or seven years before the present action. After his death Srinath brought a suit against the plaintiffs, the heirs and representatives of Upendra, upon the mortgage executed by him, which ended in a decree; and in execution of that decree the mortgagee, decree-holder, sold a Calcutta property belonging to him. The plaintiffs bring this suit upon a covenant in the *ekrarnama* for the purpose of obtaining from the defendants' contribution in respect of the debt paid off by them as aforesaid. The covenant upon which they base their action is contained in clause 4 of the *ekrarnama*. It runs thus: "We shall be liable for one-half of the debts due by the joint estate and you shall be liable for the other half; and we shall respectively pay off the debts in proportion to our half shares. Let it be further declared that we shall pay off one-half of the

amount borrowed in your own name under a mortgage from Srinath Roy and of the interest due thereon up to date, and you shall pay off the other half." They allege that the defendants are liable to pay them a half share of the amount paid by them to Srinath Roy, together with interest up to the date of payment. The defendants Probhu Gopal and Dwarkanath did not appear in the suit. The other defendants filed written statements, and among other objections contended that Upendra Nath had realized various sums of money from different parties indebted to the joint family, [244] and that they were entitled to have those sums credited against the amounts now claimed by the plaintiffs. They also allege that he was also liable to them under the *ekranama* for a share of the consideration paid by the joint family for the purchase of *mouzah* Soudra, and that in any event the plaintiffs were not entitled to interest as claimed by them. They also pleaded limitation.

The Subordinate Judge has held that the plaintiffs' suit was not barred by limitation; that the defendants had failed to establish that Upendra had realized the sums of money alleged by them; and that the plaintiffs were entitled to interest as claimed. He accordingly made a decree for Rs. 11,374, with interest at the rate of 12 per cent. per annum from the 2nd of September 1893 to the date of suit, with costs in proportion and interest at 6 per cent. per annum until realization.

The defendants have appealed to this Court, and a number of objections have been taken to the decree of the Subordinate Judge: First, that the suit is not maintainable on the ground that the cause of action accrued either on the date when the *ekranama* was executed, that is some time in the year 1884, or when the debt became repayable upon the mortgage bond; and the suit not having been brought within six years from those dates, assuming that article 120 was applicable to such an action, the suit was barred. It was also contended that the defendants, who were minors at the time of the *ekranama*, were not bound by the acts of their guardian. Besides these legal questions it was urged that the Subordinate Judge was wrong in disallowing the different items in respect of which credit was claimed by the defendants, and that in any event the plaintiffs were not entitled to interest allowed by the Subordinate Judge.

As regards the question whether the suit was maintainable or not, reference was made to Mayne on Damages, p. 405; *Loosemore v. Radford*, (1842) 9 M. & W., 657; *Lethbridge v. Mytton*, (1831) 2 B. & Ad., 772, and *Rutnessur Biswas v. Hurrish Chunder Bose*, (1884) I.L.R., 11 Cal., 221. All these cases point substantially to [245] the conclusion that when a person contracts to indemnify another in respect of any liability which the latter may have undertaken on his behalf such other person may compel the contracting party, before actual damage is done, to place him in a position to meet the liability that may hereafter be cast upon him. For instance, in *Loosemore v. Radford*, (1842) 9 M. & W., 657, the plaintiff and defendant were joint makers of a promissory note, the plaintiff being surety and the defendant as principal; the latter had covenanted with the former to pay the money to the holder of the note on a given day, but made default. Upon an action brought upon the covenant by the plaintiff who was the surety, it was held that the defendant was liable by way of damages for the full amount of the money that he ought to have paid according to the covenant. *Lethbridge v. Mytton*, (1831) 2 B. & Ad., 772, is to the same effect, and the same principle has been enunciated in the case of *Rutnessur Biswas v. Hurrish Chunder Bose*, (1884) I.L.R., 11 Cal., 221. In that case *B* had obtained from *A* a lease of lands, agreeing thereunder to pay a certain rental and a further sum of Rs. 183 odd yearly to *A*'s superior landlord, and to obtain a receipt therefor. *A* sued *B* for the rent due to himself and for the sum due to his superior landlord; it was held that *A* was entitled to recover the sum due to

his superior landlord as damages for breach of the contract, and that the amount of such damages ought not to be taken as nominal, but should be assessed on the footing of the sum for which A might become liable to the landlord. These cases, therefore, show that in a certain class of cases, even before an injury is done or damage takes place, the plaintiff may bring an action in order that the person making the covenant may place him in a position to meet the liability he has undertaken on the latter's behalf. No authority has been shown to the effect that such a suit may not be brought for damages subsequent to injury sustained. The causes of action in the two classes of cases are different. In the one there is a right to bring an action to have the plaintiff put in a position to meet the liability cast upon him; in the latter to be indemnified after the plaintiff has met the liability. We think, therefore, that the [246] plaintiffs were not bound to bring their action within six years from the date of the mortgage; that their cause of action arose when they were damaged, that is, when they paid the mortgage debt to Srinath Roy in 1893, and calculating from that time the Subordinate Judge was right in holding that the suit was within time.

[The remainder of the judgment was on the merits of the case, and is unnecessary for this report. The case was eventually remanded.]

S. C. G.

NOTES.

[See also (1911) 21 M.L.J., 983.

Upon this decision, the following remarks appear in Starling's Limitation Act, 1908, (1911, V. Edn), p. 250 :—"The cause of action arises when the plaintiff is damaged by payment of more than his share :—26 Cal., 241. If the judgment means that Art. 120 is inapplicable to such a case, it must be inaccurately reported or wrongly decided. It is difficult to make out what time elapsed between the overpayment and the bringing of the suit, but the former appears to have been in 1893, and the latter early in 1897."

In (1912) 34 All., 429, it was observed "with great respect to the learned Judges (who decided 26 Cal., 241) the rule laid down by them cannot be defended on principle. One breach of a contract can only furnish one cause of action and no more. Actual loss when it occurs is only one of the results of the breach and is not an act of the party who breaks a contract and can, therefore, create no second cause of action. It is a pity that the case of *Battley v. Falkner* 3 B. & Ad. 288, was not brought to the notice of the learned Judges. That case is a clear authority for the proposition that consequential damage arising from the breach gives no new cause of action. The claim in that case was for compensation for a breach of a contract brought within six years from the date on which the damages occurred but beyond six years from the breach. The suit was held to be barred by time."]

[26 Cal. 246]

The 8th September, 1898.

PRESENT:

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,
AND MR. JUSTICE BANERJEE.

Girindra Nath Mukerjee.....Judgment-debtor
versus

Bejoy Gopal Mukerjee and others.....Decree-holders.*

Transfer of Property Act (IV of 1882), sections 58, 59—Security bond whether attested by only one witness—Signatures of the Sub-Registrar and the identifier on the back of the bond whether sufficient to render mortgage valid—Security for the costs of the respondent to Her Majesty in Council—Code of Civil Procedure (Act XIV of 1882), sections 603 and 616.

A security bond, by which an interest in specific immoveable property has been transferred to another person for the purpose of securing a future debt, is a mortgage bond within the meaning of section 58 † of the Transfer of Property Act; and in order to create a valid mortgage it must be signed by the executant, and attested by at least two witnesses. Therefore, in a case where the mortgage bond by which the liability of a surety was created was signed by the mortgagor only on the front page, and not attested by two witnesses, but on the back of the bond it contained the signatures of the Sub-Registrar and of the identifier, a suit is not maintainable inasmuch as the bond is not a valid one under section 59 ‡ of the Transfer of Property Act.

Nitye Gopal Sircar v. Nagendra Nath Mitter, (1885) 1. L. R., 11 Cal., 429, distinguished.

Notwithstanding the admission of an appeal to Her Majesty in Council under section 603 of the Code of Civil Procedure, a surety is not precluded from questioning the validity of the security bond in execution proceedings, inasmuch as he was not a party to the order of the High Court.

THIS appeal arose out of an application to execute the order of Her Majesty in Council which awarded costs to the respondent against the surety. The facts were shortly these: An appeal to Her Majesty in Council having been

* Appeal from Order No. 285 of 1897 against the order of Babu Aunant Ram Ghose, Subordinate Judge of Nuddea, dated the 31st of July 1897.

† [Sec. 58 :—(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

“Mortgage”, “mortgagor” and “mortgagee” defined.

‡ [Sec. 59 :—Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Mortgage when to be by assurance.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.]

admitted, one Girindra Nath Mukerjee furnished security to the extent of Rs. 4,000 for the costs of the respondents in the Privy Council appeal, and he executed a bond in favour of the Registrar of the High Court, by which he gave certain immoveable properties as security. The security bond was signed by the executant on the front page, and at the foot it was signed by the scribe. But on the back of the deed, under the recorded admission of the execution by the executant and his signature, there were the signatures of the scribe and of the Sub-Registrar. After the disposal of the appeal to Her Majesty in Council, the decree-holders applied for execution of the decree for costs against the surety judgment-debtors, who, *inter alia*, objected to the execution on the grounds that, inasmuch as the security bond was not properly attested, it was invalid under section 59 of the Transfer of Property Act; that the security bond was not admissible in evidence; and that the application for execution should have been made by the Registrar of the High Court. The Subordinate Judge of 24-Pergunnahs, relying upon the case of *Nitye Gopal Sircar v. Nagendra Nath Mitter*, (1885) I. L. R., 11 Cal., 429, held that the provisions of section 59 of the Transfer of Property Act were complied with, and that the security bond was properly attested by two witnesses, inasmuch as the identifier and the Sub-Registrar signed under the signature of the executant admitting execution, and allowed execution to proceed. Against this decision the judgment-debtor appealed to the High Court.

Babu Lal Mohun Das and Babu Horendro Nath Mookerjee for the Appellant.

Babu Srinath Das and Babu Hem Chunder Mitter for the Respondents.

The judgment of the High Court (Maclean, C.J., and Banerjee, J.) was as follows :—

The question raised in this appeal, which arises out of a proceeding in execution of a decree, is whether the order of Her Majesty in Council, which awards costs to the respondents, can be [248] executed against the surety, the appellant before us, notwithstanding that the mortgage bond which creates the liability of the surety is not attested by witnesses as required by section 59 of the Transfer of Property Act. The Court below, applying the principle laid down in *Nitye Gopal Sircar v. Nagendra Nath Mitter*, (1885) I.L.R., 11 Cal., 429, has held that the requirement of the law as to the attestation of mortgages above a certain value is satisfied by the signatures of the Sub-Registrar and the identifiers of the executant below the registration, endorsement recording the admission of execution, and it has accordingly allowed execution of the order for costs to proceed against the surety.

Against this decision the surety has appealed; and it is contended on his behalf that the Court below is wrong in holding that the signatures below the registration endorsement supply the place of attestation by witnesses.

We are of opinion that this contention is valid. The attestation required by section 59 of the Transfer of Property Act is attestation by witnesses of the execution of the document, and not of the admission of execution. That is the ordinary sense of the expression "attestation by witnesses"—see *Sharpe v. Birch*, (1881) L. R., 8 Q. B. D., 111. If we look at the document itself the signature of the mortgagor does not purport to be attested. The signatures of the Sub-Registrar and of identifier are on the back of the mortgage bond, not on the same side as the signature of the mortgagor on the face of the bond. Having regard then to the provisions of section 59, in the absence of attestation, no mortgage has been effected. As regards the case of *Nitye Gopal Sircar v. Nagendra Nath Mitter*, (1885) I. L. R., 11 Cal., 429, that was the case of a will as to which the third clause of section 50 of the Indian Succession Act provides that it

"shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person." So that attestation, either of [249] the execution or of the admission of execution by the testator, is expressly made sufficient for the purpose. That, however, does not hold good in the case of a mortgage deed—see *Kumari Bibi v. Srinath Roy*, (1896) 1 C. W. N., 81, and *Tofaluddi Peada v. Mahar Ali Shaha*, (1898) *Ante*, p. 78.

It was argued for the respondents that even if that was so it did not render the security bond invalid, as it is not a mortgage within the meaning of s. 58 of the Transfer of Property Act. This argument is not sound. The document was clearly intended to transfer to the Registrar of this Court for the benefit of the respondents an interest in the properties specified in the document for the purpose of securing to the extent of Rs. 4,000 a future debt, namely, a judgment-debt that might be created by the order of Her Majesty in Council; and thus the document became a mortgage as defined by section 58 of the Act.

It was next contended for the respondents that even if the bond was a mortgage bond, as the Court by admitting the appeal to Her Majesty in Council under section 603 of the Code of Civil Procedure must be taken to have held that the security given was valid, it was not open to the appellant to question the validity of the mortgage bond in these proceedings. We do not consider this contention to be well founded. The surety was not a party to the appeal nor to the proceeding by which the appeal was admitted. It was the appellant to Her Majesty in Council and not the surety, who put forward the security bond, and the surety cannot be held to be bound by the order admitting the appeal so as to be precluded from showing that the mortgage bond is invalid in law. In other words, as he was not a party to the order of this Court, he ought not to be taken to be bound by it.

It was lastly contended by the learned Vakil for the respondents that, as by section 610 of the Code of Civil Procedure the order of Her Majesty in Council regarding the respondents' costs can be executed against the surety to the extent to which he has rendered himself liable, in the same manner as it may be executed against the appellant to the Privy Council, the execution can proceed against the surety even if the mortgage bond be [250] invalid. We are unable to accept this contention as correct. The section provides that execution of the order for costs may proceed against a surety to the extent to which he has made himself liable. Now what is the extent to which the surety in this case has made himself liable? He has not made himself personally liable at all; for the mortgage deed contains no covenant to pay. The only extent to which he intended to make himself liable was by way of a mortgage on certain property which turns out not to have been effected owing to the mortgage deed not being attested as required by section 59 of the Transfer of Property Act. He undertook no other liability. We feel constrained, therefore, to hold that the security bond was invalid and did not create any liability in the surety which can be enforced. The order of the Court below allowing execution to proceed against the surety must consequently be discharged. We give no costs of the appeal.

S. C. G.

Appeal allowed.

NOTES.

[The Privy Council held similarly in *Shamu Patter v. Abdul Kader** (1912) 35 Mad., 697 affirming 31 Mad., 215, that attestation should be of *execution* and not of *admission of execution*.

This decision had been followed in (1899) 27 Cal., 190; (1900) 14 C.P.L.R., 42; (1905) 9 C.W.N., 1001; (1906) 33 Cal., 985; 4 C.L.J., 212; (1905) 32 Cal., 494; (1905) 32 Cal., 729; 9 C.W.N., 697; (1906) 33 Cal., 861; 4 C.L.J., 41. In (1908) 26 All., 69; (1902) 27 Bom., 1, the opposite view was held.]

[26 Cal. 250]

The 9th December, 1898.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE STANLEY.

. Dwar Buksh Sirkar.....Third Party

versus

Fatik Jali and another.....Judgment-debtor and Decree-holder.*

Civil Procedure Code (Act XIV of 1882), section 244—Parties to suit—

"Representative" of party—Purchaser of the decree from the Decree-holder—Civil Procedure Code (Act XIV of 1882), sections 2, 232—

Decree-holder—Application by transferee of decree—Civil Procedure Code Amendment Act (VII of 1888)—Second Appeal.

The word "representative," as used in section 244 of the Code of Civil Procedure, when used with reference to a decree-holder, includes the purchaser of the decree from the decree-holder by an assignment in writing.

Ishan Chunder Sirkar v. Beni Madhub Sirkar, (1897) I. L. R., 24 Cal., 62, and *Badri Narain v. Jai Kishen Das*. (1834) I. L. R., 16 All., 493, referred to.

The Court executing a decree which has been so transferred can go into the disputed question of the transfer of the decree under the provisions of section 244 of the Civil Procedure Code as amended by Act VII of 1888.

[251] Where there has been an assignment pending proceedings in execution taken by the decree-holder, there is nothing in the Code which debars the Court from recognising the transferee as the person to go on with the execution even if he has omitted to make a formal application for execution, such omission being merely an error of procedure, and not an error affecting the merits of the case.

THE facts are set out sufficiently in the judgment of the High Court.

Babu Prio Sunker Mozumdar for the Appellant.

Babu Promotho Nath Sen for the Respondents.

The judgment of the High Court (Macpherson and Stanley, JJ.) was as follows :—

In this case the property of the judgment-debtor was attached and proclaimed for sale. Two days before the date fixed for the sale the decree-holder represented to the Court that the judgment-debtor had satisfied the decree by payment, and asked that the execution case might be disposed of accordingly. No order was passed on this application. On the 1st November, the day fixed for sale, Dewar Bux Sirkar, the appellant in this Court, intervened, and objected to satisfaction being recorded on the ground that he had purchased the decree from the decree-holder by means of a *kobala* some time before the payment in satisfaction was alleged to have been made by the judgment-debtor,

* Appeal from Order No. 146 of 1898, against the order of R. R. Pope, Esq., District Judge of Dinagepur, dated the 21st of February 1898, reversing the order of Babu Barbeswar Mozumdar, Subordinate Judge of that district, dated the 13th of January 1898.

and that the decree-holder could not under such circumstances certify satisfaction. He also said that no payment had, in fact, been made, and that the decree-holder and judgment-debtor were colluding to defeat his right. The Subordinate Judge after taking evidence found that there had been a valid transfer of the decree previous to the alleged payment, and he allowed the objection and rejected the decree-holder's application to have the execution case disposed of as settled. He did not, however, find whether the judgment-debtor had or had not notice of the transfer, or whether he had or had not made the payment alleged by the decree-holder.

The judgment-debtor appealed, and the District Judge, without coming to any decision on the disputed question of transfer, reversed the order of the first Court on the ground that he had no jurisdiction to make any such order under section 244 of the Procedure Code at the instance of the objector. He entertained the [252] appeal merely because he considered that the Judge had acted, although erroneously, under section 244. It is clear, however, that the appeal did lie, as the Subordinate Judge had in substance held against the judgment-debtor that the decree had not been satisfied.

The contention before us is that the Subordinate Judge had full power under section 244 to make the order which he did make. It appears that the appellant's pleader in the lower Court conceded that the case did not come under section 244, apparently with a view to defeat the judgment-debtor's right of appeal; but an erroneous admission of the pleader on a point of law cannot bind the appellant. The respondent's pleader, moreover, appears to have made the same admission, and the Judge said that it was obviously a correct admission.

A Full Bench of this Court held in *Ishan Chunder Sirkar v. Beni Madhub Sirkar*, (1897) I. L. R., 24 Cal., 62, that a purchaser of the mortgaged property after a decree for sale was the "representative" of the judgment-debtor within the meaning of section 244, and that the word "representative" used with reference to a judgment-debtor was not confined to his legal representative, but included also his representative in interest, when the representative was, as regards that interest, bound by the decree. I think the word, when used with reference to a decree-holder, must in the same way include the purchaser of the decree from the decree-holder by an assignment in writing; and it has been expressly held by the Allahabad High Court in *Badri Narain v. Jai Kishen Das*, (1894) I. L. R., 16 All., 483, that the purchaser of the decree is the "representative" of the decree-holder within the meaning of section 244. A decree-holder as defined in the Procedure Code includes any person to whom the decree is transferred. As pointed out in the Allahabad case the expression "decree-holder" is not used in section 244. That section speaks of "the parties to the suit in which the decree was passed or their representatives." The decree-holder who sold the decree was a party to the suit, and the person who purchased the decree from [253] him must, it seems, if he is anything at all, be his representative *quod* the decree within the meaning of the section.

The District Judge was also, I think, wrong in holding that the Subordinate Judge could not under the provisions of section 244 go into the disputed question of the transfer of the decree. That section, as amended by Act VII of 1888, provides that, if a question arises as to who is the representative of a party for the purpose of the section, the Court may either stay execution of the decree until the question has been determined by a separate suit, or itself determine the question by an order under the section. The only provision in the Code referring expressly to the assignment of a decree is contained in section 232, and that no doubt contemplates a case in which the assignee applies for

execution. In such a case the Court may, if it thinks fit, after notice to the decree-holder and the judgment-debtor, allow the decree to be executed by the assignee. If, however, there is an assignment pending proceedings in execution taken by the decree-holder, I see nothing in the Code which debars the Court from recognising the transferee as the person to go on with the execution. The recognition of the Court is no doubt necessary before he can execute the decree, but it is the written assignment and not the recognition which makes him the transferee in law. The omission of the transferee, if it was an omission, to make a formal application for execution, was merely an error of procedure and does not affect the merits of the case. The Subordinate Judge had, I consider, power to determine, if he chose to do so, whether there had been a valid transfer of the decree. He did determine that the decree had been transferred by the *kobala*, and he decided also a question relating to the satisfaction of the decree as between the judgment-debtor and the person whom he found to be the representative of the decree-holder. The appeal of the judgment-debtor was properly before the District Judge, and he was bound to determine all the questions raised in it including the question of representation, if raised. A second appeal lies to this Court as the appellant is the person who was found by the first Court to be the representative of the decree-holder, and the District Judge has not found that he is not the representative.

[254] It is argued for the respondent that the transferee's title was not complete as express notice of the transfer had not been given to the judgment-debtor. As already observed, the transfer, as between transferor and the transferee, is effected by the written assignment. If the judgment-debtor had no notice of the transfer and being otherwise unaware of it paid the money to the decree-holder, the payment was, of course, a good payment, and he cannot again be held liable to the transferor [*sic*] Those are matters, however, which must be determined, and the order of the Subordinate Judge was defective inasmuch as it did not determine them.

The order of the District Judge is set aside, and the case remanded to him in order that he may determine all questions arising on the appeal. The costs of this appeal will abide the result.

N. C.

Case remanded.

NOTES.

[In the C.P.C., 1908, sec. 47, sub-section 3 has been drawn up so as to make it obligatory on the Court executing the decree to determine who was the representative of a party.

Subsequent transferee is within the term 'representative,' (1899) 27 Cal., 670; see also (1902) 25 Mad., 529; (1904) 28 Mad., 87; (1908) 31 All., 82; (1912) 14 I.C., 40 (Punj.).]

[26 Cal. 254]

The 29th June, 1898.

PRESENT :

MR. JUSTICE AMEER ALI AND MR. JUSTICE PRATT.

Durga Prosonno Bose.....Plaintiff

versus

Raghu Nath Dass and others.....Defendants.*

Contribution, Suit for—Partnership business—Money borrowed by agreement by one partner and paid into partnership business—Decree against one partner—Suit for contribution by him against other partners—Adjustment of account whether necessary.

In a partnership business entered into between the plaintiff and the defendants, it was agreed that each member, together with the *gomastas* of the business, should be at liberty to borrow money upon his individual credit and to pay into the firm the money so borrowed to carry on the business. The plaintiff conjointly with defendants 4 and 6, in accordance with that agreement, borrowed several sums of money upon promissory notes, and paid the amounts so borrowed into the business. After the loan the partnership business came to an end, but no account was settled. Afterwards decrees were obtained upon those promissory notes, and the plaintiff was obliged to pay up the decretal amounts. To a suit for contribution by the plaintiff, for money so paid, against the members of the firm, the defence, *inter alia*, was that the suit was not maintainable, in the absence of adjustment of the accounts relating to the firm.

[255] *Held*, that the suit was maintainable, inasmuch as the money secured by the promissory notes did not become an item of the partnership account.

THE facts of the case, so far as they are necessary for the purposes of this report, were as follows :—

The plaintiff in his plaint stated that he and the defendants carried on in partnership the business of commission agents in respect of country produce such as jute, etc., as also a money-lending business, and after giving the shares of the different partners interested he stated that by an agreement between the parties each member, together with the *gomastas* of the business, was authorised to borrow money upon his individual credit and to pay into the firm the money so borrowed to carry on the business. In accordance with this agreement the plaintiff stated he borrowed on his own credit, by two separate bills, two sums of money, aggregating Rs. 2,000, from the defendant No. 1 and a person of the name of Rup Lal Dass. Apparently the defendant No. 1 carried on a separate money-lending business in conjunction with Rup Lal Dass. The plaintiff paid the money so raised into the business. One of the notes was paid but the other did not appear to have been paid. The plaintiff went on to state that on the 28th of Bysack 1293, conjointly with the defendants 4 and 6, he borrowed from one Trilochan Nag, who was really acting on behalf of defendant No. 5, upon a bond executed by the three, a further sum of Rs. 3,000, which also was brought into the business. The plaintiff further stated that the *karbar* came to an end some time in 1294 ; that thereafter there

* Appeal from Appellate Decree No. 38 of 1897, against the decree of S. J. Douglas, Esq., District Judge of Dacca, dated the 30th of September 1896, modifying the decree of Babu Jogesh Chunder Mitter, Subordinate Judge of that District, dated the 18th of February 1895.

was some talk between the parties about the taking of the accounts which went so far that the parties executed an *achalnamah* appointing certain arbitrators, but in consequence of the laches of the defendants, the attempt to take the accounts proved infructuous; that whilst these negotiations were going on he was induced by the defendants to renew the outstanding promissory note in favour of the defendant No. 1 and Rup Lal Dass; that subsequently the defendant No. 1 and Rup Lal Dass brought a suit against him upon that promissory note and obtained a decree which he paid up, and that similarly Trilochan Nag brought a suit upon his bond against the three executants, obtained a decree and got it satisfied from the plaintiff alone. He therefore brought this suit to recover the [256] amounts so over-paid by him in respect of the said promissory note and bond.

In paragraph 12 of the plaint he says as follows: "That because the amounts of money mentioned in paragraphs 3 and 4 were borrowed and spent on account of business of the joint firm and for the interest of the joint firm, and as at the request and desire and with the consent of the partners, defendants, the promissory note mentioned in paragraph 3 was renewed in the manner stated in paragraph 8, the amounts of money mentioned in paragraphs 10 and 11 are the just debts of the plaintiff, and all the partners, defendants, etc."; and the prayer of the plaint was that the Court might be pleased to (*ka*) "confirm that the money paid off by the plaintiff, as stated in paragraphs 10 and 11 of the plaint, was payable by all the partners of the joint firm and to declare that the same was paid off by the plaintiff (*kha*), pass a decree against the partners, defendants, either jointly or severally, for Rs. 2,800 left after deduction of the 2-13th share of the total amount, including costs and damages due by the plaintiff as stated in schedule (*ka*), below, and of Rs. 23-9 whereof remission has been given from the amount in claim together with interest during the pendency of the suit, as well as future interest, damages and the costs in Court according to the respective shares of the business, as stated in the schedule (*kha*) etc."

A number of pleas were raised by the defendants which practically reduced themselves into two. They denied in the first place the agreement, in other words, the authority which the plaintiff alleged he had from the members of the partnership business to borrow upon his own individual credit; and, *secondly*, they denied that the money so borrowed was in fact applied for the benefit of the partnership business; and by way of demurrer they alleged that, inasmuch as a suit for the adjustment of the partnership accounts was barred, the plaintiff was not entitled to any relief in the present action.

The Subordinate Judge did not frame any issue in the case; but he considered that the defendants were entitled to succeed upon their demurrer, in other words that the plaintiff was not [257] entitled to maintain the action. He proceeded upon the case of *Knox v. Gye*, (1872) L. R., 5 E. & Ir., App. 656, in holding that as the suit for the partnership account was barred, any relief which the plaintiff might have been entitled to in this action was barred also, as according to the plaintiff's statement the money had been applied to the partnership business. The Subordinate Judge accordingly dismissed the suit, and on appeal to the District Judge his decree was upheld. The plaintiff appealed to the High Court.

Dr. Rash Behary Ghose and Babu Basant Kumar Bose for the Appellant.

Babu Lal Mohun Das, Babu Boidya Nath Dutt, and Babu Horendra Narayan Mitter, for the Respondents.

Dr. Rash Behary Ghose for the appellant.—A suit for contribution by one partner against another does lie: see *Lindley on Partnership*, pp. 382 and 566. The case of *Knox v. Gye*, (1872) L. R., 5 E. & Ir. App., 656, does not apply to the facts of the present case. The present suit is one for contribution and not for adjustment of accounts. The cases of *Dayal Jairaj v. Khatav Ladha*, (1875) 12 Bom. H. C., 97, and *Merwanji Hormusji v. Rustomy Burjorji*, (1882) I. L. R., 6 Bom., 628 (635), were referred to.

Babu Lal Mohun Das for the respondents.—The suit is not maintainable, inasmuch as there cannot be any suit for contribution without going into the accounts. The case of *Knox v. Gye* applies. Let an account be taken. *Lindley on Partnership*, 6th Edn., p. 551; *Byle's Bills of Exchange*, p. 43 (12th Edn), and also the decision in Appeal from Order No. 7 of 1896, (*Post*, p. 262 note) were referred to.

Babu Basant Kumar Bose in reply.

The judgment of the High Court (*Ameer Ali and Pratt, JJ.*), after stating the facts as mentioned above, continued as follows:—

The plaintiff appealed to the District Judge, who has, in his judgment set forth at some length the arguments on both sides. He holds, and we think properly, that art. 99, Sch. II of the [258] Limitation Act of 1877 was applicable to this suit, the period running from the time when the plaintiff was compelled to make the payments; and applying strictly the decision in the case of *Dayal Jairaj v. Khatav Ladha*, (1875) 12 Bom. H. C., 97 (106), he was of opinion that the two defendants who joined with the plaintiff in executing the bond in favour of Trilochan Nag were liable for contribution to the plaintiff, but again reading strictly the case to which we have just referred, he thought that the plaintiff was not entitled to maintain his action as against the defendant No. 1.

Now, it is necessary to bear in mind the frame of the suit. Strictly speaking, this is a suit for contribution, an action in equity well known to any one at all familiar with the practice and procedure which prevailed on the Equity Side of the old Supreme Court, and unless there is anything which would justify a demurrer on the part of the defendants, there can be no question that the plaintiff would be entitled to recover in this suit; provided, of course, that his allegations of fact are well founded. The Subordinate Judge thinks that, because the money which the plaintiff borrowed upon his own credit was applied for the purposes of the partnership business, it therefore became an item in the partnership account; and that consequently, in view of the remarks made by Lord WESTBURY in *Knox v. Gye*, (1872) L.R., 5 E. & Ir. App., 656, the plaintiff could not maintain the action for contribution apart from the account. It seems to us that the Subordinate Judge has taken a somewhat narrow view of the object and scope of the action even upon the rules which were prevalent in the English Courts prior to the passing of the Judicature Act in 1873. *Knox v. Gye*, (1872) L. R., 5 E. & Ir. App., 656, was a case in which the accounts of the business of which the parties were members were actually asked for; and the subject-matter of the action and the relief that was prayed for in that suit were intimately connected with the taking of the accounts. One of the noble and learned Lords held that, although the action was brought to recover a portion of the assets that had been realized by one of the partners after the dissolution of the partnership, it could not be recovered because the accounts could not be taken. The

[259] three other Judges were of opinion that an action for the recovery of a portion of the assets realized by one of the partners might be maintained. That view has been adopted by Mr. Justice GREEN in the case to which we have already referred, and by LATHAM, J., in the case of *Merwanji Hormusji v. Rustomji Burjorji*, (1882) I. L. R., 6 Bom., 628. The case of *Knox v. Gye*, (1872) L. R., 5 E. & Ir. App., 656, occurred long before the Judicature Act came into force. Mr. Justice LINDLEY in his work on Partnership summarises the effect of the new rules in words, which to our minds are absolutely expressive of the way in which Courts of Equity, so far as we are aware, now deal with such matters. In Lindley on Partnership, 5th Edition, page 560, will be found the following passage: "The Judicature Acts and rules have materially altered the law relating to actions between partners. Formerly no action at law could be maintained by one partner against another if it in any way involved taking a partnership account: for, although the right to an account was a legal right, the old action of account, at least between partners, had long become obsolete, and Courts of law had no machinery enabling them to do justice in matters of account. Hence it became settled that actions involving accounts between partners could not be sustained. The Judicature Acts and rules have, however, abolished this rule; and the present state of the law on this subject appears to be as follows: *First*, as regards real property; *secondly*, as regards personal property; *thirdly*, as regards actions for money demands or damages. The three following rules may be taken as guides: (1) An action for damages may be maintained by one partner against another in all those cases in which such an action might have been maintained before the Judicature Acts, provided the action would not have been restrained by a Court of Equity. (2) Any action which would have been so restrained cannot be supported. (3) An action may be maintained by one partner against another for any money demand which before the Judicature Acts could have been made the subject of a suit for an account." And with reference to this he says: "Practically the important questions which will arise under the new procedure are reduced to the [260] following. 1. When can an action be maintained between partners without taking a general account of all the partnership dealings and transactions? 2. When will such an account be ordered without a dissolution of the firm? The second of those questions has been already considered. The first, which has also been alluded to, can only be answered generally by saying that each case must depend upon its own circumstances and upon whether justice can really be done without taking such an account." Even under the old rules there were numerous exceptions in the practice generally followed in the common law Courts, and Mr. Justice LINDLEY in p. 562 gives for purposes of reference a summary of the circumstances under which an action could have been maintained, as also the circumstances under which it could not. In p. 564 will be found an abstract of a case where "*A* and *B* agreed to become partners and each agreed to furnish a certain amount of capital, and *A* lent *B* the amount *B* was to contribute. This loan constituted a debt for which an action by *A* against *B* would lie, although they may have actually become partners. And it also followed that if partners agreed to contribute capital from time to time to meet expenses as occasion might require, and one of them was compelled to pay the whole of the expenses for which all were liable, he could sue his co-partners for what they ought to have contributed according to their agreement." Another case of a similar character is given in p. 566, and in p. 567 some instances are given in which an action was held not to be maintainable. The case of *Dayal Jairaj v. Khataw Laaha*, (1875) 12 Bom. H. C., 97, arose out of a suit brought in 1878; whilst that of *Sedgwick v. Daniell*, (1857) 2 H. & N., 319,

was undoubtedly under the old rules. There four persons, shareholders in a certain company, borrowed on their own credit a certain sum of money which was applied for the business of the company. The plaintiff in that action had to pay in the entire amount, and brought a suit for contribution against his co-partners. The learned Judges held that the action was maintainable. They said that, inasmuch as some of the [261] shareholders had entered into a separate obligation, the suit was maintainable by the plaintiff as against the persons who joined in incurring the obligation with him. We think the learned District Judge in this case has regarded as a principle what was stated, as we understand it, merely as a test. To our minds the learned Judges in *Sedgwick v. Daniell*, (1857) 2 H. & N., 319, considered the fact that four persons out of the company had entered into a transaction as an indication that that transaction had nothing to do with the partnership business. In our opinion they simply used that circumstance as a test for determining whether the transaction in respect of which the action was brought was so intimately connected with the partnership business as to make it an item in the partnership account. We are inclined to think that if the District Judge had not taken that limited view of *Sedgwick v. Daniell*, (1857) 2 H. & N., 319, his conclusion would have been different. In the case of *Dayal Jairaj v. Khataw Ladha*, (1875) 12 Bom. H. C. Rep., 97, Mr. Justice GREEN, on appeal from the decision of Mr. Justice SARGENT, pointed out what he thought was the principle properly deducible from the enunciations contained in *Knox v. Gye*, (1872) L. R., 5 E. & Ir. App., 656, and applying the test pointed out in *Sedgwick v. Daniell*, (1857) 2 H. & N., 319, which was strictly applicable to the facts of the case before him, he upheld the decision of the Court below. The facts of the Bombay case were shortly these, and they indicate exactly how matters stood before Mr. Justice GREEN: Six persons were members of a partnership business. Two retired before dissolution, two became insolvents, and the plaintiff had to pay all the amounts recoverable from the different parties. He then brought a suit against the only defendant who could be sued. Upon objections raised by the defendant he subsequently added the other persons who had joined with him in contracting the debt for which he had been sued and held liable. There is nothing in the facts of the present case which would, in our opinion, bar a suit for contribution, unless of course the money secured by the promissory note became an item of the partnership account. The most important allegation which affords an indication to the question [262] whether the money was borrowed upon an understanding totally apart from the partnership business, or whether it became an item of the partnership business, is contained in paragraph 2 of the plaint. The plaintiff states that there was an agreement between the parties that one or more of them might upon his individual credit borrow money from outsiders which money he might pay into the business; and he alleges further that not only were the members so authorised, but also the *gomastas* were placed on the same footing, *i.e.*, that under and by virtue of that agreement the *gomastas* had equal authority to pledge their credit. Apart from that agreement it cannot be said that the position of the *gomastas* was the same as that of the partners in the firm. To our mind this is a clear indication of the fact that the contract was wholly distinct from the partnership business. In considering also the question whether this suit is maintainable or not, we must bear in mind the allegations contained in paragraph 12 of the plaint relating to the renewal of one of the notes at the request of the defendants.

We have reserved for this stage this last case relied upon by the respondents in support of their contention. It is an unreported judgment delivered

by two learned Judges of this Court on the 5th of January 1897 in appeal from Order No. 7 of 1896.* The facts out of which that appeal arose are

**The 5th January, 1897.*

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Guda Kulita and another.....Defendants

versus

Joyram Das.....Plaintiff.†

Contribution, Suit for—Partnership business—Whether a suit for contribution by a partner against a co-partner would lie and in what cases—Adjustment of account whether necessary.

A suit for contribution by a partner against some of his co-partners, on account of money paid by him for the satisfaction of a debt contracted by him jointly with the said co-partners, is maintainable in cases where the liability satisfied by the plaintiff is not a joint liability of the entire partnership, or where the said partners were some only of several persons comprising the partnership, and the bond was executed not in the usual course of business of partnership; it is also maintainable in a case where the co-partners expressly promised to contribute their share of debt after a decree has been passed upon the bond.

THE facts of the case as stated in the plaint were shortly these: The plaintiff and the two defendants executed a joint bond in favour of one Deb Hari Gossami, and borrowed from him a certain sum of money. Deb Hari brought a suit upon that bond, obtained a decree and in execution of that decree realized the whole amount due under it from the plaintiff. It was admitted that the money that was borrowed by the plaintiff and the defendants was applied to the partnership business carried on by the plaintiff, the defendants and a third party, who was no party to the bond in favour of Deb Hari or a defendant in the suit brought by him. Plaintiff further stated that the decree-holder Deb Hari, after having taken out execution of his decree, threatened to put him in jail, and the defendants at this time when asked to contribute their share of the debt promised to do so, but avoided payment under some excuse or other. Thereupon the plaintiff brought this suit for contribution. The defence, *inter alia*, was that the suit was not maintainable, unless a suit for settlement of account of the partnership business was brought. The Court of First Instance dismissed the suit, holding that it was not maintainable. On appeal to the Judge of the Assam Valley District, he, holding that the suit was maintainable, remanded the case under section 562 of the Civil Procedure Code to the Court below, to be tried on the merits. Against this decision the defendants appealed to the High Court.

Babu Jasoda Nundun Poramanick for the Appellants.

Babu Hem Chundra Miller for the Respondent.

The judgment of the High Court (Banerjee and Rampini, JJ.) was as follows:—

This is an appeal from an order of the Judge of the Assam Valley District remanding, under section 562 of the Code of Civil Procedure, to the first Court for trial on the merits the plaintiff respondent's suit which had been dismissed by that Court on the ground that the suit was not maintainable; and the question for determination in this appeal is whether the view taken by the Lower Appellate Court that the suit is maintainable is right.

The learned Vakil for the defendants-appellants contends that the question should be answered in the negative, and the ground of his contention is that the suit in this case is one that is brought by one partner against some of his co-partners for contribution on account of money paid by him for the satisfaction of a debt of the firm.

Now the facts of the case as stated in the plaint are shortly these: The plaintiff and the two defendants executed a joint bond in favour of one Deb Hari Gossami and borrowed from him Rs. 500. Deb Hari Gossami brought a suit against the plaintiff and the defendants upon that bond, obtained a decree, and in execution of that decree realized the whole amount due under it from the plaintiff. It was not disputed in the course of the argument that the money that was borrowed by the plaintiff and the defendants was applied to the

* † Appeal from Order No. 3 of 1896, against the order of G. Godfrey, Esq., District Judge of the Assam Valley Districts, dated the 8th of November 1895, reversing the order of Abdul Majid, Esq., Extra Assistant Commissioner and Munsif of Gauhati, dated the 26th of July 1895.

not suffi-^[263]ciently stated in the judgment, nor do we understand the learned Judges in the sense in which the judgment was attempted to be construed. If the facts had been identical with the facts of this case, and if the learned Judges had gone so far as the learned pleader for the respondents attempted to make out, we would have felt it our duty to make a reference to a Full Bench. Having regard to the opinion expressed by the learned Judges, almost in the language of Mr. Justice LINDLEY as given at ^[264]p. 566 of his book, namely, that "if it was a liability of the partnership, then the mere fact of one partner having been compelled to pay the whole of the partnership debt would not entitle him to sue his co-partners, or any of them, for contribution in the absence of any special circumstances," we think they had distinctly in view the fact that even under the old rules there might be special circumstances which would make the action main-^[265]tainable. The case of *Sadler v. Nixon*, (1834) 5 B. & Ad., 936, referred to in that judgment, as Mr.

partnership business carried on by the plaintiff the defendants and the third party, a person named Sandhyaram, who was no party to the bond in favour of Deb Hari Gossami, nor a defendant in the suit brought by him. And the question is whether, upon this state of facts, the liability that was satisfied by the plaintiff was a liability of the partnership, or whether it should be treated as a separate liability. If it was a liability of the partnership, then the mere fact of the one partner having been compelled to pay the whole of the partnership debt would not entitle him to sue his co-partners or any of them for contribution in the absence of any special circumstances, though, of course, he would be entitled to charge the sum paid in the partnership account. In support of this view we need only refer to the case of *Sadler v. Nixon*, (1834) 5 B. and Ad., 936, and other cases referred to in Lindley on Partnership, 5th Edition, p. 566. On the other hand, if it be treated as a separate liability distinct from the partnership business, that is, in other words, if the liability which was satisfied by the plaintiff alone was not a joint liability of the whole partnership but a joint liability only of himself and the two defendants, in that case a separate suit would clearly lie; see the cases of *Sedgwick v. Daniell*, (1857) 2 H. & N., 319, and *Dayal Jairaj v. Khataw Ladha*, (1875) 12 Bom. H. C. Rep., 97. The determination of the preliminary objection raised to the tenability of the suit will, therefore, depend upon the determination of the question whether the liability satisfied by the plaintiff alone was a joint liability of the entire partnership or a liability of the plaintiff and defendants only. It was on the one hand argued for the appellants that the liability should be treated as a liability of the entire firm because the money borrowed from Deb Hari Gossami constituted the entire capital of the firm, and it had been borrowed in the usual course of business of the partnership and with the consent of the remaining partner Sandhyaram, and section 249 of the Contract Act was relied upon in support of this view. It was further contended that, upon the statements made by the plaintiff in his deposition, the firm should be treated as having consisted on the date of the loan only of the plaintiff and the defendants. On the other hand, it was contended by the learned Vakil for the plaintiff-respondent that the very fact of the bond having been executed by the plaintiff and the two defendants should be taken as sufficient for the present purpose to show that the liability created thereby was not the liability of the whole firm. Upon the material placed before us, we are not in a position to accept either of these two extreme contentions as correct. We think the question ought to be determined upon the evidence. Of course if it is found that at the date when the bond in favour of Deb Hari Gossami was executed, the plaintiff and the defendants were the only members that constituted the partnership, then the plaintiff's case should fail. So also should the suit fail if it is found that the money was borrowed in the usual course of business of the partnership on behalf of all the members, though the bond was executed only by three of them. But if it is found that the plaintiff and defendants were some only of several persons composing the partnership, and that the bond was executed not in the usual course of business of the partnership, in that case the suit will lie and should be tried on the merits. We should further add that if the express promise to pay that is referred to in the fourth paragraph of the plaint is made out, in that case, quite apart from all other circumstances, the suit will lie, and the Court should, therefore, in the first instance, determine whether this allegation in the plaint is true. The remand order of the Lower Appellate Court will, therefore, stand, but the questions for determination by the first Court in the first instance will be those indicated above. The costs of this appeal will abide the result.

S. C. G.

Appeal dismissed.

Justice GREEN points out, has been doubted in the English Courts; and a reference to it will show that that case can hardly be regarded as an authority for the contention now advanced. *Sadler v. Nixon* was disposed of without any reasons being given. In this view of the law, and having regard to the case made by the plaintiff in this action, it appears to us that if there was a contract, either express or implied, between the plaintiff and the defendants that he should, like the *gomastas* as he alleges, pledge his [266] individual credit and borrow money from outsiders, and apply the same to the benefit of the business, the mere fact that the money was applied to the partnership business does not render it an item in the partnership account so as to preclude the plaintiff from maintaining the present action. The plaintiff did not actually seek for an adjustment of account, although he stated in one of his prayers that if it was necessary that accounts should be taken he was not unwilling to that course being adopted. The test in all these actions, as pointed out in *Sedgwick v. Daniell*, (1857) 2 H. & N., 319, is whether the money which was borrowed and sued for became by the mere fact of borrowing an item in the partnership account; but we think that is clearly not so here. We are of opinion therefore that with respect to defendants 4 and 5 the District Judge's decision proceeding on a strict and somewhat literal interpretation of the case of *Dayal Jai Raj v. Khatai Ladha*, (1875) 12 Bom. H. C., 97, is correct so far as it goes; and we accordingly affirm his decree as against defendants 4 and 5; but we think that the dismissal of the suit against the other defendants is erroneous. We accordingly set aside the order of dismissal and remand the case to the District Judge either to try it himself or, in the event of the parties desiring that evidence should be gone into regarding the [267] allegations in the plaint to which we have referred, to remit it to the Court of First Instance. In that case proper issues should be framed and the evidence directed to the points requiring determination. The plaintiff has throughout expressed his willingness to have the accounts adjusted; and as between him and the defendants 4 and 5, as also the other defendants, if his allegations are established, it will be a mere question whether he has been overpaid or not.

We think that under the circumstances of the case the plaintiff is entitled to his costs in all the Courts.

S. C. G.

Appeal allowed. Case remanded.

NOTES.

["It may be taken generally that if the account sought is in respect of a matter which, though arising out of the partnership business or connected with it, does not involve the taking of general accounts, the Court will, as a rule, give the relief asked for and will now-a-days refuse to interfere only in those cases in which a partial account would work injustice to the other partner."—(1908) 19 M.L.J., 10 : 32 Mad., 76, where the subject is fully dealt with.]

[26 Cal. 267]

The 8th September, 1896.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Jatindra Mohan Poddar.....Petitioners
versus
Srinath Roy and others.....Opposite Parties.*

*Parties—Civil Procedure Code (Act XIV of 1882), sections 108, 109—
Whether an auction-purchaser is a necessary party to an application
to set aside an ex parte decree—Partnership business—Service of
summons upon minors whether good, by affixing summonses
on the house in which the business is carried on—Civil
Procedure Code (Act XIV of 1882), sections 74,
76, and 443.*

An auction-purchaser of property sold in execution of an *ex parte* decree, is not a necessary party to an application made by the judgment-debtor to set aside the said decree, inasmuch as the auction-purchaser does not come under the description of "opposite party" in section 109 of the Code of Civil Procedure.

In a suit for the enforcement of an equitable mortgage of certain property belonging to a partnership business, brought against certain minors and other persons who constituted a firm carrying on business within the jurisdiction of the Court in which the suit was brought, but the minors resided outside its jurisdiction, the summonses were neither served upon the minors, nor upon their guardian personally, but were affixed on the house in which the business was carried on.

Held, that there was no service of summons either personal or substituted upon the minors either under section 74 or under 76 of the Code of Civil [268] Procedure, even assuming that those sections can apply to a case in which some of the defendants who were interested in the partnership business are minors.

Held, also, that sections 74 and 76 of the Code of Civil Procedure are controlled by section 443 of the said Code.

THE facts of this case, so far as they are necessary for the purposes of this report, were shortly as follows :—

Raja Srinath Roy and others instituted a suit upon an equitable mortgage against a number of persons, including the present appellants, represented by their mother as their certificated guardian ; the defendants were all members of a partnership firm carrying on business under the name and style of Bungshi Badan and Giridhar Poddar. The plaint was filed on the 12th February 1895 and an *ex parte* decree was made in favour of the plaintiffs on the 13th February 1896. The present appellant made an application on the 2nd August 1897 to set aside the decree under section 108 of the Code of Civil Procedure on the ground that no summons had been served upon the minors or their certificated guardian. The Court below found that, although the firm was alleged to have stopped payment in August 1894, it continued as a matter of fact till April 1895, and was not formally dissolved by an order of the Court till the 11th May 1896. The Court further found that in the present suit,

* Appeal from Order No. 430 of 1897, against the order of Babu Rajendra Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 7th of September 1897.

summons was served on the 9th March 1895 upon the defendants 3 to 8 at the office of the firm at Baliaghata, and held that such service was good service upon the minor defendants according to section 76 of the Code of Civil Procedure, although they were then residing in the District of Faridpore. The Court, also holding that as one of the partners, Srinath Poddar, appeared and defended the suit, there was sufficient appearance on behalf of the minors under section 36 of the Civil Procedure Code read with section 251 of the Indian Contract Act, dismissed the application under section 108 of the Civil Procedure Code. The petitioners appealed to the High Court.

The *Advocate-General* (Sir Charles Paul), Dr. Ashutosh Mookerjee, and Babu Sarat Chandra Ghosh, for the Appellants.

Mr. Pugh, Dr. Rash Behary Ghose, Babu Busunt Kumar Rose and Babu Jogendra Chunder Ghose for the Respondents.

[269] Mr. Pugh, for the respondents, took a preliminary objection to the hearing of the appeal on the ground that the auction purchasers at the sale in execution of the original decree, which was sought to be set aside, had not been made parties to the appeal.

— The *Advocate-General* for the appellant.—The objection comes too late, as it was not taken in the Court below; moreover the auction-purchasers are not necessary parties. As to the merits, no summons was served upon the infants, and at the time when the summons had been served upon the other defendant the business had ceased to exist. The case of *Gocul Das Dwarkadas v. Ganeshlal*, (1880) I. L. R., 4 Bom., 416, referred to by the Subordinate Judge has no application to this case.

Mr. Pugh for the respondents.—The auction-purchasers are necessary parties, as the decree under which the sale took place is sought to be set aside. As to the merits, there was a valid service under section 74 or section 76 of the Code of Civil Procedure. Moreover appearance by the managing partner was a good appearance on behalf of the minors. See Indian Contract Act, section 251, Lindley on Partnership, 6th Edition, p. 280, and the case of *Tomlinson v. Broadsmith*, L. R., (1896) 1 Q. B., 386.

Dr. Ashutosh Mookerjee in reply.—The auction-purchasers are not "opposite parties" within the meaning of sections 108 and 109 of the Code of Civil Procedure, as they would not be affected by the decree being set aside. See *Jan Ali v. Jan Ali Chowdhry*, (1868) 1 B. L.R., A. C., 56, and *Zainulabdin Khan v. Muhammad Asghar Ali Khan*, (1887) I. L. R., 10 All., 166; L. R., 15 I. A., 12. There was no valid service under section 74 or 76 of the Civil Procedure Code, as, in the case of infant defendants, these sections must be taken to be controlled by section 443; moreover, the firm was not sued as such and no attempt was made to serve the managing member as representing the firm. See Daniell's Chancery Practice, pp. 334, 335; and *Lovell v. Beauchamp*, L.R., (1894) A. C., 607.

[270] The judgment of the High Court (Maclean, C.J. and Banerjee, J.) was as follows:—

This appeal arises out of an application by the appellants, under section 108 of the Code of Civil Procedure, to set aside the *ex parte* decree obtained by the respondents against the appellants, and certain other persons. The Court below has rejected the application, holding that summonses had been duly served on the petitioners under section 76 of the Code of Civil Procedure; that the appearance entered by the defendant Srinath Poddar was an appearance entered by all the defendants; that the petitioners were aware of the institution of this suit; and that the application was not a *bona fide* one. *

Against this order of the Court below the petitioners have preferred this appeal, and it is contended, on their behalf—*first* that the Court below is wrong

in holding that summonses had been duly served on the petitioners under s. 76 of the Code of Civil Procedure, and that it ought to have held that no effective service of the summonses had been made on them; and, *secondly*, that the Court below is wrong in holding that the appearance entered by the defendant, Srinath Poddar, was an appearance entered on behalf of all the defendants as their recognized agent, and that it ought to have held that, so far as the petitioners being minors are concerned, appearance on their behalf could only have been entered by their guardian *ad litem*, duly constituted.

The respondents raised a preliminary objection that the present application could not be entertained in the absence of the auction-purchasers of the property sold in execution of the *ex parte* decree.

We are of opinion that the preliminary objection cannot prevail.

The parties entitled to notice of an application under section 108 of the Code of Civil Procedure are those that come under the description of "opposite party" in section 109, and they are in our opinion such of the parties to the suit as are interested in opposing the application. An auction-purchaser does not come within this description. It was urged that the auction-purchasers [271] are interested in opposing an application of this nature, as their position may be affected by the *ex parte* decree being set aside. The answer, however, to this argument is that, as the sale has been confirmed, their rights, whatever they may be, cannot be affected in any way by the present proceeding to which they are not parties and which is instituted with the object of setting aside the *ex parte* decree, and not of setting aside the sale held in execution of it. The preliminary objection must be over-ruled.

The following are the facts material to be stated. The two petitioners who are minors represented by their mother and guardian appointed by the Civil Court were, as such, represented by her as their guardian; and no order appointing her as guardian *ad litem* for the purposes of the suit was made under section 443 of the Code of Civil Procedure. This fact is undisputed. The suit was brought in 1895 against the minors, and certain other persons, who constituted a firm carrying on business at Baliaghata within the jurisdiction of the Court in which the suit was brought, but the minors resided outside its jurisdiction; and the suit was for the enforcement of an equitable mortgage of certain property belonging to the partnership. The firm fell into financial difficulties about the year 1894, but the partnership was not dissolved until May 1896; and though it was contended by the present appellants that the partnership had ceased to exist since July 1894, we consider, though in the view we take the point is not very material, that the balance of evidence supports the contention that the firm continued to carry on business down to the 20th of March 1895. It is not disputed that the summonses in suit were neither served upon the minors nor upon their mother personally. The summonses on the defendants were taken to their place of business at Baliaghata, and sought to be served personally on some of them who were at that place, and on their refusal to sign the acknowledgment of service, they were affixed, on the 9th of March 1895, on the house in which the business of the firm was carried on.

These being the facts of the case, the first question is whether the summonses were duly served on the petitioners. If that question is answered in the negative the mere fact of the certi-[272] ficated guardian of the petitioners being aware of the institution of the suit is a matter of no importance, and cannot affect the rights of the minors. It must be borne in mind that section 108 of the Civil Procedure Code is imperative, and enacts that, if the applicant for setting aside an *ex parte* decree "satisfies the Court that the summons

was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree, etc."

As we have pointed out, there was no personal service of the summons on the minors or upon their guardian, nor was the summons affixed to the house in which the minors or their guardian actually resided, but the Court below has held that the summons was duly served on the petitioners under section 76 of the Code. It is contended for the appellants that this view is wrong, because there could be no service of summons, actual or constructive, on the petitioners before any guardian was appointed for them under section 443, and the suit was not properly instituted against them, and further because the partnership business at Baliaghata had stopped payment before the institution of this suit. As in point of fact there was no service on the certificated guardian, the mother, this point is not very material, but as the person by whom the minors were said to be represented was their guardian appointed by the Civil Court, and there is no suggestion that she was not the proper person to represent them, the Court was under section 443 bound to appoint her as the guardian for the suit, and under such circumstances, it may well be, having regard to the view expressed in the Full Bench case of *Suresh Chunder Wum Chowdhory v. Jugut Chunder Deb*, (1886) I. L. R., 14 Cal., 204, that the absence of a formal order would not vitiate the proceedings.

As for the second branch of the contention, the evidence, as we have said above, indicates that the business of the firm was being carried on when the summonses were served.

The question then is whether there was due service of the summons under either section 76, or section 74 of the Code, [273] and whether either of those sections applies to a case in which a minor is sued along with other persons, or whether sections 74 and 76 are not controlled by section 443.

It is, we think, abundantly clear from the evidence that the service of the summons in this case was not made, and was not intended to be made, on any of the defendants for himself and for the other defendants as their partner, or as manager of their joint business, or as agent under section 74 or section 76. There having been no personal service on any guardian *ad litem* of the minors, the suggestion that the service such as it was, was one under section 74 or 76, savours somewhat of an after-thought. The service sought to be effected, and the judgment of the Court below supports this view, was personal service on certain of the defendants (other than the petitioners) in their personal and not in any representative character, and upon their refusal to sign the acknowledgment of service, the summonses were, apparently under section 80 of the Code, affixed to the place of business at Baliaghata.

In our opinion there was no service of the summons under either section 74 or section 76, even assuming that those sections can apply to a case in which some of the defendants who were interested in the partnership or business are minors. Though it is unnecessary for us to decide the point, it is by no means clear that those sections apply to a case like the present. Section 443 of the Code requires that a minor defendant shall be represented by a guardian appointed for the suit, in other words, by a guardian *ad litem*, and although that section does not expressly say anything about the service of summonses, it speaks of the person so appointed as being appointed to "put in the defence for such minor and generally to act on his behalf in the conduct of the case;" and it would be anomalous to hold that though the case requires the appointment of a proper person as guardian to act for a minor generally in the conduct of the case, service of the summons on a person other than such person

may be sufficient service on the minor. In our opinion there has been neither personal nor substituted service of the summons upon the minor defendants, and, if so, they are entitled to have the decree set aside under section 108. It follows from the above that the [274] appearance which Srinath Poddar purported to enter on behalf of the minors is quite ineffectual. He had no power or authority to enter any appearance on their behalf.

The result is that the appeal must be allowed, the order of the Court below must be reversed, and the *ex parte* decree made in this case must be set aside, and the Court below directed to proceed with the hearing of the suit. We cannot, however, part with the case without impressing upon plaintiff litigants the absolute necessity of proceeding with strictness in accordance with the Code in cases where minors are defendants. The inconvenience, difficulties, loss of time and money by not so proceeding are aptly illustrated by the present case, but all this difficulty might have been avoided if the plaintiff had complied with the Code and had seen that a proper guardian *ad litem* had been appointed in the first instance. His present position is attributable to his lack of due diligence and care at the outset of the suit. The Court ought to be jealous in seeing that in the case of minor defendants the provisions made for their protection are strictly complied with.

We should have been better satisfied if we could have taken a different view of the law applicable to this case, as there is ground at least for suspecting the sincerity of the application in the true interests of the minors, and we may add that it will be for the advisers of the minors to consider, and most carefully, whether any real benefit is likely to accrue from a rehearing of the suit, especially having regard to the question of subsequent costs. The respondents must pay the appellants their costs of this appeal.

S. C. G.

Appeal allowed.

NOTES.

[As regards irregularities in the service of summons on the minors and in the appointment of guardians *ad litem* see also (1903) 30 Cal., 1021 ; (1910) 32 All., 287.]

[275] *The 13th January, 1899.*

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE STEVENS.

Goor Bux Sahoo.....Plaintiff

versus

Birj Lal Benka and others.....Defendants.*

Appeal—Appal from Order— Civil Procedure Code (Act XIV of 1882), sections 57, 582, 588, 589—Returning plaint to be presented to the proper Court—Order under Civil Procedure Code, section 552.

Where an order is made by the lower Court of appeal, returning a plaint under section 57 of the Civil Procedure Code, by virtue of the powers conferred on it by section 582, an

* Appeal from Order No. 32 of 1898, against the order of J. Knox-Wight, Esq., District Judge of Patna, dated the 4th of February 1898, directing the return to the plaintiff for the purpose of being presented to the proper Court, the plaint which had been filed in the Court of Babu Hamengoo Chundra Bose, Subordinate Judge of that district.

appeal lies to the High Court under section 589. Section 588 does not prohibit such appeal. *Bindeshri Chaubey v. Nandu* (1981) I. L. R., 3 All., 456, distinguished.

THE facts and arguments on this appeal, so far as they are material to this report, appear from the judgment of the High Court.

Mr. C. Gregory and Babu Karuna Sindhu Mukerjee for the Appellant.

Dr. Rash Behary Ghose and Babu Jogesh Chandra Roy for the Respondents.

The judgment of the High Court (Ghose and Stevens, JJ.) was as follows :—

This is an appeal against an order of the District Judge of Patna under section 57 of the Code of Civil Procedure, directing that a plaint which had been filed in the Court of the Subordinate Judge of that District, be returned to the plaintiff for the purpose of being presented to the proper Court.

The suit was one for the recovery of damages by reason of breach of a contract on the part of the defendant in the matter of the sale of certain goods which had been consigned by the plaintiff, and despatched by him from his place of business in the [276] district of Patna to the defendant at Calcutta. The plaint mentioned in the first place what the nature of the contract was, and that the defendant had committed a breach of such contract in connection with the sale of the goods that had been consigned to him ; and it then stated that the cause of action had accrued at Sadikpore, Nawada, and Mokama, the places from which the goods were despatched to the defendant. The plaint, however, omitted to state where the contract was entered into between the parties, and also where it was to be fulfilled.

The defendant entered appearance on the 22nd December 1896, and presented a petition stating that the suit should have been instituted in Calcutta, and praying at the same time, under section 20 of the Code of Civil Procedure, for stay of proceedings. The Subordinate Judge fixed, in the first instance, the 6th of January 1897, and ultimately the 22nd of January of the same year, for the purpose of determining the question raised by the defendant. On that date, the plaintiff was examined, and also cross-examined by the defendant, and he put in a petition for the amendment of his plaint. In that petition the plaintiff alleged that the contract between the parties was entered into at Mokama in the district of Patna ; and that the stipulation was that the price of the grains to be sold by the defendant should be paid at Barh in the same district ; and that, therefore, the cause of action arose within the jurisdiction of the Court of the Subordinate Judge of Patna. The Subordinate Judge allowed this amendment. Subsequently the defendant put in his written statement ; issues were fixed for trial upon the merits of the case, and ultimately the Subordinate Judge found upon the evidence adduced on both sides that the agreement was entered into within the jurisdiction of his Court ; that the proceeds of the sale of the goods transmitted by the plaintiff were payable in the district of Patna ; and that, therefore, the cause of action arose within his jurisdiction. He further found that the plaintiff had suffered damage by reason of the conduct of the defendant in connection with the sale of the goods in question, and accordingly gave the plaintiff a decree as claimed by him.

Against this decree an appeal was preferred by the defendant. [277] In dealing with this appeal, the District Judge has not gone into the merits of the case, but he is of opinion that the amendment of the plaint that was prayed for by the petition presented by the plaintiff on the 22nd January 1897 should not have been allowed by the Subordinate Judge, because the cause of action, as alleged in that petition, was totally different from that stated in the plaint, and that it created a " different jurisdiction ; " and he has accordingly directed

that the plaint be returned to the plaintiff with a view to its being presented to the proper Court. Certain other minor points are dealt with by the District Judge in his judgment; but we do not think it necessary to notice them.

We observe that the learned Judge, though asked to do so, did not enter into the question whether the contract upon which the plaintiff sued was effected in the district of Patna or not.

The present appeal is by the plaintiff; and upon its being called on for hearing, a preliminary objection has been taken by the learned Vakil for the respondent upon the ground that no appeal lies to this Court under section 588 of the Code of Civil Procedure from the order of the District Judge directing that the plaint be returned for the purpose of its being presented to the proper Court. In support of his argument the learned Vakil has called our attention to the case of *Bindeshri Chaudhey v. Nandu*, (1881) I. L. R., 3 All., 456. In that case, which was instituted in the Court of the Munsif, the defendant raised the objection that the value of the subject-matter of the suit exceeded the pecuniary jurisdiction of the Court, and that, therefore, the suit was not cognizable by the Munsif. The Munsif, however, found that the value of the property was within his pecuniary jurisdiction, and on the merits gave the plaintiff a decree. On appeal by the defendant, the Lower Appellate Court, upon investigation, held that the value of the subject-matter of dispute did exceed one thousand rupees, and that, therefore, the suit was not cognizable in the Court of the Munsif, and accordingly directed that the appeal be decreed, and the record of the case sent back to the Munsif for the purpose of the plaint being returned to the plaintiff for being presented to the proper Court. On second appeal, the learned Judges [278] of the High Court at Allahabad held that article 6 of section 588 of the Code of Civil Procedure referred to an order passed by the Court of First Instance, and not to a decision of an Appellate Court on general grounds; that the proper course for the plaintiff appellant was to file a second appeal on proper Court-fees against the decision of the Appellate Court; and that the special appeal to the High Court could not be entertained. In the present case, it will be observed, that the learned District Judge of Patna did not go into the merits of the question, whether the cause of action to the plaintiff really arose within the jurisdiction of the Court of the Subordinate Judge of Patna; but, as already stated, being of opinion that the amendment as prayed for by the plaintiff ought not to have been allowed by the Subordinate Judge, and confining, as we understand it, his attention to the plaint, has held that the plaint should be returned to the plaintiff for the purpose of being presented to the proper Court, being apparently of opinion that, upon the recitals in the plaint, the suit was not cognizable in the Court of the Subordinate Judge of Patna, but in some other Court.

Section 588 of the Code of Civil Procedure lays down that an appeal shall lie from certain orders mentioned therein, one of those orders being an order returning a plaint for the purpose of being presented to the proper Court as mentioned in article 6 of that section; and it is provided that the orders passed in appeals under that section shall be final; that is to say, that there should be only one appeal against an order of the kinds mentioned in section 588. No doubt, the order contemplated in article 6 of the section is one which it is ordinarily within the province of the Court of First Instance, where the plaint is presented, to make; but the like order may also be made by the Appellate Court under the powers conferred upon it by section 582. That section provides that "the Appellate Court shall have, in appeals under this chapter, the same powers, and shall perform as nearly as may be the same duties, as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits

instituted under Chapter V ; and in Chapter XXI, so far as may be, the word 'plaintiff' shall be held to include a plaintiff-appellant or defendant-appellant," and so on. Then we find that [279] in section 589 of the Code it is provided that, "when an appeal from an order is allowed by this Chapter, it shall lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made or, when such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court ;" so that, when an order is made by an Appellate Court under section 57 of the Code, by virtue of the powers conferred on it by section 582, and where an appeal has to be preferred against such an order, it must be preferred to the High Court, as provided by section 589.

We think, upon a consideration of the sections to which we have referred, that it was in no way the intention of the Legislature to prohibit an appeal such as has been preferred in this case against an order of the Appellate Court under section 57 of the Code of Civil Procedure. It seems to us to be clear that what section 588 prohibits is a second appeal against any of the orders mentioned therein ; but when a Court of Appeal makes the order by virtue of the powers conferred upon it by section 582, there is no reason to hold, having regard to the provisions of section 589, that an appeal does not lie against it.

Turning now to the merits of the matter before us, we are of opinion that the learned District Judge has not taken a right view of the question raised before him. As already pointed out, he has not investigated the question, whether or not the cause of action arose within the local limits of the jurisdiction of the Subordinate Judge of Patna ; but he is of opinion that the amendment allowed by the Subordinate Judge ought not to have been allowed, because the petition for amendment introduced a cause of action very different from that which was alleged in the original plaint, and a different jurisdiction. We have already mentioned what the plaint was, and also indicated the defect in it. It seems to us that the cause of action stated in the petition of amendment is in no way inconsistent with that alleged in the plaint. The plaintiff in his plaint omitted to mention, as we take it, the place where the contract was entered into, or where it was agreed that it should be fulfilled ; and the circumstances under which the cause of action arose in Patna were not accurately [280] stated, and all that was supplied and put right by the petition of the 22nd January 1897. It did not, as we understand, introduce a new cause of action, nor a different jurisdiction. No doubt, as pointed out by the learned District Judge, there was considerable delay in the presentation of the petition. But if the cause of action as mentioned in that petition did not raise, before the Court of the Subordinate Judge, a case altogether different from that set up in the plaint, there is no reason why the Subordinate Judge should not have allowed the amendment prayed for. It was discretionary with him to allow it ; and we do not think that the discretion was badly exercised. At any rate, he allowed the amendment, and tried out the case on the merits. That being so, we think that it was the duty of the Judge to investigate whether the contract between the parties was entered into in the district of Patna, and whether it was agreed that it should be fulfilled there.

We accordingly direct that the order of the District Judge be set aside, and the case sent back to him with a direction that he do determine the question whether the contract was entered into in the district of Patna, and whether the parties agreed that it should be fulfilled there. If he finds this question against the plaintiff, it will be his duty to return the plaint for the purpose of being presented to the proper Court, or make such other order as he may be advised in that behalf. If, on the other hand, he finds that the cause of

action really arose within the local limits of the jurisdiction of the Subordinate Judge, he should try the appeal on the merits, and determine whether the decree made by the Subordinate Judge in favour of the plaintiff should be affirmed or got.

The costs will abide the result.

S. C. C.

Appeal allowed. Case remanded.

NOTES.

[This was followed in (1899) P.R., 59; (1900) F.L.R., 137; (1902) 25 All., 174; (1903) 80 Cal., 453; see also (1903) 31 Cal., 344, where an order returning a memorandum of appeal was held to be non-applicable.]

[281] ORIGINAL CIVIL.

The 9th February, 1899.

PRESENT :

MR. JUSTICE JENKINS.

Jadobram Dey

versus

Bulloram Dey.

Partnership—Alleged agreement—Burden of proof—Contract Act (IX of 1872), section 253—Evidence—Income Tax—Income Tax Act (II of 1886), Rule 16—Production and admissibility in evidence of Income Tax papers.

In a partnership suit where one party does, but the other party does not, allege a specific agreement that the shares in the said partnership were unequal, the existing presumption as to the equality of partner's shares casts the burden of proof on those alleging the agreement who must therefore begin.

Rule 16 of the rules made by the Local Government under section 38 of the Income Tax Act (II of 1886) does not apply to the production of Income Tax papers in a Court of Law in a suit between two partners.

Lee v. Birrell, (1813) 3 Camp., 337, and Mayne's Commentary on the Criminal Law, pp. 86, 87, cited.

THIS was a partnership suit. The plaintiff and defendant had carried on business together for many years as dealers in stationery under the style of Day and Cousin. The plaint alleged that the parties in 1865 commenced to carry on business together upon the terms amongst others that each should be entitled to an eight annas share in the said partnership business; that the business was first carried on at the dwelling house of the parties, but that in 1870 a shop was opened at 9, Hastings Street, in Calcutta, and thenceforward the business was carried on at that shop, upon the same terms as before. The plaint also alleged that there was an equal contribution of capital. The defendant by his written statement denied that the shares were equal, and alleged that the business had all along been carried on upon the terms that the share of the defendant in the profit and losses should be 10 annas, and that of the plaintiff 6 annas, and that the capital had been contributed by the parties in proportion to their respective shares.

The plaint further alleged that the defendant had in fraud of the partnership opened another shop competing with the latter, [282] and had wrongfully closed the partnership business and excluded the plaintiff therefrom, and in the prayer asked for distribution of the partnership business, and that the usual accounts should be taken, and that the defendant should be ordered to account for the profits made in his other and rival shop, and should pay Rs. 2,000 as damages. At the trial the claim for damages and account of the alleged rival shop, was abandoned, and the issue was limited to the question whether the shares were equal or unequal and as to their amount. During the hearing of suit the following points were raised :—

(1) As to whether the onus was on the defendant, who alleged inequality of shares in the partnership business, to prove it.

Mr. *Sinha* for the Plaintiff.—The onus is on the defendant. In the absence of any evidence the presumption is that the shares of the partners are equal. It lies on the defendant who alleges inequality to prove it. *Lindley on Partnership*, s. 348.

Mr. *J. G. Woodroffe* (Mr. *Dunne* with him) for the Defendant.

Where no agreement is alleged or proved it is true that the presumption contended for does arise—Contract Act (Act IX of 1872), section 253 : but in the present case the plaint in effect alleges a specific agreement that the shares were to be equal. The plaintiff therefore rests his case, not on presumption but on the agreement, which he must prove.

Jenkins, J.—As the plaintiff does not allege any specific agreement, but contends that the business had been carried on without anything being said as to the amount of the shares, and as the defendant on the other hand alleged a specific agreement that the shares were to be unequal, the presumption which exists as to the equality of partner's shares casts the burden of proof upon the defendant, who must therefore begin.

(2) A further question then arose as to the production of certain Income Tax returns made by the firm of Day and Cousin. It was alleged that it would appear from these returns that the firm had stated the shares of the partners to be as alleged by the defendant. Application had been made to the Registrar for the issue of a subpoena upon the Income Tax Collector to produce all returns made by the firm from the year 1886. The Registrar refused to [283] issue the subpoena without the order of the Court by reason of Rule 16 issued under section 38 of the Income Tax Act (II of 1886) (*Calcutta Gazette*, March 10th, 1886), which rule was as follows :—

“ 16. All public servants are forbidden to make public or disclose, except for the purpose of the working of Act II of 1886, any information contained in documents delivered or produced with respect to assessments under Part IV of the said Act, and any public servant committing a breach of this rule shall be deemed to have committed an offence under section 166 of the Indian Penal Code.”

On application being made to the Court by the defendant, the subpoena was ordered to issue to the Income Tax Collector for the production in Court of returns without prejudice to any objection raised hereafter by the parties as to the production in evidence of these documents. At the hearing a clerk from the Income Tax Office attended with two Income Tax returns (the preceding returns having been destroyed), but objected on behalf of the Collector to their production in evidence on the ground of their being confidential communications and on the ground of the rule abovementioned.

Mr. *J. G. Woodroffe* for the Defendant.—These documents are not privileged from production. It is for the Court, not the Registrar, to decide as to

the production of the document in evidence. The rule was published with the object of regulating the conduct of the officers of the Income Tax Office, not with the object of depriving litigants of evidence which they would otherwise be entitled to use. The rule has no application where disclosure is sought under the process of Court. Even if the rule has such application production can in this case be enforced because there is in fact no disclosure. The rule is for the protection of persons making returns. There can be no disclosure where the person applying for the return is the partner in the firm which made it. This is not the case of a stranger applying for returns made by a firm with which he is not connected. In the case of *Ali Khan Bahadur v. Indar Parshad*, (1896) I. L. R., 23 Cal., 950: L. R., 23 I. A., 92, the Judicial Commissioners held the returns to be inadmissible, but the Privy Council, [284] while deciding nothing upon this finding, appear to have inspected the returns in question. [JENKINS, J.—There are the cases of *Lee v. Birrell*, (1813) 3 Camp. 337; and *R. v. Yakataz Khan*, (1863) 2nd Madras Sessions, cited in Mayne's Criminal Law, pp. 86, 87.] Those cases are in the defendant's favour. No doubt it does not there appear that there was any such rule then in force as that which is now published: See Act XVII of 1870; and 46 Geo. III, c. 65, Sched. F; but there is no substantial difference between the oath of secrecy there referred to and the rule in question.

Mr. Pugh for the Plaintiff.—The grounds on which the plaintiff objects to these documents being produced are because he knows nothing about them. In England there was no statutory provision, but the Income Tax Officer was appointed on taking an oath not to disclose secrets which came to his knowledge. The question before Lord ELLENBOROUGH was whether, notwithstanding the oath, he could be made to disclose the particulars. Here there is a statutory provision, and the facts in that case differ materially from those in the present case.

Mr. Woodroffe.—In reply.

Jenkins, J.—The point for my decision is whether certain Income Tax papers, which are desired in evidence, are privileged from production by virtue of a rule made by the Local Government in pursuance of the power contained in section 38 of Act II of 1886. This section and the rule framed under it appear to me to have been framed for the purpose of regulating the conduct of officers coming under its operation and from [for?] preventing any disclosures by them in the course of their duties, and its object was to secure the interests of those making the returns under the Act. I think, however, that the rule was not directed against their production in a Court of Law such as is sought in this case. I therefore think the objection fails. A somewhat analogous point was decided by Lord ELLENBOROUGH in the case of *Lee v. Birrell*, (1813) 3 Camp., 337, and also apparently by SCOTLAND, C. J., in the Madras Court. The reference to this decision appears in Mr. Mayne's Commentaries on [285] the Criminal Law (Mayne's Criminal Law, pp. 86, 87). In both cases it was decided, notwithstanding the oath of secrecy taken on assumption of office, that the documents were not privileged from production.

[The returns were admitted upon its being proved that they had been compiled by the defendant in consultation with the plaintiff who had approved of their being made in the form in which they then appeared, and upon its appearing from the returns that the shares of the partners had been stated therein to be as contended for by the defendant.]

Attorneys for the Plaintiff: Messrs. Pugh & Co.

Attorneys for the Defendant: Messrs. Gonesh Chunder Chunder & Co.

C. E. G.

NOTES.

[As regards the privilege contained in The Indian Evidence Act, 1872, secs. 123 and 124, see the full discussion in (1908) 19 M.L.J., 263 : 32 Mad., 62.]

[26 Cal. 285]

APPELLATE CIVIL.

The 8th September, 1898.

PRESENT :

SIR FRANCIS W. MACLEAN, KT., K.C.I.E., CHIEF JUSTICE,
AND MR. JUSTICE BANERJEE.

Braja Lal Sen.....Plaintiff

versus

Jiban Krishna Roy.....Defendant.*

Hindu Law—Bengal School—Father's brother's daughter's son, whether preferential heir to mother's brother's son—Limitation Act (IX of 1871)—Suit by reversioner for possession of immoveable property—Revival of right extinguished—Limitation Act (XV of 1877), section 2—Effect of Sale for arrears of rent accrued due after the death of the full owner, from the female heir—Res judicata.

Under the Bengal School of Hindu Law, the father's brother's daughter's son as heir is preferential to the mother's brother's son.

A and I, daughters of one R, on his death succeeded in equal shares to the properties left by him. Subsequently A died, leaving behind her a minor son U, who after his mother's death held possession of half of the said properties as heir to his mother's father for more than twelve years. The period of twelve years expired before the Limitation Act (IX of 1871) came into operation. In a suit for recovery of possession of the share of the immoveable properties, which was originally in the possession of U, but [286] afterwards passed into the hands of a third party, by the reversioner within twelve years from the death of I, the female heir, the defence was that the suit was barred by limitation.

Held, that inasmuch as the possession of U was adverse to the female heir, and as her right to the disputed property was barred before the Limitation Act (IX of 1871) came into operation, the right of the reversioner was also barred. *Srinath Kur v. Prasunno Kumar Ghose*, (1893) I. L. R., 9 Cal., 934, followed. *Tikaram v. Shama Charan*, (1897) I. L. R., 20 All., 42, dissented from.

A claim for arrears of rent, against a female heir, accrued due after the death of the last full owner, is a personal claim against her : therefore by a sale held under the provisions of Bengal Act VIII of 1869, in execution of a decree for arrears of such rent obtained against her by some of the co-sharer landlords, only the limited estate of the female heir passed unless the said landlords proceeded to bring the tenure itself to sale.

Baijun Doobey v. Brij Bhokun Lal, (1875) I. L. R., 1 Cal., 133 : L. R., 2 I. A., 275 ; and *Mohima Chunder Roy Chowdhry v. Ram Kishore Acharjee Chowdhry*, (1875) 15 B. L. R., 142 : 23 W. R., 174, followed.

* Appeal from Original Decree No. 26 of 1897, against the decree of Babu Bulloram Mullick, Subordinate Judge of 24-Pergunnahs, dated the 3rd of October 1896.

A previous suit brought by the said female heir for setting aside the aforesaid sale was dismissed. In a subsequent suit by the reversioner for recovery of possession of the immoveable property so sold, the defence was that the suit was barred as *res judicata*.

Held, that the dismissal of the previous suit, which was for recovery only of the limited estate of a female heir, would not be a bar to the subsequent suit, which was for the recovery of the absolute estate, which vested in the reversioner.

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgment of the High Court.

Dr. Rash Behary Ghose and Babu Bhawani Churn Dutt for the Appellant.
Babu Saroda Churn Mitter and Babu Haro Kumar Mitter for the Respondent.

The judgment of the High Court (Maclean, C.J., and Banerjee, J.) was as follows:—

This appeal arises out of a suit brought by the plaintiff appellant for possession and mesne profits of certain immoveable [287] property known as *chak* Bele Durgahagun, on the allegation that the *chak* appertained to the estate of one Ramsagur Mitter; that on the death of Ramsagur Mitter in 1240, corresponding to 1833, his two daughters Anandmoyi and Ishaneswari, who were his heiresses, held and owned the said *chak* in equal shares; that on the death of Anandmoyi in 1241 (or 1834), her share passed by survivorship to her sister Ishaneswari, who, however, out of affection, gave Anandmoyi's son Uma Charan an eight anna share of the *chak* for his maintenance, and Uma Charan accordingly held possession of the same; that on the death of Ishaneswari in Falgoun 1300 (or March 1894), the plaintiff as Ramsagur Mitter's father's brother's daughter's son became entitled to the said *chak* by inheritance, and that he has been wrongfully kept out of possession of it by the defendant; and that even if the defendant had acquired any right to the *chak* it became extinguished on the death of Ishaneswari.

The defendant sets up various defences. He says that the plaintiff is not the heir of Ramsagur, pleads the statute of limitation, sets up the plea of *res judicata*, and alleges that the property in dispute never belonged to Ramsagur Mitter, but was acquired by Uma Charan's father Harish and Ishaneswari in equal shares; and that even if it did belong to Ramsagur, the plaintiff's right, if any, as reversioner, has become extinguished. He then alleges, and there is not, we think, any dispute as to the truth of these allegations, whatever the result in law flowing from them may be, that Uma Charan, Ishaneswari, and her son Prosonno Coomar Bose jointly mortgaged the *chak* in dispute to Kristo Mohun Mitter in May 1861, to pay off certain arrears of rent due in respect thereof; that Uma Charan's heirs subsequently mortgaged their eight anna share, that is, a moiety of the *chak*, to Brojo Nath Kundoo to satisfy the mortgage debt due to Kristo Mohun Mitter; that subsequently the eight anna share of Uma Charan's heirs in the *chak*, was sold in execution of the decree obtained on Brojo Nath Kundoo's mortgage, and that the remaining eight anna share of the *chak*, which belonged to Ishaneswari, that is, the other moiety, was sold in execution of certain decrees for arrears of rent, and that the entire sixteen annas interest in the *chak*, that is, the entirety of the property, was purchased by one Mathura Nath [288] Chukravarti, whose interest subsequently passed by a sale in execution of a decree to Thakomoni Dasi. It is further alleged by the defendant, and we think proved, that the execution sale of Ishaneswari's eight anna share was set aside in a regular suit, and the said share was again sold on the 5th of January 1885 in execution of a fresh decree for arrears of rent, and purchased by one Chandra Coomar Bandopadhyaya, from whom it passed through an intervening transfer to Thakomoni Dasi; that

Thakomoni Dasi subsequently mortgaged the disputed *chak* and other properties to the defendant; and that the defendant purchased the entirety of the property at a sale held in execution of the decree obtained by him on his mortgage. He thus claims to be entitled to the entire sixteen anna share, in other words the entirety of the property in dispute, and, in assertion of that claim, opposes the plaintiff's contention.

The Court below held that the plaintiff was the reversionary heir of Ramsagur Mitter; that the property in dispute appertained to the estate of Ramsagur, and that the plaintiff's claim was not barred by limitation, but he dismissed the suit on the ground that the sale of Ishaneswari's eight anna share, in execution of the decrees for rent, passed not merely her limited interest as her father's daughter, but also the reversionary interest in the said share; that the present suit, so far as it relates to that share, was successfully met by the defendant's plea of *res judicata* by reason of the dismissal of Ishaneswari's suit for reversal of the execution sale; and that the reversionary right claimed by the plaintiff in respect of the eight anna share held by Uma Charan had been extinguished, and an absolute title created in favour of Uma Charan by virtue of a family arrangement made by Ishaneswari, and acquiesced in by Prosanno Kumar Bose, the then next reversioner.

Against this decision the plaintiff appeals, urging that the Court below was wrong in holding that the sale in execution of the rent decrees could pass anything beyond Ishaneswari's limited interest; that it was wrong in holding that the suit as regards Ishaneswari's eight anna share was barred as *res judicata*; and that it was also wrong in holding that, in regard to the remaining eight anna share, an absolute title had been created in favour of Uma Charan. The respondent not only supports the judgment [289] of the lower Court on the points decided in his favour, but also seeks to support the decree of dismissal of the suit on three additional grounds, namely, that the plaintiff has failed to establish his heirship to the estate of Ramsagur Mitter; that he has also failed to show that the property in dispute appertained to that estate; and that the suit, as regards the eight anna share of the *chak* held by Uma Charan, was barred by limitation. In this position of matters the points which arise for our determination are:

First.—Whether the plaintiff has made out that he is the reversionary heir to the estate of Ramsagur Mitter.

Second.—Whether the *chak* in dispute appertains to that estate.

Third.—Whether the plaintiff's claim to the eight anna share of the *chak* held by Uma Charan is barred by limitation.

Fourth.—Whether the reversionary right claimed by the plaintiff in the eight anna share held by Uma Charan became extinguished under the family arrangement set up by the defendant.

Fifth.—Whether the defendant's plea of *res judicata* in respect of the other eight anna share is a bar to the suit.

Sixth.—Whether the reversionary interest in the eight anna share passed under or was bound by the sale in execution of the rent decrees against Ishaneswari or her limited interest only.

Dealing with these various points in the order indicated above, on the first point the case of the plaintiff is that he is Ramsagur Mitter's father's brother's daughter's son, and as such, he is, in the absence of any nearer heirs, the reversionary heir to Ramsagur. The defendant contends that one Panchanan Bose, who is Ramsagur Mitter's mother's brother's son, but who has made no claim to the property in dispute, is his heir in preference to the plaintiff. The

Court below has found the plaintiff's relationship with Ramsagur Mitter established by evidence. The correctness of this finding has not been questioned on this appeal, and we see no reason to dissent from it. But the learned Subordinate Judge has held that the alleged relationship of Panchanan Bose with Ramsagur Mitter is not established, and that, even if it had been established, still the plaintiff would be the preferential heir of [290] Ramsagur, and his finding of fact and his conclusion of law are both impugned on behalf of the respondent as incorrect. Three witnesses have been examined on behalf of the defendant to prove the alleged relationship between Panchanan Bose and Ramsagur Mitter; they are Harinath Mitter, a relation of Ramsagur, Sham Charan Mitter, a neighbour, and Panchanan Bose himself. There is no evidence to contradict them. The Court below has given no good reason for disbelieving their evidence; and we hesitate to affirm the finding of the Court below that the evidence is insufficient to prove that Panchanan Bose is the son of Ramsagur's maternal uncle. But in the view we take upon the question of law, it becomes unnecessary to determine this question of fact. We agree with the Court below in holding that even if Panchanan Bose be Ramsagur's maternal uncle's son, still the plaintiff would be the preferential heir of Ramsagur.

Whatever doubts might at one time have existed as to the heritable rights of the father's brother's daughter's son under the Bengal School of Hindu law [see *Gobindo Hareekar v. Woomesh Chunder Roy*, (1864) W. R., F. B., 176], it must now be taken as settled by the decision of the Full Bench in the case of *Guru Gobind Shaha v. Anund Lal Ghose*, (1870) 5 B. L. R. 15: 13 W. R., F. B., 49, that he is in the line of heirs as a *sapinda* relation within the meaning of the *Dayabhaga*, and the only ground upon which the learned Vakil for the respondent rests his contention on this point is that the plaintiff, though in the line of heirs of Ramsagur, is excluded by Panchanan, the maternal uncle's son, being entitled to succeed in preference to the father's brother's daughter's son. No authority is cited in support of this contention; and the only reason given in its favour is that, while the maternal uncle's son is mentioned in the *Dayabhaga*, the father's brother's daughter's son is not. This is not, however, strictly correct. For if the maternal uncle's son is mentioned, by necessary implication (and not expressly, as the argument assumes) in the *Dayabhaga*, chapter XI, section VI, paragraphs 13 and 20,* so is the father's brother's daughter's son, as has been shown in the case of *Guru Gobind Shaha v. Anund Lal Ghose*, (1870) 5 B. L. R., 15: 13 W. R., F. B., 49. And as for the [291] exact position of the father's brother's daughter's son in the line of heirs, though that may be after the agnatic *sapinda* descendants of the great grandfather, a point upon which conflicting considerations may arise [see *Huri Das Bundopadhyaya v. Bama Churn Chattopadhyaya*, (1888) I. L. R., 15 Cal., 780] there can be no doubt that he comes before the *sapinda* relations in the maternal line. This will be seen from the *Dayabhaga*, chapter XI, section VI, paragraphs 13 and 20, in the former of which the author indicates the reason for the succession of maternal kinsmen and for the preference of *sapindas* in the paternal over those in the maternal line, according to the doctrine of spiritual benefit. That reason is shortly this: The wealth of a deceased person, who can no longer have temporal enjoyment, should devolve on those who can confer spiritual benefit on him. Now the *sapindas* on the paternal line offer oblations to the paternal ancestors which the deceased was bound to offer, and in which he participates, and the *sapindas* in the maternal line offer oblations to the maternal ancestors, which the deceased was bound to offer, but in which he does not participate; so that, while they both confer spiritual

benefit on the deceased, the former benefit him doubly by enabling him to participate in the oblations offered by them and by discharging a duty that was incumbent on him of offering oblations to certain ancestors, and the latter benefit him only in one way, namely, by offering certain oblations which he was bound to offer; and therefore while both are entitled to inherit his estate, the latter succeed only on failure of the former. After showing that his doctrine is in conformity with the texts of Manu, the author of the *Dayabhaga* states his conclusion in paragraph 20. We should add that there is a slight inaccuracy in Colebrooke's translation of this paragraph in the passage "which the deceased shares, or which he was bound to offer," where the word "or" has been erroneously used for "and." The view we take that the father's brother's daughter's son comes in the order of succession before the maternal line is in accordance with the opinion of Jagannath (see Colebrooke's Digest, Book V, chapter VIII, section 1, v. 434, commentary, Madras Edition, Vol. II, page 567).

[292] Upon the second point all that is urged on behalf of the respondent, who impugns the correctness of the lower Court's finding, that the *chak* in dispute belonged to Ramsagur Mitter, is that the *pottah* of 1246 or 1839 (Ex. H. 2, p. 94 of the Paper Book), under which the *chak* is held, was granted to Uma Charan and Ishaneswari, and that the terms are very different from those of the *pottah* in favour of Ramsagur granted by Rani Sankari in 1227 or 1820. That may be so, but it is clear from the *pottah* of 1246 or 1839 (Ex. H. 2) that it was granted to Uma Charan and Ishaneswari as the heirs of Ramsagur, and that the tenure created by it was only a modified form of the tenure created in favour of Ramsagur by the *pottah* of Rani Sankari. We see no reason to disturb the finding arrived at by the Court below that the property in dispute appertained to the estate of Ramsagur Mitter.

Upon the third point, namely, that relating to the statute of limitation which has been decided by the lower Court in favour of the appellant, and which is raised before us by the respondent, the contention of the respondent is that the possession of Uma Charan Dutta and his heirs and successors was adverse to Ishaneswari, and that the claim of the plaintiff in respect of the eight anna share, over which such possession extended, was barred by limitation. In answer it is urged for the appellant that the possession of Uma Charan was not adverse to Ishaneswari, and that even if the possession of Uma Charan's heirs and successors was adverse, such adverse possession did not extend over a period of time sufficiently long to bar Ishaneswari's claim, before the present law, which gives the reversioner a fresh starting point, viz., from the date of the death of the person having the limited interest, first came into force. In other words, the appellant urges that when Uma Charan died in 1872, the claim of Ishaneswari had not become barred by the adverse possession, if adverse, of Uma Charan, and Uma Charan's heirs, and consequently that under the new law the period of limitation only begins to run against him as from the date of her death. In approaching this part of the case we have to deal with a condition of affairs which originated more than sixty years ago, and so far as the [293] evidence goes, there are matters which are left in some obscurity. But the evidence appears to us to establish these facts.

The property in dispute appertained, as has been found above, to the estate of Ramsagur Mitter, and on his death in 1240 or 1833 descended to his two daughters, Anandmoyi and Ishaneswari, as his heiresses. On Anandmoyi's death in 1241 or 1834 one moiety of the property would appear to have been held by her son Uma Charan Dutta, who was then a minor, and the other moiety by Ishaneswari. Things continued in this state down to Joisto 1279

or May 1872, when Uma Charan died and disputes arose between his sons and Ishaneswari. The possession of one moiety by Uma Charan is admitted in the plaint; but the plaintiff says that Uma Charan held possession by virtue of a gift from his aunt Ishaneswari, who, out of affection, gave him that moiety of the property for his maintenance. There is, however, no evidence, leastways no reliable evidence, of this supposed gift, and the first mention of it is to be found in the *pottah* (Ex. III, page 32 of the Paper Book) executed by Ishaneswari in favour of one Mathura Nath Chakravarti in 1873, which is after the death of Uma Charan, and after the dispute had commenced with his sons. The learned Vakil for the appellant asks us to infer such a gift from the fact deposed to by several of the witnesses for the plaintiff, and by one of the witnesses (Kedar Nath Mitter) for the defendant, that Ishaneswari loved Uma Charan as if he were her son, and lived in joint mess with him, and he contends that but for a gift express or implied from Ishaneswari, Uma Charan could not have obtained the half share he held; as, on Anandmoyi's death Ishaneswari became, as the survivor, entitled by law to the whole of her father's estate. There might have been considerable force in this contention if there had been nothing to show how and under what circumstances the possession of Uma Charan commenced. But that is not the case. It appears from the plaintiff's Exhibits I and V (attested copies of a decree of the Sudder Dewani Adalat, dated the 1st February 1837 and a *solenamah* or deed of compromise, dated the 29th January 1840) and the defendant's Exhibit H 2 (the *pottah* of 1246 already referred to) that Ramsagur Mitter brought a suit to recover possession of the *chak* in dispute; that on his death during the pendency [294] of that suit his daughter's son Uma Charan, then a minor, represented by his father Hara Chunder Dutta, and Ishaneswari, daughter of Ramsagur, were substituted as his legal representatives; that the suit resulted in a compromise pursuant to which a *pottah* was obtained from the proprietors of the land; and both in the deed of compromise and in the *pottah* Uma Charan and Ishaneswari are described and treated as the heirs of Ramsagur. Uma Charan's claim to one moiety of the property as a co-heir with his aunt Ishaneswari was thus asserted (erroneously no doubt), and this claim was not opposed by Ishaneswari who apparently was under a mistake as to the extent of her own right. Under the circumstances the fair inference appears to us to be that the admitted possession of Uma Charan from about 1838 to the date of his death in 1872, a period of nearly thirty-five years, ought to be attributed to the independent right which he asserted, and which was not disputed, as a co-heir of his grandfather, rather than to a gift which we are invited to infer from the circumstance of the affection which Ishaneswari felt for her nephew Uma Charan, and of their living in joint mess.

In our opinion the possession of Uma Charan from 1838 to 1872 was under this claim of right, and was adverse to his aunt Ishaneswari. After the death of Uma Charan, disputes undoubtedly arose between his sons and Ishaneswari as is admitted in the plaint, and the possession (so far as it extended) of Uma Charan's sons and of persons deriving title from them must, on the plaintiff's own admission, have been that of trespassers as against Ishaneswari. It is not by any means clear from the evidence that after Uma Charan's death, Ishaneswari had possession of the entire property. Debendra Kumar Dutta, one of the sons of Uma Charan, who is examined for the plaintiff, and who admits that he manages the case on behalf of the plaintiff, in his examination-in-chief cannot say more than this: after his father's death, "Ishaneswari was in possession of the sixteen annas of many portions of the disputed *chak*, and realized the sixteen annas of the rents;" but in his cross-examination he says: "A year after the death of my father, my eldest brother

Upendra died. Mohendra then may have been twelve or thirteen years old. [295] On the death of my eldest brother, the second brother used to look after the estate. We had then a half share of the *chak* and the other half appertained to the estate of Ramsagur." And a little further on he adds: "We became dispossessed of the disputed *chak* from the time of the auction sale." The evidence tends to the conclusion that after Uma Charan's death, though there was some dispute about possession, the moiety of the property held by him remained in the possession of his sons until it was sold at auction at the instance of their creditors, and thereafter it remained in the possession of the auction-purchaser and of the persons deriving title from him.

It is in this manner, as appears to us, that possession has been held of the moiety of the property now under consideration, and the question is what is the effect in point of law of such possession as regards the plea of limitation.

It is contended for the defendant that, as the possession of Uma Charan's sons, and of persons deriving title from them must, in any view of the case, be held to be that of trespassers as against Ishaneswari, and as such possession had continued for more than twelve years before her death, the reversioner's claim must be held to be barred by limitation, notwithstanding that she died within twelve years before the institution of this suit, inasmuch as article 141 of schedule II of the Limitation Act only gives a fresh starting point to the reversioner from the date of the female heir's death, when the reversioner is entitled to the estate at such date, that is to say, when the interest of the female heir has not itself been barred at the date of her death. In our opinion the question is concluded by the Full Bench decision in the case of *Srinath Kur v. Prosunno Kumar Ghose*, (1893) I. L. R., 9 Cal., 934, and we cannot agree with the view of the Allahabad High Court expressed in the case of *Tikaram v. Shama Charan*, (1897) I. L. R., 20 All., 42, that the case of *Srinath Kur v. Prosunno Kumar Ghose*, (1893) I. L. R., 9 Cal., 934, has been virtually overruled by the decisions of the Privy Council in the case of *Lachhan Kunwar v. Anant Singh*, (1894) I. L. R., 22 Cal., 445: L. R., 22 I. A., 25.

[296] It appears to us, therefore, not material to discuss this question any further, more especially as we entertain the view that the admitted possession of Uma Charan from 1838 to 1872 must be taken to have been a possession adverse to Ishaneswari. Such adverse possession, which had continued for upwards of twelve years, and had barred Ishaneswari's claim before the new law (first enacted by Act IX of 1871) came into operation, must be held to bar the reversioner also. This view gains support from the decision of a Full Bench of this Court in *Nobin Chunder Chuckerbutty v. Gurupersad Doss*, (1868) B. L. R., Sup. Vol., 1008: 9 W. R., 505, which has been approved by the Privy Council in *Amirto Lal Bose v. Rajonee Kant Mitter*, (1875) 15 B. L. R., 10: 23 W. R., 214. And if the reversioner's right was barred before the new law of limitation came into force, as under the circumstances of this case in our judgment it was, that law (see section 2 of Act XV of 1877) does not revive such right.

It was further contended by the learned Vakil for the appellant that Ishaneswari by allowing the *pottah* of 1246 (Exhibit H 2) to be taken by Uma Charan jointly with herself, precluded herself from suing Uma Charan as a trespasser, and as this happened before Uma Charan's possession had continued for twelve years, Uma Charan's possession could not upon the authority of the case of *Nobin Chunder Chuckerbutty v. Gurupersad Doss*, (1868) B. L. R., Sup. Vol., 1008: 9 W. R., 505, bar the reversion. We do not think this argument is well-founded, viz., that the taking of the *pottah* jointly with Uma

Charan can have any such effect. It seems to us that the *pottah* has one of two effects: either as an admission of Uma Charan's title to one moiety, to which his long possession of that moiety of the property is to be attributed, or as indicating an alienation by way of gift by Ishaneswari in favour of her nephew Uma Charan of that moiety, in which view the alternative contention put forward in the fourth point, urged would prevail. The alienation to be implied from the transaction was made by Ishaneswari in favour of Uma Charan, who was one of the then next reversioners, and such alienation was subsequently ratified by her son, Prosonno Kumar Bose, the only other next reversioner for the time being as [297] appears from the mortgage deeds of 1861 and 1869 (Exhibits B and A).

In this view, the interest acquired by Uma Charan would, upon the authority of *Nobokishore Sarma Roy v. Hari Nath Sarma Roy*, (1884) I. L. R., 10 Cal., 1102, be an absolute interest.

For the reasons given above we think that the suit, as regards the moiety of the *chak* which was held by Uma Charan, fails.

It remains now to consider the last two points, which relate to the remaining eight-anna share or the other moiety of the *chak* property.

Upon the fifth point the contention of the defendant, which has been accepted by the Court below, is that, as the suit brought by Ishaneswari in 1886 for setting aside the sale of an eight-anna share of the *chak* in dispute for arrears of rent was dismissed on the 19th of March 1887, that decision is binding on the reversioner, and the present suit, so far as it relates to that share, is barred as *res judicata*. On the other hand it is urged for the plaintiff-appellant, that, if what passed by the sale in execution of the decrees for arrears of rent, was only the limited estate of Ishaneswari, the suit could only have been for reversal of the sale of that estate, and the dismissal of such a suit cannot be a bar to the present suit, which is brought for recovery of the absolute estate now vested in the reversioner. And it is further urged that, having regard to the main ground of dismissal of the former suit, namely, that the sale had been confirmed with the consent of Ishaneswari, given upon receipt of Rs. 2,040 by her, the decree in that suit cannot bind the reversioner. We are of opinion that the appellant's contention is sound. It is quite true that Ishaneswari, though owning only the limited estate of a Hindu female, represented the absolute estate for certain purposes, and that a decree in a suit concerning the absolute estate if obtained against her without fraud or collusion would be binding on the reversioner—see *Kattuma Nauchear v. The Rajah of Shivagunga*, (1863) 9 Moo. I. A., 539 (604); but if a suit, though concerning the absolute estate, is determined [298] upon a ground personal to the female heir, for instance, if a suit brought by a Hindu widow to recover possession of immoveable property appertaining to her husband's estate is dismissed on the ground of its having been alienated by her in favour of the defendant, in the absence of legal necessity being shown, the decree in such a case ought not to bind the reversioner. Now having regard to the ground upon which Ishaneswari's suit for reversal of sale was dismissed (see Exhibit IX, p. 44 of the Paper Book) we do not think it would be right to hold that the dismissal of that suit is a bar to the reversioner's claim. If what passed by that sale so sought to be set aside was only the limited estate of Ishaneswari, the dismissal of the suit for setting that sale aside cannot bind the reversioner, whilst if what passed under that sale included also the interest of the reversionary heir, the question of *res judicata* becomes a superfluous one.

It remains, therefore, to determine what passed by the sale, which is the sixth and the last point. The sale, though for arrears of rent, was admittedly

in execution of decrees for rent obtained by certain sharers, not the entire body of co-sharers, in the undivided estate under which the *chak* in dispute was held, and according to the law then in force (section 64 of Bengal Act VIII of 1869) it had "the same effect as the sale of any immoveable property sold in execution of a decree, not being for arrears of rent payable in respect thereof," that is to say, it would pass not the whole tenure, but only the right, title and interest of the judgment-debtor. The judgment-debtor in this case was Ishaneswari, who held the qualified estate of a Hindu daughter under the law of the Bengal School, but the Court below has held that as she represented the absolute estate for certain purposes, and, as the suits for rent were brought against her as representing the absolute estate, the whole inheritance and not merely her limited interest passed by the sale in execution of the rent decrees; and the decision of the Privy Council in *Jugul Kishore v. Jotendro Mohun Tagore*, (1884) I. L. R., 10 Cal. 985: L. R., 11 I. A., 66, is relied upon in support of this view. The rule laid down in that case is this: "If the suit is simply for a personal claim against the widow then merely [299] the widow's qualified interest is sold and the reversionary interest is not bound by it. If, on the other hand, the suit is against the widow in respect of the estate, or for a cause which is not a mere personal cause of action against the widow, then the whole estate passes." The suit against Ishaneswari was admittedly one for arrears of rent, and the question is whether a claim for arrears of rent is a personal claim against the widow, or is one against the inheritance which, for certain purposes, she represents. The point is not free from difficulty, and there is some conflict of authority in this Court upon it, the case of *Tiluck Chunder Chuckerbutty v. Muddun Mohun Joogee*, (1869) 12 B. L. R., 143, note: 12 W. R., 504; and *Anund Moyee Dossee v. Mohendro Narain Dass*, (1871) 15 W. R., 264, being in favour of the respondent, while *Mohima Chunder Roy Chowdhry v. Ram Kishore Acharjee Chowdhry*, (1875) 15 B. L. R., 142: 23 W. R., 174 [in which *Tiluck Chunder Chuckerbutty v. Muddun Mohun Joogee*, (1869) 12 B. L. R., 143 note: 12 W. R., 504, was cited and considered] and *Kristo Gobind Majumdar v. Hem Chunder Chowdhry*, (1889) I. L. R., 16 Cal., 511, support the opposite view. As for the case of *Jugul Kishore v. Jotendro Mohun Tagore*, (1884) I. L. R., 10 Cal., 985: L. R., 11 I. A., 66, relied upon by the Court below, though it lays down the general principle quoted above, the facts of that case were different from those in the case we are now considering. There the sale was in execution of a decree for mesne profits and costs against a Hindu widow, who was sued, along with certain reversionary heirs, for possession of immoveable property, and for mesne profits. Here the suit for rent was brought against Ishaneswari alone, and in respect of arrears which accrued due after her father's death, and as she was in enjoyment of the rents and profits of the *chak*, the liability for rent ought to be regarded as her personal liability and ought not to be held as attaching to the reversion, unless the landlord proceeded to bring the tenure itself to sale under the special provisions of the rent law. In *Tiluck Chunder Chuckerbutty v. Muddun Mohun Joogee*, (1869) 12 B. L. R., 143 note: 12 W. R., 504, the landlord had, as had been pointed out by the Privy Council in *Baijun Doobey v. Brij Bhookun Lall*, (1875) I. L. R., 1 Cal., 133: L. R., 2 I. A., 275, proceeded against the tenure under the [300] rent law, and the same remark also applies to the case of *Anundmoyee Dossee v. Mohendro Narain Das*, (1871) 15 W. R., 264.

* The present case in our opinion is rather analogous in principle to the case of *Baijun Doobey v. Brij Bhookun Lall*, (1875) I. L. R., 1 Cal., 133: L. R., 2 I. A., 275, in which the Privy Council held that a sale in execution of a decree against a Hindu widow for arrears of her mother-in-law's maintenance

which was a charge on the inheritance, passed only the widow's estate; and following that case and the case of *Mohima Chunder Roy Chowdhry v. Ram Kishore Acharjee Chowdhry*, (1875) 15 B. L. R., 143 note: 23 W. R., 174, we hold that the sale in question passed only the limited estate of Ishaneswari.

The result is that the decree of the Court below, so far as it relates to the eight-anna share of the *chak* in dispute that was sold on the 5th of January 1885, must be set aside, and the plaintiff's suit in respect of that share decreed with mesne profits and costs in proportion. The decree dismissing the suit as regards the remaining eight annas will stand. As each party has partially succeeded and partially failed in this appeal there will be no costs.

S. C. G.

Decree varied.

NOTES.

[The Privy Council affirmed this decision in (1903) 30 Cal. 550, as regards the point that the decree for rent was personal so long as the tenure was not brought to sale under the Rent Law. See also (1912) 16 C.W.N., 1070; (1912) 17 C.W.N., 337.]

[26 Cal. 300]

The 14th December, 1898.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE RAMPINI.

Pardhan Bhukhan Lal and another.....Defendants

versus

Narsing Dyal.....Plaintiff.*

Interest—Penalty – Enhanced rate of Interest—Interest Act (XXVIII of 1855), section 2—Contract Act (IX of 1872), section 74—Equitable relief.

In a mortgage bond the interest payable was 2 per cent. per mensem, and there was a stipulation that on default of payment on the due date, interest should run "from the date of default of promise" at 6 per cent. per mensem. In a suit upon the bond, interest was claimed at the higher rate from the date of default to the date of realization.

[301] *Held*, that it is open to the Court to decide, notwithstanding the provisions of section 2,† Act XXVIII of 1855, whether the stipulation as to the enhanced interest was agreed upon as interest properly so called, or as a penalty, and whether in the circumstances of the case the debtor was entitled to equitable relief. *Ramendra Roy Chowdhry v. Serajuddin Ahmed Chowdhry*, (1898) 2 C.W.N., 231, and *Umar Khan v. Sale Khan*, (1893) 1. L. R., 17 Bom., 106, referred to.

Per GHOSE, J.—The cases of *Mackintosh v. Crow*, (1882) 1. L. R., 9 Cal., 689, and *Kala Chand Kyal v. Shib Chunder Roy*, (1892) 1.L.R., 19 Cal., 392, do not lay down any rule

* Appeal from Appellate Decree No. 77 of 1897, against the decree of F Cowley, Esq., Judicial Commissioner of Chota Nagpur, dated the 16th of September 1896, modifying the decree of Colonel C. H. Garbett, Esq., Deputy Commissioner and Subordinate Judge of Hazaribagh, dated the 27th of July 1894.

What rate of interest shall be decreed by the Court in any suit.

† [Sec. 2 :—In any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties; and if no rate shall have been agreed upon, at such rate as the Court shall deem reasonable.]

of law precluding the Court from affording relief to a debtor, independently of section 74^a of the Contract Act (IX of 1872), even when the bond provides for increased rate of interest prospectively and not retrospectively, where a proper ground for such equitable relief is made out.

Per RAMPINI, J.—The stipulation for increased rate of interest may be a penalty, but is not necessarily so merely because the increased rate is an exorbitant one; whether it is a penalty or not is rather a question of fact than one of law, and the Court must consider whether in the circumstances of the case the defendants had made out their claim to equitable relief. *Ramendra Roy Chowdhry v. Serajuddin Ahmed Chowdhry*, (1898) 2 C. W. N., 234, distinguished.

Pava Nagaji v. Govind Ramji, (1873) 10 Bom. H. C. R. A. C., 382; *Umar Khan v. Sale Khan*, (1893) I. L. R., 17 Bom., 106; *Bichook Nath Panday v. Ram Lochun Singh*, (1873) 11 B. L. R., 135; *Magniram Marwari v. Rajpati Koeri*, (1893) I. L. R., 20 Cal., 366 note; and *Surya Narain Singh v. Jogendra Narain Roy Chowdhury*, (1893) I. L. R., 20 Cal., 360, explained.

THIS was a suit on a mortgage bond, dated the 16th August 1886, for recovery of Rs. 1,183, of which the principal was Rs. 185 and the rest interest. The facts of the case, so far as they are necessary for this report and the arguments urged and the cases cited, appear from the judgments of the High Court.

The defendants (debtors) appealed to the High Court.

Babu *Joges Chandra Dey* and Babu *Raghunandan Prasad* for the Appellants.

Dr. *Rash' Behary Ghose* and Babu *Akkhoy Kumar Banerjee* for the Respondents.

[302] The judgments of the High Court (GHOSE and RAMPINI, JJ.) were as follows:—

Ghose, J.—This appeal arises out of a suit for the recovery of money due upon a bond. The document stipulates for the payment of interest at the rate of Rs. 2 per cent. per mensem, but provides at the same time that if the money borrowed be not repaid on the due date, interest at the rate of Rs. 6 per cent. per mensem should be paid from that date. And the main question that has been discussed before us is whether the Courts below were right in decreeing to the plaintiffs interest at the rate of Rs. 6 instead of Rs. 2 per cent. per mensem from the date of default, it being contended on behalf of the defendant appellant that the stipulation to pay such increased rate of interest was but a penalty against which a Court of Equity should give relief.

Both the Courts below have decreed the claim in full. And the learned Judicial Commissioner has affirmed the decree of the Court of First Instance allowing the plaintiff interest at the increased rate upon the ground that the stipulation to pay such increased rate of interest from a "definite date" is "not illegal."

* [Sec. 74:—When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named.

Title to compensation for breach of contract in which a sum is named as payable in case of breach.

Exception.—When any person enters into any bail bond, recognizance or other instrument of the same nature, or, under the provisions of any law or under the orders of the Government of India or of any Local Government, gives any bond for the performance of any public duty or act, in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty or promise to do an act in which the public are interested.]

No doubt, according to section 2, Act XXVIII of 1855, a man is free to contract to pay any rate of interest that he chooses on the money borrowed, and he may do so from any time, either prospective or retrospective. Such a contract may not be "illegal," but the question that may arise, and which does arise in this case, is whether the stipulation to pay the increased rate of interest was, in the circumstance, not really a penalty against which a Court of Equity ought to grant relief. The Courts below have not apparently considered the case from this point of view, but have proceeded upon the idea that whenever the increased rate of interest is agreed to be paid from the date of default, and not from the date of the bond, the Court is bound to enforce such stipulation. The learned Judicial Commissioner does not quote any case in support of his view, but the Deputy Commissioner has referred to the case *Mackintosh v. Crow*, (1882) I.L.R., 9 Cal., 689.

[303] In the case of *Mackintosh v. Crow*, (1882) I. L. R., 9 Cal., 689, it was held that where money is borrowed under a contract for repayment with interest on a certain day, and the contract stipulates that if the money is not paid on the due date it shall thenceforth carry interest at an enhanced rate, such a stipulation is not a penalty, and the enhanced rate can be recovered in its entirety. This case was approved of in *Kala Chand Kyal v. Shib Chunder Roy*, (1892) I. L. R., 19 Cal., 392. The stipulation in the bond in the latter case was that, on failure of payment on the due date, the interest should be paid at an increased rate from the date of bond, and it was held by a Full Bench of this Court that this provision was a penalty, and that section 74 of the Contract Act applied to the money claimed at the enhanced rate of interest.

But these cases, and other cases which are to the same effect, do not, I think, lay down any rule of law precluding the Court from affording relief to a debtor, independently of section 74 of the Contract Act, even when the bond provides for increased rate of interest prospectively and not retrospectively, where a proper ground for such equitable relief is made out. As explained in the case of *Ramendra Roy Chowdhry v. Serajuddin Ahamed Chowdhry*, (1898) 2 C. W. N., 234, it is open to the Court to decide, notwithstanding the provisions of section 2 of Act XXVIII of 1855, whether the stipulation as to the enhanced interest was agreed upon between the parties as interest, properly so called, or as a penalty. And as stated by SARGENT, C. J., in the case of *Umar Khan v. Sale Khan*, (1893) I. L. R., 17 Bom., 106, "that a proviso for enhanced interest in the future cannot be considered as a penalty unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties."

I do not propose to go into all the authorities on the subject, and as to the circumstances under which a Court may or may not afford equitable relief; for the learned Judicial Commissioner has not dealt with the case from the point of view which I have expressed.

[304] In this view of the matter, the case should, I think, be sent back for consideration of the question whether, in the circumstances of the case, the defendant is entitled to equitable relief.

Another point has been raised before us, which is to the effect that the Courts below have allowed the plaintiff compound interest. The matter is not very clear upon the decree itself; but I think it would be as well to declare that the plaintiff is not entitled to such compound interest.

Rampini, J.—This is an appeal against a judgment of the Judicial Commissioner of Chota Nagpur.

The suit is one based on a mortgage bond in which the amount of the principal lent was Rs. 185. The interest payable on the loan was 24 per cent. per annum, and there was a further stipulation that, if default in payment was made on the due date, interest should run "from the date of default of promise" at the rate of 72 per cent. per annum.

The lower Courts have held that the stipulation for payment of interest at the higher rate is enforceable under the law, and have decreed the plaintiff's claim.

The defendants appeal, and on their behalf it has been urged : (1) That the higher rate should not have been decreed up to the date of realization ; (2) that compound interest should not have been allowed ; and (3) that the stipulation for the payment of the higher rate of interest of 72 per cent. is, in the circumstances of this case, a penalty, and one from which this Court as a Court of Equity should give relief.

The first ground of appeal is apparently founded on a misapprehension. The Subordinate Judge, whose order has been affirmed by the Judicial Commissioner, has allowed the higher rate of interest not up to the date of realization, but only up to three months from the 24th July, 1894.

From the decree it is not clear whether compound interest has been decreed or not. If it has, I agree, that, looking at the terms of the bond, it should not be allowed.

The principal ground of appeal in the case is, however, the third ; and in support of his contention that the higher rate of 72 per [305] cent. is a penalty, from the burden of which we should relieve his client, the learned pleader for the appellant relies on the two cases of *Ramendra Roy Chowdhry v. Serajuddin Ahamed Chowdhry*, (1898) 2 C. W. N., 234, and *Manoo Bepari v. Durga Churn Saha*, (1898) 2 C. W. N., 333, recently decided by two Benches of this Court.

In the first of these cases it was held on a consideration of the terms of the bond sued on that the higher rate of interest stipulated for in case of default of payment was meant to apply *from the date of the loan*, and that in that view of the matter it was a penalty, which could not be enforced. So far then the ruling in the case of *Ramendra Roy Chowdhry v. Serajuddin Ahamed Chowdhry*, (1898) 2 C. W. N., 234, is no authority for the argument of the learned pleader for the appellant in the present case, for in the present case it is clear beyond all doubt that the higher rate of 72 per cent. per annum was to run only "from the date of default of promise," and not from the date of loan.

But the learned Judges who decided the case of *Ramendra Roy Chowdhry v. Serajuddin Ahamed Chowdhry*, (1898) 2 C. W. N., 234, went on to say that even if the stipulation for the higher rate of interest in that case were to be construed as running only from the date when default had been committed, they were not "prepared to hold that it was a stipulation which, according to the principles of equity, ought to be enforced." "No doubt," it was said, "according to section 2 of Act XXVIII of 1855 a man is free to contract to pay any rate of interest that he chooses on the money borrowed, and there is nothing to hinder him from agreeing to pay it from any time either prospective or retrospective. But the question that would arise in a case like the present is whether a Court of Equity is precluded from affording relief independently of section 74 of the Contract Act. This question seems to have been discussed in the Bombay High Court in two cases, viz., *Pava Nagaji v. Govind Ramji*, (1873) 10 Bom. A. C., 382, and *Umar Khan v. Sale Khan*, (1893) I. L. R., 17 Bom., 106, and also by this Court in *Bichook Nath Panday v. Ram Lochun Singh*,

(1873) 11 B. L. R., 135, [306] and it has been held in these cases that, notwithstanding section 2 of the said Act, it is still open to the Court to decide whether the provision as to the enhanced rate of interest was agreed upon by the parties as interest, or whether it was intended to be a penalty. We are inclined to adopt this view, and we may in this connection also refer to the case of *Magniram Marwari v. Rajpati Koeri*, (1893) I.L.R., 20 Cal., 366 note., where this Court, upon a similar question being raised, did not hold that the matter was precluded by the Act of 1855, but rather went into the facts with a view to see whether any case for equitable relief had been established. In the present case there can be little or no doubt, looking at the instrument as a whole, that the provision to pay interest at 75 per cent. per annum in case of breach was not meant to be interest properly so called, but a penalty to ensure due payment in accordance with the instalments mentioned in it. It will be observed that interest upon the sum borrowed was calculated upon the date of the bond at more than 12 per cent. per annum, and added on to the principal, and the whole amount was agreed to be paid in eight years, and the further provision was that in default of payment of the instalments, interest should be paid at the rate of 75 per cent. per annum. We think that this provision was intended to be a penalty, and that the debtor is entitled to be relieved from it in accordance with the principles of equity and good conscience.

The facts of the second case relied on, that of *Manoo Bepari v. Durga Churn Saha*, (1898) 2 C. W. N., 333, are similar. In that case the higher rate of interest was also 75 per cent. per annum, but GHOSE, J., who delivered the judgment of the Bench, held that on the terms of the bond it was not clear whether the higher rate was to run from the date of the bond, or from the date of default, but considered that it was safer to hold that the former was the case, and consequently that the stipulation to pay this higher rate of interest was a penalty. GHOSE, J., went on to say: "We think we are not precluded from relieving the defendant from the penalty of paying that interest, if we are convinced that the stipulation was intended to be really a penalty for ensuring the payment of the instal- [307] ments on the dates agreed upon, and not for the payment of a higher interest. He then referred to the cases of *Ramendra Roy Chowdhry v. Serajuddin Ahamed Chowdhry*, (1898) 2 C. W. N., 234, and of *Umar Khan v. Sale Khan*, (1893) I. L. R., 17 Bom., 106, and observed that the Bench was prepared to adhere to the view expressed in these cases. AMER ALI, J., concurred.

Now, with regard to those cases, I would say, *firstly*, that seeing that in both of them it was held on a consideration of the bonds sued on that the higher rate of interest was to run from the date of the bond, they are not on all fours with the present case in which no such contention has been or could be raised; *secondly*, the learned Judges who decided those cases, merely laid down that the Courts of this country are not restricted by the terms of section 2 of Act XXVIII of 1855, from giving equitable relief against stipulations to pay increased rates of interest, which appear to be penalties and not interest, but they did not lay down any hard and fast rule as to when such stipulations are to be regarded as penalties which should be relieved against.

The leading case on the subject of when such stipulations are penalties is the case of *Mackintosh v. Crow*, (1882) I. L. R., 9 Cal., 689. In that case it was ruled, that "where money is borrowed under a contract for repayment with interest on a certain day, and the contract stipulates that, if the money is not paid at the due date, it shall *thenceforth* carry interest at an enhanced rate, such a stipulation is not a penalty, and the enhanced rate may be recovered in its entirety." In that case, WILSON, J., who delivered the judgment of the Court, laid down that it was a rule of law established by the Legislature

of this country that a man is free to contract to pay any rate of interest that he chooses upon money borrowed; and the Courts *must* enforce it against him (Act XXVIII of 1855, s. 2), and there is nothing to hinder his agreeing with regard to the future as well as the present. He may contract to pay no interest at present, but interest hereafter: or to pay one rate of interest now, and a higher or lower rate hereafter.

[308] Other cases to the same effect are *Mackintosh v. Hunt*, (1877) I. L. R., 2 Cal., 202; *Bhola Nath v. Fateh Singh*, (1884), I. L. R., 6 All., 63; *Kunj Behari Lal v. Ilahi Baksh*, (1884) I. L. R., 6 All., 64; *Jaganadham v. Ragunandha*, (1886) I. L. R., 9 Mad., 276; and *Dullabh Das Dev Chand Shet v. Lakshman Das Swarupchand*, (1890) I. L. R., 14 Bom., 200. In the full Bench case of *Kala Chand Kyal v. Shib Chunder Roy*, (1892) I. L. R., 19 Cal., 392, it was unanimously held that when it was stipulated in the bond that the increased rate of interest should in the case of default run from the date of the bond, this is a penalty, and the provisions of section 74 of the Contract Act become applicable, but no dissent from or doubt of the correctness of the rule laid down in *Mackintosh v. Crow*, (1882) I. L. R., 9 Cal., 689, and other cases, that where the higher rate of interest is to run only from the date of default this is not a penalty, was expressed.

There are numerous other cases to the same effect. Reference to them in detail appears to be unnecessary.

I would now advert to the cases referred to by the learned Judges who decided the cases of *Ramendra Roy Chowdhry v. Serajuddin Ahamed Chowdhry*, (1898) 2 C. W. N., 234, and *Manoo Bepari v. Durga Churn Shaha*, (1898) 2 C. W. N., 333. These are the cases of *Bichook Nath Panday v. Ram Lochun Singh*, (1873) 11 B. L. R., 135, and *Magniram Marwari v. Rajpati Koeri*, (1893) I. L. R., 20 Cal., 366 note, decided by this Court, and those of *Pava Nagaji v. Govind Ramji*, (1873) 10 Bom. A. C., 362, and *Umar Khan v. Sale Khan*, (1893) I. L. R., 17 Bom., 106, decided by the Bombay High Court.

The case of *Bichook Nath Panday v. Ram Lochun Singh*, (1873) 11 B. L. R., 135, is an old case, in which the increased rate of interest was to run [309] from the date of the bond. This is undoubtedly a penalty. The learned Judges who decided the case of *Ramendra Roy Chowdhry*, (1898) 2 C. W. N., 234, no doubt only referred to *Bichook Nath Panday's* case as an authority for the proposition that the provisions of section 2 of Act XXVIII of 1855 do not preclude a Court from giving equitable relief, where there is reason to believe that the stipulation for the increased rate of interest is a penalty. It would, however, seem to me to be no authority for holding that a stipulation for the payment of increased interest from the date of default is necessarily and in all cases a penalty.

The case of *Magniram Marwari v. Rajpati Koeri*, (1893) I. L. R., 20 Cal., 366 note, similarly appears to me to afford no authority for the proposition that the enhanced rate of interest in this case is necessarily of the nature of a penalty. On the contrary, it appears to me to be an authority for the proposition that equitable relief against a stipulated rate of interest can only be given in exceptional circumstances, such as will be adverted to later on.

The case of *Pava Nagaji v. Govind Ramji*, (1873) 10 Bom. A. C., 362, would only seem to lay down that the provisions of Act XXVIII of 1855 do not destroy the equitable jurisdiction of the Courts to relieve against a penalty.

There remains the case of *Umar Khan v. Sale Khan*, (1893) I. L. R., 17 Bom., 106. In this case it was said by SARGENT, C.J., and JARDINE, J., that "upon a review of the authorities we think the safer conclusion is that a proviso

for retrospective enhancement of interest in default of payment of interest at the due date is generally a penalty which should be relieved against, but that a proviso for enhanced interest in the future cannot be considered as a penalty, unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties, as may well be deemed to have been the case in *Bichook Nath Panday v. Ram Lochun Singh*, (1873) 11 B. L. R., 135, and *Pava Nagari v. Govind Ramji*, (1873) 10 Bom. A. C., 382.

[310] It appears then that a stipulation for an enhanced rate of interest running from the date of default is not to be considered as a penalty except in exceptional circumstances.

The law on this subject has been summed up in Cunningham and Shephard's Contract Act (8 Edit., p. 229) as follows: "The equitable jurisdiction which the Courts possessed to relieve against penalties is not restricted by Act XXVIII of 1855 or by this Act. The tendency, however, of Courts of Equity as well as of Courts of Law at the present day is to interfere as little as possible with the expressed intention of the contracting parties, and the mere fact that the terms are exorbitant is by itself no reason for not enforcing an agreement. It is only when to this fact is added the circumstances that the parties were not on an equal footing, or that the party seeking relief did not fully understand the transaction that the Court will give relief."

The judgment of PIGOT, J., in *Surya Narain Singh v. Jogendra Narain Roy Chowdhry*, (1893) I. L. R. 20 Cal., 360, may also be cited. In this judgment it is said: "Such a contract as to interest must, we think, be held valid, where there is no question of fraud or oppression, improper dealing, exorbitant amount, dealing with an ignorant person, or the like considerations, but there is nothing of the sort in this case."

Now, applying these principles to the present case it would seem to me that the stipulation for increased rate of interest contained in the bond now sued on may be a penalty, but is not necessarily so merely because the increased rate is an exorbitant one. Whether it is a penalty or not is rather a question of fact than one of law, and as the lower Courts seem to have been under the impression, when deciding the case, that they must decree the increased rate in favour of the plaintiff, and could, in no circumstances, grant the defendants equitable relief, I think it advisable to remand this case to the Lower Appellate Court to re-consider the case, and to enable the defendants to show, if they can, that in the circumstances they are entitled to equitable relief. [311] If they do not make out such a case, the plaintiff will be entitled to a decree for the full amount of the interest claimed by him.

I would accordingly remand the suit and would order costs to abide the result.

S. C. C.

Appeal allowed ; case remanded.

NOTES.

[The Contract Act, 1872, sec. 74, was repealed and a new section substituted in its place in 1899. It has been held that notwithstanding the Interest Act, 1855, the Court has the power to interfere with the interest agreed upon whenever it appears to be in the nature of a penalty. See particularly the judgment of SUNDARA AYYAR, J. in *Muthukrishna Iyer v. Sankaralingam Pillai*, (1913) 36 Mad., 229 F.B., which is an exhaustive review of the case-law on the subject. This decision was referred to or followed in (1906) 10 C.W.N., 1020; (1899) 27 Cal., 421; (1902) 30 Cal., 15; (1904) 1 N.L.R., 9; see also (1903) 31 Cal., 138.]

[26 Cal. 311]

The 3rd January, 1899.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Ram Narain Shaha.....Plaintiff
versus

Kamala Kanta Shaha and others.....Defendants.*

Easement—Implied grant—Easement upon the severance of a heritage by its owner into two or more parts—Continuous and apparent easement—Right of way—Limitation Act (XV of 1877), section 26.

Implication of a grant of easement upon the severance of a tenement may extend to a "way," but that is so only where there has been some permanence in the adaptation of the tenement from which continuity could be inferred.

Charu Surnokar v. Dokouri Chunder Thakoor, (1882) I. L. R., 8 Cal., 956, distinguished.

THIS appeal arose out of a suit for the declaration of a right of way and for the removal of certain obstructions alleged to have been made by the defendants. The plaintiff's allegation was, that on the north of a tank known as Sen's tank was his homestead, as well as that of the defendants, his house being just on the northern bank of the tank, and that of the defendants on the east of it; that there was a space between the defendants' house and the tank, over which he had a right of way, and which was interfered with by the defendants. Originally the homestead of the plaintiff and that of the defendants and the tenement over which the right of way was claimed belonged to one and the same person. The western portion, now plaintiff's house, was the inner apartment, and the eastern portion, now defendants' house and the land over which right of way was claimed, was the outer apartment. In course of time the entire house passed to two sets [312] of owners; the western portion passed to one Ram Coomar Sen and others and afterwards to the plaintiff, and the eastern portion including the disputed land passed to one Bhairab Das and others and afterwards to the defendants, who were occupying it since ten years before this suit. The Munsif upon the evidence held that the plaintiff had been living on the western portion for about thirty years, and that he had proved his right of way over the disputed land which had all along remained waste and unoccupied, although it formed part of the defendants' homestead, and decreed the plaintiff's suit. On appeal to the Subordinate Judge by the defendants, he reversed the decision of the Court of First Instance. From this decision the plaintiff appealed to the High Court.

Babu Saroda Churn Mitter and Babu Kuruna Sindhu Mookerjee for the Appellant.

Dr. Rash Behari Ghose and Babu Benod Behary Mookerjee for the Respondents.

The judgment of the High Court (Banerjee and Rampini, JJ.) was as follows :—

This appeal arises out of a suit for the declaration of a right of way, and for the removal of certain obstructions alleged to have been made by the defendants.

* Appeal from Appellate Decree No. 1220 of 1897, against the decree of Babu Amrita Lal Pal, Subordinate Judge of Dacca, dated the 30th of April 1897, reversing the decree of Babu Shoshi Bhushan Chowdhry, Munsif of Munshigunge, dated the 30th of March 1896.

Three points have been raised by the learned Vakil for the plaintiff appellant. *First*, that upon the findings arrived at by the Lower Appellate Court, the plaintiff was entitled to a decree quite irrespective of section 26 of the Limitation Act, on the ground that the claim was one that the plaintiff was entitled to make under an implied grant presumable from what is known as: "Disposition of the owner of two tenements;" *secondly*, that the Lower Appellate Court is in error in throwing upon the plaintiff the burden of proof upon the question whether the user was "as of right;" and, *thirdly*, that upon the findings arrived at, by the Lower Appellate Court, even if the plaintiff was not entitled to a right of way for marriage and funeral processions, he was at least entitled to an ordinary right of way.

In support of the *first* contention raised, it is argued that as the tenement belonging to the plaintiff, and the tenement over [313] which the right of way is claimed, belonged originally to one and the same person, and as it has been found that the original owner of the land over which the way is now claimed used it as a way for purposes of ingress to and egress from the other tenement now belonging to the plaintiff, the plaintiff must be held to be entitled to the way in question, and the case of *Charu Surnokar v. Dokouri Chunder Thakoor*, (1882) I. L. R., 8 Cal., 956, is relied upon as supporting the appellant's view. We are, however, of opinion that the contention is not sound, and that the case cited is distinguishable from the present. The presumption in favour of the grant of an easement upon the severance of a heritage by its owner into two or more parts arises primarily with reference only to continuous and apparent easements; and a "way" is evidently neither a "continuous" nor always an "apparent" easement.

It is true that in certain cases referred to in text books on the subject—See Gale on Easements, 6th edition, pp. 108 to 123 and Goddard on Easements, 5th edition, pp. 174 to 186, implication of a grant of an easement, upon the severance of a tenement, has been held to extend, under certain circumstances, to a "way," but that is so only where there has been some permanence in the adaptation of the tenement, from which continuity could be inferred. In other words the extension of the rule can hold good, if at all, only in the case of "a formed road," to use the language of Lord Justice FRY in *Thomas v. Owen*, (1887) L. R., 20 Q. B. D., 225 (231), "made over an alleged servient tenement, to and for the apparent use of the dominant tenement."

Now, in the present case, not only is there no finding of fact that there has been any such permanence of adaptation, any such formed road, but there was no case of an implied grant from the severance of a heritage made or even suggested in the plaint or in the issues. Nor was the case put upon a ground like this in either of the Courts below.

That being so, we do not think that the first contention is at all tenable.

It was argued that even if the findings arrived at by the Lower [314] Appellate Court be not sufficient to entitle the plaintiff to a decree, as the Lower Appellate Court has not considered the question whether a grant could not be implied from the severance of the original tenement into two, the case ought to be remanded to that Court in order that it may be dealt with from that point of view, and it was urged that the case cited, *Charu Surnokar v. Dokouri Chunder Thakoor*, (1882) I. L. R., 8 Cal., 956, was an authority in favour of the appellant. But, as we have said above, that case is quite distinguishable from the present, for there the way claimed was one leading to a *ghat*, and the way or path and the *ghat* were alleged to have been constructed by the original owner; and so there was a sufficient case made in the pleadings for

the implication of a grant upon severance of the tenement by reason of the alleged permanence of adaptation evidenced by the construction of the way and *ghat*.

It is not, however, suggested in this case that the way claimed by the plaintiff is a metalled way, or is anything but an undefined track over a strip of land.

As to the second contention raised on behalf of the appellant we do not think that it arises in this case. For the learned Subordinate Judge, after having said in his judgment that he entertains doubt regarding the correctness of the proposition, that the burden of proof upon the question whether the user was as of right, lay upon the party who alleged that it was not as of right, goes into the entire evidence bearing upon the question, and upon a consideration of the evidence adduced on both sides comes to the affirmative finding that the user was permissive. And if the second contention fails, it is conceded that the third contention must also fail.

The contentions urged before us, therefore, all fail, and this appeal must be dismissed with costs.

S. C. G.

Appeal dismissed.

NOTES.

[See also (1907) 8 C.L.J., 289, *per* MOOKERJEE, J.]

[315] *The 19th January, 1899.*

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Kali Nath Sen and another.....Plaintiffs

versus

Trailokhya Nath Roy.....Defendant.*

Bengal Tenancy Act (VIII of 1885), sections 67, 187—Suit for arrears of rent and interest at an exorbitant rate—Rule relating to hard and unconscionable bargains—Liability of a purchaser of a tenure at a sale for arrears of rent to pay interest.

A stipulation for the payment of interest at an unusual and an exorbitant rate cannot be supposed to be an incident of a tenancy which would attach to it even after a sale for arrears of rent.

In execution of a decree for rent against a tenant who held under a *kabuliyat*, dated March 1880, the plaintiff put up the tenure for sale and the defendant purchased it on the 20th November 1891. Subsequently a suit for rent with interest at 225 per cent. per annum, specified in the *kabuliyat* executed by the former tenant, was brought by the plaintiff against the defendant. The defence was that the plaintiff was not entitled to interest at such high rate.

* Appeal from Appellate Decree No. 1445 of 1897, against the decree of Babu Dwarka Nath Mitter, Subordinate Judge of Faridpur, dated 30th of April 1897, affirming the decree of Babu Govind Lal Gupta, Munsif of Madaripur, dated the 7th of August 1896.

Held, that the plaintiff was not entitled to recover interest at the rate claimed, it being an exorbitant one and not an ordinary incident of a tenancy.

Held, also, that in such a case the rule relating to hard and unconscionable bargains should apply, and the plaintiff would be entitled to interest at 12 per cent. per annum, being the ordinary rate of interest for arrears of rent.

Per RAMPINI, J.—By the sale of an ordinary *raiya* tenancy for arrears of rent, a new contract is created between the auction-purchaser and the landlord at the date of the sale; therefore, in a case where the tenure was sold after the Bengal Tenancy Act came into operation, and a suit was brought by the landlord for rent with interest against the auction-purchaser, the provisions of section 67 read with section 178, sub-section 3, cl. (h) of the Bengal Tenancy Act would apply.

THIS appeal arose out of an action for rent, with interest, based upon a *kabuliyat*. The plaintiff's allegation was that one Ratan Mandal took a settlement of a *raiya* holding, and executed in his favour a registered *kabuliyat* in the year 1880, by which the said Ratan Mandal agreed to pay interest at the rate of three annas per rupee per month on his failure to pay rent according to [316] instalments. Ratan Mandal having allowed the rent to fall into arrear a suit was brought against him, a decree was obtained, and in execution of that decree, his tenure was sold after the expiration of the term and was purchased by the defendant in the year 1891. Subsequently the plaintiffs brought a suit against the defendant for arrears of rent with interest based upon the *kabuliyat* executed by the former tenant. The defence, *inter alia*, was that the claim for interest was illegal, and that he (the defendant) was not bound to pay interest according to the terms of the *kabuliyat* executed by his predecessor. The Court of First Instance decreed the plaintiffs' suit in part, but held that the defendant was not liable for interest. On appeal by the plaintiffs to the Subordinate Judge, he held that the plaintiffs were not entitled to interest at the exorbitant rate specified in the *kabuliyat*, but he allowed interest according to the provisions of section 67 of the Bengal Tenancy Act. Against this decision the plaintiffs appealed to the High Court.

Babu Chunder Kant Sen for the Appellants.

Babu Jogesh Chunder Roy for the Respondent.

The High Court (BANERJEE and RAMPINI, JJ.) delivered the following judgments :—

Banerjee, J.—This appeal arises out of a suit for arrears of rent with interest, based on a *kabuliyat*, and the suit was brought, not against the person who had executed the *kabuliyat*, but against the purchaser of his holding at a sale for arrears of rent.

The defence, so far as it is necessary to consider it for the purposes of this appeal, was that the claim for interest was illegal, and that the plaintiffs were not entitled to any interest, as the rent had been tendered.

The first Court found for the defendant upon most of the points raised, and decreed the claim of the plaintiffs only in part.

On appeal the Lower Appellate Court has modified that decree, and allowed interest in accordance with the terms of section 67 of the Bengal Tenancy Act, holding that the rate of rent specified in the *kabuliyat* was not recoverable as against the defendant.

[317] In second appeal the only question raised is whether the decision of the Lower Appellate Court as regards interest is correct.

The learned Vakil for the plaintiffs, appellants, contends that the interest claimed in this suit is perfectly legal, and that the defendant is bound to pay that interest, notwithstanding that he is the purchaser of the holding at a

sale for arrears of rent due from the former tenant, who had executed a *kabuliyat*, inasmuch as the stipulation as regards interest was an incident of the tenancy.

On the other hand, it has been argued on behalf of the defendant respondent, that the plaintiffs are entitled to interest only in accordance with the provisions of section 67 of the Bengal Tenancy Act: *Firstly*, because the *kabuliyat* relied upon by the plaintiffs created a tenancy from year to year only, so that at the commencement of each year of the tenancy, a fresh contract as to the terms of the tenancy is to be implied, and the contract as regards payment of interest, which was in contravention of the provisions of section 67 of the Bengal Tenancy Act, became inoperative by section 178, sub-section 3, clause (h), from the year after that Act was passed; *secondly*, because even if the stipulation in the *kabuliyat* could be binding after the passing of the Tenancy Act as against the former tenant, by whom the *kabuliyat* was executed, it cannot be operative as against the purchaser of the holding at a sale for arrears of rent, the stipulation to pay interest at an exorbitant rate not being an ordinary incident of a tenancy, and that a fresh contract is to be implied as between the landlord and the tenant upon the transfer of the holding at a sale for arrears of revenue; and, *thirdly*, because the stipulation for the payment of the exorbitant interest claimed by the plaintiffs is such a hard and unconscionable contract that Courts of Equity ought not to enforce it.

I am of opinion that the stipulation for the payment of interest upon arrears of rent is an ordinary incident of a tenancy in this country, unless there is something unusual in the stipulation, and that, as a rule, it would attach to the tenancy, not only so long as it remains in the possession of the tenant who enters into the stipulation, but would continue to attach to it, notwithstanding a sale for [318] arrears of rent. But though that is so, if there is anything unusual in the stipulation, it would not be an ordinary incident of a tenancy, and would not continue to be attached to the tenancy after a sale for arrears of rent. Let us then see whether the stipulation for the payment of interest in the present case ceases to be binding on account of any of the reasons specified in the argument of the learned Vakil for the respondent.

With reference to the *first* reason assigned, I am of opinion that, having regard to the terms of the *kabuliyat*, it cannot be said that a fresh contract is to be implied at the commencement of each year of the tenancy. The *kabuliyat* does not specify any term. It stipulates for the payment of interest from year to year, and it further stipulates that, in case there be any default in the payment of any instalment, the tenant will pay interest for the over-due instalment at a certain rate. That, in my opinion, is a contract entered into once for all, and would continue in force so long as the tenancy is not determined, and I see no reason for holding that at the commencement of each year there must be implied the making of a fresh contract. It was argued that the case of *Ali Mahmud Pramanick v. Bhagabati Debye*, (1898) 2 C. W. N., 525, favours the respondent's contention. On the other hand, it is argued that the case of *Kishore Lal Dey v. The Administrator-General of Bengal*, (1898) 2 C. W. N., 203, supports the opposite view.

I am of opinion that neither of the two cases cited touches, in any way, the present question. In the case of *Kishore Lal Dey v. The Administrator-General of Bengal*, (1898) 2 C. W. N., 203, what was held was this, that where a tenant holds over after the expiry of his term, the correct view to take is that he enters into an implied contract once for all, at the beginning of the holding over, and there is no rule of law in support of the view that he enters

into an implied contract at the beginning of each year of the holding over. The correctness of that view is questioned by one of the learned Judges who decided the case of *Ali Mahmud Pramanick v. Bhagabati Debya*, (1898) 2 C. W. N., 525, while the other learned Judge thought it unnecessary to consider the point, as the case before the Court [319] did not require the point to be determined. But in neither of the two cases had the Court to determine whether where a lease was for a term uncertain, any implied contract had to be presumed at the commencement of each year of the tenancy.

The second reason relied upon is a valid reason for holding that the stipulation for the payment of interest is not binding. Although, as I have said, a stipulation regarding the payment of interest is ordinarily one of the incidents of tenancy, a stipulation for the payment of interest at an unusual and an exorbitant rate cannot be supposed to be an incident of a tenancy which would attach to it even after a sale for arrears of rent.

No doubt the line between what rate of interest would be within the limits of an usual rate of interest, and what would exceed those limits, is not always easy to draw. But there can be little difficulty in saying that whereas the law, section 21 of Bengal Act VIII of 1869, and section 67 of the Bengal Tenancy Act, provides that 12 per cent. per annum shall be the ordinary rate of interest, 225 per cent. per annum, (for that is the rate of interest in the present case) falls outside the limits of ordinary interest for arrears of rent.

The distinction between usual and unusual terms of a contract of tenancy is a distinction which should be taken into consideration in determining whether the incident in question continues to attach to the tenancy, notwithstanding its sale for arrears of rent, and it is a distinction which has been given effect to by this Court in certain cases, of which I may refer to the following, namely, *Deendoyal Paramanick v. Juggeshur Roy*, (1863) Marsh, 252; and *Alim v. Satis Chandra Chaturdhrin*, (1896) I. L. R., 24 Cal., 37.

Following the principle laid down in these cases, I must hold that the stipulation for interest in the present case was not such an incident of the tenancy as would continue to be attached to it, notwithstanding the sale of the holding for arrears of rent.

In this view of the case it becomes unnecessary to consider the question whether the sale of a tenancy for arrears of rent involves a new contract between the auction-purchaser and the [320] landlord at the date of the sale, such as would bring into operation the provisions of section 67 of the Bengal Tenancy Act.

I am also of opinion that the third reason put forward by the learned Vakil for the respondent, for holding that the stipulation for the payment of interest is not enforceable, is a valid reason. The rate of interest, as I have already said, is the exorbitant rate of 225 per cent. per annum, and the contract was entered into between the landlord and a cultivating *raiyat*, that is a person belonging to a section of the community that has been considered entitled to some special protection, not only by the Legislature, as is evident from the provisions of the Bengal Tenancy Act, section 67 and section 178, sub-section (3), clause (h), but also by Courts of Justice, as will be seen from the observations of Mr. Justice MAHMOOD in the case of *Lalli v. Ram Prasad*, (1886) I. L. R., 9 All., 74.

Having regard then to the exorbitant nature of the interest claimed, and the parties to the stipulation, I am of opinion that the case is one to which

the rule of law relating to hard and unconscionable bargains enunciated by their Lordships of the Privy Council in *Kamini Sundari Chaudhrani v. Kali Prossunno Ghose*, (1885) I. L. R., 12 Cal., 225; L. R., 12 I. A., 215, should apply. Applying that principle, I think that the stipulation for interest in this case is one that a Court of Justice ought not to enforce.

For all these reasons I am of opinion that the judgment of the Court below is right, and ought to be affirmed, and this appeal dismissed with costs.

Rampini, J.—The only point for determination in this appeal is whether the defendant is liable to pay interest at the rate specified in the *kabuliyat* given by the former tenant, Ratan Mandal, or not.

This *kabuliyat* was executed in favour of the plaintiffs by Ratan Mandal on the 26th Falgun 1286, which corresponds with some date in March 1880, that is, before the passing of the Bengal Tenancy Act. The *kabuliyat* is one executed by an ordinary *rayat*. The tenancy is from year to year, and the rate of [321] interest stipulated for in it is three annas per rupee per mensem, or 225 per cent. per annum.

The Courts below have held that the defendant is not liable to pay interest at that rate. But the learned Vakil for the plaintiffs, appellants, contends that he is liable.

I am of opinion that the appeal fails, and that we cannot decree interest at this rate. I fully concur in what has been said by my learned brother as to the rate stipulated for being exorbitant and unconscionable, and, as to its being a rate at which no Court of Equity should give a decree. I further concur in what my learned brother has said as to the incident of paying interest on arrears being an ordinary incident of a tenancy in this country, and agree that a purchaser of a holding at a sale for arrears of rent must be liable to pay interest on arrears. But I do not think that it is one of the ordinary incidents of a *rayat* tenancy in this country that interest at a higher rate than 12 per cent. should be paid. Section 67 of the Bengal tenancy Act, read with section 178, sub-section 3, clause (h), shows that the payment of interest at a higher rate than 12 per cent. per annum is not now one of the ordinary incidents of a *rayat* tenancy. In support of this view, I would cite a passage from the judgment in the case of *Alim v. Satis Chandra Chaturdhuri*, (1896) I. L. R., 24 Cal., 37, which runs as follows: "We will assume, in the absence of anything to denote the contrary, that the original holder, while holding over, held under all the terms of the *kabuliyat* which he had given. When however, the landlord put up the holding to sale for its arrears he must be taken to have put it up subject to all the ordinary incidents of such a holding. It was not an ordinary incident that interest on arrears should be payable at the very high rate claimed. On the contrary, there was no such incident, and if the landlord had put up the holding subject to an express condition that the higher rate should be paid, the condition would not bind the purchaser, in so far as it purported to create a new contract between himself and the landlord. If there was no such condition attached to the sale, the purchaser must be taken to have purchased subject to all [322] ordinary incidents of the holding. If there was such a condition, and it was for the respondent to show it, which he has not done, the condition was, we consider, contrary to the provisions of the Act, and not binding on the purchaser. An agreement by a tenant of a holding for a term to pay interest at a certain rate may, if made before the passing of the Act, bind him so long as he continues to hold, but it does not attach to the land when the term has expired, and the holding by the act of the

landlord passes into other hands, and if the landlord after the expiry of the term puts up the holding to sale under the Act, he puts it up subject to the express provisions of the Act in connection with it."

The learned Judges in the case quoted above appear to me to lay down that it is not an ordinary incident of a *raiya* holding in this country, that interest on arrears should be paid at a higher rate than 12 per cent., and they further hold that even if the landlord had put the holding of the defendant in that case up to sale subject to the terms of the *kabuliyat* executed by him before the passing of the Bengal Tenancy Act, the stipulation for the payment of a higher rate of interest than 12 per cent. would not have been binding, as the defendant's lease was for a term which had expired, and the defendant, who was holding over, was to be regarded as holding the land under a new contract impliedly entered into on the expiration of the term of his lease.

Now, in this case it seems to be clear that the tenancy was not put up for sale subject to the terms of the *kabuliyat* executed by the former tenant. The defendant has expressly pleaded this in paragraph 2 of his written statement. He says: "He was not aware of a contract to pay such interest, nor did the plaintiffs cause the fact of the contract to pay such interest to be mentioned in the sale *ishtihar*." There is no evidence, or even contention, on the part of the plaintiffs to the contrary. I am therefore of opinion that the defendant in this case is not bound to pay the higher rate of interest claimed by the plaintiff, (1) because the payment of more than 12 per cent. interest on arrears is not one of the ordinary incidents of a *raiya* holding, and (2) because the holding was not put up for sale with notice that it was being sold subject to the terms of Ratan Mandal's *kabuliyat*.

[323] But I go further, and consider that, even if it had been put up for sale under the express terms of Ratan Mandal's *kabuliyat*, the defendant would not be liable to pay the higher rate, because a fresh contract must be regarded as having been entered into between him and the landlord, when the latter put the holding up to sale and the former purchased it, which he did on the 20th November 1891. The holding is an ordinary *raiya* tenancy not transferable except by custom or with the consent of the landlord. That being so, when the landlord put the holding up to sale he offered to accept the purchaser as a new tenant. The defendant, when he purchased, accepted his offer, and must now, I think, be regarded as holding under a new contract made after the passing of the Tenancy Act, and not under the terms of the old *kabuliyat*. Therefore, the provisions of section 67 of the Bengal Tenancy Act, read with section 178, sub-section (3), clause (h), must apply.

For these reasons I concur in dismissing this appeal.

I would add that to give effect to the contention of the appellants would, in my opinion, be contrary to the policy of the Tenancy Act. Section 67 lays down that an arrear of rent shall bear simple interest at 12 per cent., and clause (h), sub-section (3), section 178, enacts that no contract made after the passing of the Tenancy Act is valid, which contravenes the provisions of section 67.

If the contention of the learned Vakil for the appellants were given effect to, and if a landlord could enforce stipulations in contracts made before the passing of the Tenancy Act with former tenants for the payment of such exorbitant rates of interest on arrears as 225 per cent. per annum, the policy

of the Tenancy Act as embodied in sections 67 and 178 (3), clause (h), would, in my opinion, be completely set at nought. .

S. C. G.

Appeal dismissed.

NOTES.

[This was distinguished in (1904) 32 Cal., 258; 9 C.W.N., 175; 30 Cal., 213.]

[324] *The 6th January, 1899.*

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Bhubon Mohun Pal and another.....Judgment-debtors

versus

Nunda Lal Dey.....Auction-purchaser.*

*Sale in execution of decree—Fraud—Application to set aside sale on the ground of fraud in a case where a third party is the auction-purchaser—
Code of Civil Procedure (Act XIV of 1882), sections 2, 244,
311 and 588—Second Appeal—Limitation Act (XV of
1877), Schedule II, articles 166 and 178.*

The decision in the case of *Mohendro Narain Chaturaj v. Gopal Mondul*, (1890) I.L.R., 17 Cal., 769, has been in effect overruled by the decision of the Privy Council in the case of *Prosunno Kumar Sanyal v. Kali Das Sanyal*, (1892) I.L.R., 19 Cal., 683; L. R., 19 I.A., 166.

An application to set aside a sale on the ground of fraud would come under section 244 of the Civil Procedure Code notwithstanding that the purchase was made by a person who was a third party.

Saadatmand Khan v. Phul Kuar, (1898) I. L. R., 20 All., 412, distinguished.

An application to set aside a sale on the ground of fraud is governed by Art. 178 † of the Limitation Act.

Nemai Chand Kanji v. Deno Nath Kanji, (1898) 2 C. W. N., 691, referred to.

* Appeals from Orders Nos. 224 and 237 of 1898, against the order of A. E. Staley, Esq., District Judge of Hooghly, dated the 7th of May 1898, reversing the decree of Nalini Nath Mitter, Munsif of Howrah, dated the 7th of March 1898.

† [Art. 178 :—

Description of application.	Period of limitation.	Time from which period begins to run.
Applications for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, section 230.	Three years ...	When the right to apply accrues.]

THE facts of this case, for the purposes of the report, and the arguments, appear sufficiently from the judgment of the High Court.

Babu Nil Madhab Bose, and Babu Shib Chander Palit, for the Appellants.
Babu Saroda Churn Mitter, for the Respondent.

The judgment of the High Court (**Banerjee and Rampini, JJ.**) was as follows :—

This appeal arises out of an application for setting aside a sale of immoveable property held in execution of a decree for arrears of rent, on the ground that the sale was brought about by fraud, and that the judgment-debtors were kept out of knowledge of [325] the sale until the time when the auction-purchaser took possession of the property.

The first Court found for the judgment-debtors and set aside the sale.

On appeal the Lower Appellate Court has reversed the order of the first Court, without coming to any finding as to whether the allegation that the sale had been brought about by fraud was correct, the ground being that the applicants had failed to show that they had been kept out of the knowledge of the sale by the fraud of the decree-holders and the auction-purchaser, and that their application was barred by limitation.

Against this decision of the Lower Appellate Court the present appeal has been preferred, and at the hearing of the appeal a preliminary objection is raised on behalf of the respondent that a second appeal does not lie, the order of the Lower Appellate Court being final under section 588 of the Code. The argument in support of this objection is this, that the application must be treated as one under section 311 of the Code of Civil Procedure, that it cannot come under section 244 of the Code as the auction-purchaser is a third party and not one of the parties to the suit, and that consequently the last paragraph of section 588 makes the order of the Lower Appellate Court final. And in support of this contention a decision of a Full Bench of this Court in the case of *Mohendro Narain Chaturaj v. Gopal Mondul*, (1890) I. L. R., 17 Cal., 769, is relied upon. On the other hand it is argued by the learned Vakil for the appellants that the application for setting aside the sale in this case being based on the ground that the sale had been brought about by fraud, it comes under section 244 and not under section 311 of the Code, and that the fact of the auction-purchaser being a third party, does not prevent the application from being dealt with under section 244, and, in support of this contention, the decision of the Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal*, (1892) I. L. R., 19 Cal., 683 : L. R., 19 I. A., 166, and the decisions of this Court in the cases of *Doyamoyi Dasi v. Sarat Chunder Mojumdar*, (1897) I. L. R., 25 Cal., 175, and *Nemai Chand Kanji v. Denonath Kanji*, (1898) 2 C. W. N., 691, are relied upon.

[326] We are of opinion that the preliminary objection urged on behalf of the respondents ought not to prevail, and that a second appeal lies in this case. It is true that the case of *Mohendro Narain Chaturaj v. Gopal Mondul*, (1890) I. L. R., 17 Cal., 769, cited by the respondents favours the objection raised on their behalf, but the decision of the Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal*, (1892) I. L. R., 19 Cal., 683 : L. R., 19 I. A., 166, must be taken to have overruled, in effect, the case of *Mohendro Narain Chaturaj v. Gopal Mondul*, (1890) I. L. R., 17 Cal., 769 ; we have had occasion to consider this matter in an unreported case, namely, second appeal No. 956 of 1895,

*Moti Lal Chakrabutty v. Russick Chandra Bairagi** and the view we took there is also confirmed [327] by the decisions of this Court in the cases of *Doyamoyi Dasi v. Sarat Chunder Mojumdar*, (1897) I. L. R., 25 Cal., 175, and *Nemai Chand Kanji v. Denonath Kanji*, (1898) 2 C. W. N., 691.

It was contended on behalf of the respondents that the decision of the Privy Council in the case of *Saadatmand Khan v. Phul Kuar*, (1898) I. L. R., 20 All., 412, would go to show that the order of the first Appellate Court in a case like this is final, and that a second appeal does not lie from such an order. The argument is based upon the fact that an appeal to Her Majesty in Council was allowed from an [328] order of the District Judge made in an appeal

* *The 9th December, 1896.*

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Moti Lal Chakrabutty and others.....Defendants

versus

Russick Chandra Bairagi.....Plaintiff.†

Civil Procedure Code (Act XIV of 1882), section 244—Suit to set aside a sale on the ground that the decree was obtained by fraud, whether maintainable, where third party is the auction-purchaser—Limitation Act (XV of 1877), Sch. II, Art. 95.

A suit to set aside an execution sale on the ground of fraud is not maintainable under the provisions of section 244 of the Civil Procedure Code, even in a case where the real or nominal auction-purchaser is a person who was not a party to the original suit.

Prosunno Kumar Sanjal v. Kali Das Sanjal, (1892) I. L. R., 19 Cal., 683 : L. R., 19 I. A., 166, followed.

A suit to set aside an execution sale on the ground that the decree was obtained by fraud is maintainable and is governed by article 95† of the Limitation Act.

THE facts of this case, so far as they are necessary for the purposes of this report, appear sufficiently from the judgment of the High Court.

Babu Kulada Kinker Roy for the Appellants.

Babu Chunder Kant Sen for the Respondent.

The judgment of the High Court (Banerjee and Rampini, JJ.) was as follows:—

This appeal arises out of a suit brought by the plaintiff-respondent to recover possession of certain lands on the allegation that they constitute his *jote* under defendants Nos. 2 to 4, that these defendants, in collusion with their servant the defendant No. 1, fraudulently obtained against the plaintiff an *ex parte* decree without serving any summons on him ; that they then fraudulently caused the sale of the *jote* in execution of their decree without serving any writ of attachment or sale proclamation ; that the *jote* was purchased at the execution sale by defendant No. 1 for the benefit of defendants Nos. 2 to 4 ; and that the plaintiff came to know of the decree and the sale on the 11th Falgun 1299.

† Appeal from Appellate Decree No. 956 of 1895, against the decree of Alfred Fr. Sternberg, Esq., District Judge of Rungpore, dated the 28th of February 1895, affirming the decree of Babu Hari Prasanno Mukerjee, Munsif of Gyabanda, dated the 9th of July 1894.

‡ [Art. 95 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
To set aside a decree obtained by fraud, or for other relief on the ground of fraud.	Three years.	When the fraud becomes known to the party wronged.]

from an order passed on an application for setting aside a sale. This question was not raised in that case, and, moreover, the order made in that case was clearly under section 312, the ground upon which the sale was sought to be set aside being irregularity in the conduct of the sale and not fraud. If that was so, the order complained of was one that came specifically under section 588 of the Code and could not come within the definition of "decree" in the Code, and so no second appeal could lie in that case.

[329] It was further contended that the observation of the Judicial Committee in the case of *Prosunno Coomar Sanyal v. Kali Das Sanyal*, (1892) I. L. R., 19 Cal., 683 : L. R., 19 I. A., 166, that the fact of the auction-purchaser being a third party, does not prevent a case from being dealt with under section 244 of the Code of Civil Procedure, was in the nature of an *obiter dictum*, and cannot be taken to over-rule the decision of the Full Bench in *Mohendro Narain Chaturaj v. Gopal Mondul*, (1890) I. L. R., 17 Cal., 769.

The defence was that no regular suit was maintainable for setting aside an execution sale ; that the suit was barred by limitation ; that the allegation of fraud was unfounded ; and that the defendant No. 1 had purchased the property for his own benefit at an execution sale duly held.

The first Court, without going into the question whether the decree had been obtained by fraud, found for the plaintiff upon all the other questions that were raised in the case, and gave him a decree, and on appeal that decree has been affirmed by the Lower Appellate Court.

In second appeal it is contended for the defendants that section 244 of the Code of Civil Procedure bars this suit. In support of this contention, the learned Vakil for the appellants relies upon the decision of the Privy Council in the case of *Prosunno Kumar Sanyal v. Kali Das Sanyal*, (1892) I. L. R., 19 Cal., 683 : L. R., 19 I. A., 166, and he argues that this case has in effect overruled the decision of the Full Bench of this Court in the case of *Mohendro Narain Chaturaj v. Gopal Mondul*, (1890) I. L. R., 17 Cal., 769, upon which the Lower Appellate Court has based its judgment. In answer to this contention, it is urged for the respondent that the case of *Prosunno Kumar Sanyal v. Kali Das Sanyal*, (1892) I. L. R., 19 Cal., 683 : L. R., 19 I. A., 166, is distinguishable from the case before the Full Bench and from the one before us, and that the question that arises in this case did not properly arise in that case, nor was it determined by their Lordships of the Judicial Committee.

This contention is so far correct that, while the plaintiffs in *Prosunno Kumar Sanyal's* case raised no question affecting the validity of the decree, the plaintiff impugns not only the sale, but also the decree itself on the ground of fraud, and thus raises a question which does not relate to the execution, discharge or satisfaction of the decree and which cannot come within the scope of section 244 of the Civil Procedure Code. But the Courts below have not gone into this last-mentioned question at all. They have set aside the execution sale and given the plaintiff a decree for possession solely upon the ground that the sale was brought about by fraud, and they have overruled the objection in bar based upon section 244 solely upon the ground that the auction-purchaser, though a party to the fraud, was no party to the suit in which the decree was passed. The first question for determination in this appeal, therefore, is whether that decision is correct, and that question will have to be determined quite irrespectively of the fact that the plaintiff impugns the decree itself as fraudulent. If the question is answered in the negative, then the further questions will arise, whether the decree which led to the sale was obtained by fraud, and whether the defendant No. 1, the auction-purchaser, was a party to that fraud ; and for the determination of these two questions the case will have to go back.

The learned Vakil for the respondent contends that quite apart from the question raised in the case whether the decree itself was obtained by fraud, the decision appealed against is correct.

After carefully considering the two cases referred to above, and the facts of this case as found by the Courts below, we feel bound to say that we are unable to accept this last-mentioned contention as correct. It is true that the judgment of this Court in *Prosunno Kumar Sanyal's* case was based upon the ground that the suit there as against the decree-holders was not maintainable by reason of the provisions of section 244 of the Code of Civil Procedure, and as against the auction-purchasers it was not maintainable because there was no case made out at all upon the allegations in the plaint. But their Lordships of the Privy Council in confirming the judgment of this Court did not make any distinction of that kind at all, but held that section 244 was a bar to the whole suit, notwithstanding

[330] We have given our reasons for considering this argument untenable in our judgment in the unreported case referred to above ; and it is enough to say that the question, whether section 244 of the Code would be a bar to a suit for setting aside an execution sale on the ground of fraud where a third party was the auction-purchaser, was a question that did directly arise before the Privy Council, and the decision of their Lordships was that that section was a bar to the suit.

[331] The effect of that decision was therefore this that an application for setting aside a sale on the ground of fraud would come under section 244, notwithstanding that the purchase was made by a person who was a third party.

The preliminary objection being disposed of against the respondents, let us now see how the appeal stands on the merits.

The point urged on behalf of the appellants is that the Lower Appellate Court was wrong in holding that the application for setting aside the sale in this case was barred by limitation. If the application was one governed by article 166 of the second schedule of the Limitation Act, then the conclusion

that it was brought, not only against the decree-holders, but also against the auction-purchaser who was a third party. That the question that arises in this suit, *viz.*, whether a suit to set aside an execution sale on the ground of fraud is maintainable notwithstanding the provisions of section 244 of the Code by reason of the real or nominal auction-purchaser being a third party, did properly arise and was determined in the case of *Prosunno Kumar Sanyal v. Kali Dass Sanyal*, (1892) I.L.R., 19 Cal., 683. L.R., 19 I.A., 166, is clear from the following passage in their Lordships' judgment. "Both Courts have held," observe their Lordships, "that the question which the plaint seeks to raise could only have been determined by the order of the Court which executed the decree, and that, in such a case as the present, a separate suit for the purpose of setting aside an execution sale is expressly forbidden by section 244 of the Civil Procedure Code. Mr. *Doyle*, who appeared for the appellants, admitted that the question at issue was one 'relating to the execution, discharge or satisfaction of the decree.' But he argued with much ingenuity that the suit was not barred by the provisions of section 244, because the question concerned the auction-purchasers as much as anybody, and therefore, as he contended, it could not properly be described as a question 'arising between the parties to the suit in which the decree was passed.' At the same time he admitted that he was unable to produce any authority for his contention, and he also admitted that it was the common practice to make the auction-purchaser a party to an application for setting aside an execution sale. As the point appeared to be one of some importance, and the respondents were not represented at the Bar, their Lordships thought it desirable, before giving judgment, to examine the reported cases which have arisen under section 244 of the Code of Civil Procedure. An examination of these cases, of which it is only necessary to mention *Sakharam Gobind Kale v. Damodar Akharam Gujar*, (1885) I. L.R., 9 Bom., 468, and *Kuriyal v. Mayan*, (1883) I.L.R., 7 Mad., 255, has satisfied their Lordships that the decision appealed from is in accordance with the construction which the Courts in India have uniformly placed on the section in question. It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244, and that when a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result has never been held as bar to the application of the section."

No doubt their Lordships observe that the Counsel for the appellants before them admitted that he was unable to produce any authority for his contention ; and no doubt it is true that the Full Bench decision in *Mohendro Narain Chaturaj v. Gopal Mondul*, (1890) I. L. R., 17 Cal., 769, was authority in his favour ; but that does not go to show that their Lordships' determination of the case is based upon the admission of Counsel and not upon their decision of the question raised. Their Lordships' observation that "the fact that the purchaser, who is no party to the suit, is interested in the result has never been held a bar to the application of the section," may not be quite reconcilable with the fact that a Full Bench of this Court in the case of *Mohendro Narain Chaturaj v. Gopal Mondul*, (1898) I. L. R., 17 Cal., 769, has taken a somewhat different view. But it is not for us to say how far that may form a ground for inducing their Lordships in any future case to reconsider the question. All we can say is that it would be contrary to first principles and settled

arrived at by the Lower Appellate Court would be one that would not be open to question in second appeal. Then, is the application one that is governed by article 166? We are of opinion that this question must be answered in the negative. Article 166 of the Limitation Act applies only to an application to set aside a sale in execution of a decree on the ground of irregularity in publishing and conducting the sale, or on the ground that the decree-holder has purchased without the permission of the Court.

The ground upon which the sale now in question is sought to be set aside is not either of those two grounds, but is fraud on [332] the part of the decree-holder, and also on the part of the auction-purchaser in bringing about the sale.

That is a very different ground from irregularity in publishing the sale. The case, therefore, is governed, not by article 166, but by article 178, there being no other provision in the Act applicable to the case; and, if that is so, the question of limitation cannot arise, the application being within three years from the date when the right to apply accrued.

The view we take is supported by the decision of this Court in *Nemai Chand Kanji v. Deno Nath Kanji*, (1898) 2 C. W. N., 691.

It was argued that as one of the facts found by the Lower Appellate Court is that it is not shown that the auction-purchaser was a party to the fraud alleged to have been committed by the decree-holder in bringing about the sale,

practice (see the Rules of this Court, Chapter V, para. 6) for us not to follow a decision of the Privy Council which is in point for a reason like that. We must therefore follow in this case the decision in *Prosunno Kumar Sanyal v. Kali Das Sanyal*, (1892) I. L. R., 19 Cal., 683; L. R., 19 I. A., 166, and hold that section 244 of the Code of Civil Procedure is a bar to this suit so far as it seeks to set aside the sale on the ground of fraud, notwithstanding that one of the parties to it is the auction-purchaser who was no party to the original rent suit.

It remains now to consider the further contention urged on behalf of the respondent, that, even if no separate suit is maintainable, the plaint in this suit may be treated as an application under section 244 of the Code of Civil Procedure; and the relief that has been given to the plaintiff may be granted to him, if not in the form of a decree in a regular suit, in the form of an order under that section, seeing that upon the facts found, an application under section 244 was not barred by limitation, and that the suit was brought in the very same Court that would have had to hear such an application. Now if the assumptions of fact upon which this argument proceeds had all been correct, the case of *Purmessur Pershad Narain Singh v. Jankee Koor*, (1873) 19 W. R., 90, would have lent considerable support to it. But upon the facts of this case, we think the contention must fail. For we find on reference to the record that this suit was instituted in the second Munsif's Court at Grahanda, while the Court executing the decree was a different Court, viz., the Court of the first Munsif of that place. For the foregoing reasons we must hold that the decision appealed against is wrong in law and must be set aside. But, as has been said above, that does not dispose of this case. The questions raised in the case, namely, whether the decree was obtained by fraud and whether the defendant No. 1 was a party to that fraud, must now be determined, and if they are answered in the affirmative, the plaintiff would be entitled to a decree. Those are questions which clearly do not come within the scope of section 244 of the Code of Civil Procedure, and so far as the suit depends upon their determination, that section can be no bar to it. It was urged for the appellant that the suit, so far as it seeks to set aside the decree, is barred by article 164 of the second schedule of the Limitation Act. But that article has no application to this case. What the plaintiff seeks to do is, not to set aside the decree merely as an *ex parte* decree passed without service of summons, but to set it aside on the ground that it was obtained by fraud. The provision of the Limitation Act applicable to it is article 95; and upon the facts found, the suit is not barred under that article.

The result then is that the case must go back to the Lower Appellate Court for the determination of the two questions stated above. If that Court is satisfied that any evidence was excluded by reason of the view taken of the case by the first Court, it will allow the parties to adduce fresh evidence. Otherwise the questions will be determined upon the evidence on the record.*

Costs will abide the result.

S. C. G.

Appeal allowed. Case remanded.

so far as the auction-purchaser is concerned, the case against him can only be regarded as one for setting aside the sale on the ground of irregularity, and that the extended period of limitation in the case of an application to set aside a sale on the ground of fraud, cannot [333] apply to the case, so far as it proceeds against the execution-purchaser.

We are unable to accept this contention as sound. If the sale was a fraudulent sale, then, even if the auction-purchaser was not a party to that fraud, still it could not be said that the application ought not to be dealt with as one outside the scope of article 166.

The application is one to have the sale set aside; and if it was vitiated by fraud, the consequence of that must attach, so far as the present question goes, as much to the case of the auction-purchaser as to the case of the decree-holder.

It would be different if it had been necessary for the applicant to obtain an extension of the period of limitation under article 18 of the Limitation Act. That section expressly provides that the extended period of limitation on the ground of fraud is applicable only as against a party to the fraud. Here the applicant obtains the extended period, not by the application of article 18, but because his case does not come under article 166, but comes under a different article under which, quite apart from article 18, the application is not barred.

[334] The application, as we have pointed out, is governed by article 178 of the second schedule of the Limitation Act, there being no other provision of the law applicable to this case, which is one for setting aside a sale on the ground of fraud.

For the foregoing reasons we are of opinion that the decision of the Lower Appellate Court that the application is barred by limitation must be set aside, and this case sent back to that Court in order that it may be determined on the merits.

The costs of this appeal will abide the result. The question for which the case is remanded is whether the sale in question was brought about by the fraud of the decree-holder.

S. C. G.

Appeal allowed. Case remanded.

NOTES.

[An application otherwise falling within sec. 244 C.P.C., 1882, does not cease to be so by reason merely of its ground being fraud:—(1896) 26 Cal., 326; (1899) 26 Cal., 589; (1904) 31 Cal., 385; (1899) 27 Cal., 197; (1900) 28 Cal., 4; (1901) 6 C.W.N., 283; (1901) 23 All., 478. (1902) 24 All., 239; (1904) 26 All., 447.

In the C.P.C., 1908, the words '*or fraud*' have been inserted in Sch. I, O. 21, r. 90; with this result that applications to set aside a sale on account of fraud in publishing or conducting it are taken out of sec. 47 and as a consequence there is no second appeal.

See also (1911) 10 I.C., 412 (Cal.) where the decree was of the nature cognizable by a Court of Small Causes.

As regards limitation, see the Limitation Act (1908) Art. 166, which is general in its terms; see also (1914) 24 I.C., 249; (1912) 16 I.C., 464 (Cal.); (1908) 36 Cal., 336; 5 C.L.J., 328.]

The 9th March, 1899.

PRESENT :

MR. JUSTICE SALE.

Mugniram and others

versus

Gurmukh Roy.*

*Evidence—Registration Act (III of 1877), section 49—Collateral purpose—
Mortgage, unregistered—Limitation Act (XV of 1877).*

An unregistered document, the registration of which is compulsory, may be admissible in evidence for a collateral purpose, i.e., to prove admission of liability on part of the executant sufficient to prevent a claim from being barred by the Limitation Act.

IN this case the plaintiffs sued to recover the sum of Rs. 3,801 by way of principal and the sum of Rs. 997-12-6 for interest, being at the rate of 9 per cent. per annum. The plaintiffs alleged that previous to 23rd December 1894 there had been monetary transactions between their own firm and the defendant's firm, and on 22nd December 1894 an adjustment of account was come to between them, by which the sum of Rs. 833-6-9 was found due to the plaintiffs as principal, and Rs. 253-4-9 as interest; and that Rs. 253-4-9, the amount of the interest, had been paid, and Rs. 32-6-9 on account of the principal, which left a balance in favour of the plaintiffs' firm of Rs. 801. The plaintiffs further alleged that on 23rd December 1894 they at the request of the defendant [335] advanced to certain persons a sum of Rs. 3,000 at the above rate of 9 per cent. First the plaintiffs produced as evidence of these transactions entries in their books to the following effect:—

On the other side.

Account 1 of Gurmukh Roy Dip Chand Bengum, Sambat 1,951.

B. M. B. 15 cash book, page 313 Miti, the 14th of the light side in Pous.

286-11-6 cash book, page 399, Amount given up to you in respect of interest up to Miti, the 11th of the dark side in Pous. The same is credited. 30-11-6.

1,086-11-6. Previous balance.

3,000 cash book, page 295 Miti, the 12th of the dark side in Pous 1-14 cash book, page 321 Miti, the 7th of the dark side in Magh 1 cash book, page 370 Miti, the 15th of the light side in Falgoon. 4,089-9-6.

These entries were not signed by the defendant, and it did not appear from the entries that any interest had ever been paid or that there had been an adjustment of account.

Secondly, as evidence of the defendant's liability the plaintiffs' firm produced a mortgage executed by him in the Hindi language, charging his immoveable property in Ladnoo with the sum of Rs. 3,801, but it was found that the defendant had omitted to complete this mortgage by registering it.

Thirdly, the plaintiffs produced other entries in their books relating to monetary transactions with the defendant, but not signed by him, and

Fourthly, they tendered oral evidence.

The suit was instituted on 23rd November 1897.

* Original Civil Suit No. 796 of 1897.

Mr. Chakravarti for the Plaintiff.—The mortgage, although not registered, can be used as collateral evidence, and by way of an admission of liability on the part of the defendant, in spite of section 49 of the Registration Act (III of 1877) ; see *Field's Evidence Act*, pp. 452, 453 ; and *Woodroffe's Evidence Act*, p. 415 ; also the case of *Lachmipal Sing Dugar v. Khairat Ali*, (1869) 4 B. L. R., F. B., 18, and the *Bengal Banking Corporation v. Mackertich*, (1884) I. L. R., 10 Cal., 315.

An unregistered document, the registration of which is compulsory, is nevertheless admissible if evidence for a collateral [336] purpose. If such a document is admissible as evidence of admission of liability on the part of the defendant it is sufficient to free the claim from being barred by the Limitation Act (XV of 1877).

No one appeared for the defendant.

Sale, J.—I will allow the document to be admitted as evidence for the collateral purpose of showing that there has been an admission of liability on the part of the defendant sufficient to prevent the claim from being barred by the Limitation Act.

Attorneys for the Plaintiff : *Babus Kally Nath Mitter & Surbadhicary.*

C. E. G.

NOTES.

[See also 32 Mad., 410 ; 27 Bom., 515 (*contra* 17 M. L. J., 469) ; 23 Mad. 92 ; 4 Bom. L. R. 883, where the deeds were admitted for a collateral purpose.]

[26 Cal. 336]

APPELLATE CRIMINAL.

The 26th January, 1899.

PRESENT :

MR. JUSTICE O'KINEALY AND MR. JUSTICE STANLEY.

The Deputy Legal Remembrancer.....Appellant

versus

Sarna Kahmi.....Respondent.*

Bigamy—Complaint by the husband—" Person aggrieved"—

Criminal Procedure Code (Act V of 1898), section 198—

Penal Code (XLV of 1860), section 494.

The husband is a " person aggrieved " within the meaning of section 198 of the Criminal Procedure Code upon whose complaint the Court should take cognizance of an offence under section 494† of the Penal Code.

* Criminal Government Appeal No. 4 of 1898.

† [Sec. 494 :—Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Marrying again during the life-time of husband or wife.

Exception.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted, of the real state of facts so far as the same are within his or her knowledge.]

Queen-Empress v. Bai Rukshmoni, (1886) I. L. R., 10 Bom., 340, and *In the matter of Ujjala Bewa*, (1878) 1 C. L. R., 523, referred to.

THE accused in this case was on the complaint of her husband charged under section 494 of the Penal Code with having committed bigamy. The Sessions Judge before whom the trial was held, without going into the facts of the case, directed the jury to return a verdict of "not guilty" inasmuch as, regard being had to the provisions of section 198 of the Criminal Procedure Code, he was of opinion that the case could not proceed. The [337] husband in his opinion was not a "person aggrieved" within the meaning of that section. The jury in pursuance of the direction of the Sessions Judge returned a verdict of "not guilty" and the accused was acquitted. The Local Government appealed against this order of acquittal.

The judgment of the High Court (O'Kinealy and Stanley, JJ.) was as follows:—

In this case Government has appealed from a decision passed by the Sessions Judge of Jessore.

The accused was tried with the aid of a jury under section 494 of the Indian Penal Code, namely, for marrying again during the life-time of her husband. The Judge did not try the facts, but he directed the jury that, as a matter of law, the husband was not competent to carry on the case under the Procedure Code. Section 198 of the Procedure Code runs as follows: "No Court shall take cognizance of an offence falling under chapter XIX or chapter XXI of the Indian Penal Code or under sections 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence." Section 494 falls between sections 493 to 496, and is therefore within section 198. The Judge directed the jury that, as a matter of law, the husband is not the "person aggrieved" by such offence, and he thinks that the only "person aggrieved" is the person with whom the second ceremony was gone through. If he refers to the words of the section they would show him that the grievance may not be confined to a single individual. In the case of *Queen-Empress v. Bai Rukshmoni*, (1886) I.L.R., 10 Bom., 340, it was admitted by all at the Bar that a husband would be a "person aggrieved" under section 494; and in *In the matter of Ujjala Bewa*, (1878) 1 C. L. R., 523, the Judges were of the same opinion.

We think, therefore, that the direction of the Court below was not correct, and, setting aside the judgment of acquittal, we direct that the case be re-tried.

S. C. B.

NOTES.

[In (1905) 3 C.L.J., 38, MOOKERJEE, J., on a review of the authorities, held that it should be determined with reference to each case who was the 'person aggrieved'; and that the husband was not the only such person.]

[336] APPEAL FROM ORIGINAL CIVIL.*The 13th and 16th January, 1899.*

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, MR. JUSTICE
PRINSEP, AND MR. JUSTICE HILL.

Madhubmoney Dassee.....Defendant

versus

Nundo Lal Gupta.....Plaintiff.*

*Landlord and Tenant—Assignment, by tenant, of goodwill, stock-in-trade, fixtures,
furniture and chattels—Notice by landlord to lessee and to assignee
to deliver up possession on expiration of lease, or to pay rent—
Holding over—Use and occupation—Liability of assignee
for compensation for use and occupation.*

L assigned to *D* the stock-in-trade, goodwill, fixtures, chattels and premises in connection with a certain business carried on by him at the said premises which he held on lease from the plaintiff. The deed of assignment contained (*inter alia*) a provision empowering the assignee, in the event of any breach by *L* of the covenants contained in the said deed, to let the premises for any term or terms of years for such rent and under such covenants and conditions as *D* might think fit; and there was a further provision that *L* should not remove any of the stock-in-trade, chattels, &c., without the permission of *D*. Shortly before the expiration of the lease, the plaintiff served a notice on *L* to deliver up possession of the premises on the expiry of the lease, or to pay an enhanced rent therefor, and a notice on *D* requiring *D* to deliver up possession, and stating that, in default, he would hold *D* jointly liable with *L* for the enhanced rent. *D* had durwans and a clerk on the premises to see that nothing was removed therefrom without his permission. *L* and *D* continued to keep the stock-in-trade on the premises after the determination of the lease, and the business was carried on as before. The plaintiff subsequently brought an action against *D* and *L* for compensation for use and occupation of the premises for four months.

Held (reversing the decision of AMEER ALI, J.) that the lease did not pass under the terms of the assignment to *D*, and that *D* was not liable to the plaintiff for compensation for the use and occupation of the premises.

ON the 19th August 1891, the plaintiff granted a lease of the premises No. 159 and 160, Dhurrumtollah, in the town of Calcutta, to one Joseph Lauter, a veterinary surgeon and stable-keeper for a term, which expired on the 31st August 1895. On the 30th September Lauter assigned to one Dwarka Nath Mitter [339] the goodwill and his interest in the business of veterinary surgeon and stable-keeper as the same was carried on at the said premises, and "all the horses, carriages, stock-in-trade, fixtures, furniture and other effects in anywise belonging to or used in the said business, and all the right, title, interest, property, claims and demands whatsoever of the said Lauter to, in, and upon the said business and other the premises" thereby assigned. The assignment contained (*inter alia*) provisions to the effect that "on default on the part of the said Lauter in payment of the principal money or interest thereby secured, or some part thereof, within twenty-four hours after the date appointed for payment thereof in case of breach of any of the covenants which the said Lauter had entered into with the said Dwarka Nath Mitter, then it

* Appeal from Original Decree No. 35 of 1897 from the decision of Mr. Justice AMEER ALI, dated the 17th August 1897, in Small Cause Court transfer suit No. 2 of 1896.

should be lawful for the said Dwarka Nath Mitter, or his executors, &c.; at any time after the expiry of twenty-four hours from such default or breach of covenant to enter upon the said premises, or any other place in which the horses, carriages, and other chattels" thereby assigned, "should be or should be supposed to be, to seize the said horses, &c., and either remove them or allow them to remain on the said premises; and also at any time after the expiry of twenty-four hours from such default to sell the horses, carriages, goodwill, chattels and premises" thereby assigned; "and also at any time or times to let the said horses, carriages, goodwill, chattels and premises, or to grant any lease or leases thereof for any term or terms of years upon such terms and conditions, and subject to such covenants as he or they should think fit." Another clause prohibited Lauter from removing any of the chattels, horses, carriages, &c., without the consent of Dwarka Nath Mitter.

On and shortly after the 18th July 1895 certain letters passed between the pleaders of the plaintiff and Dwarka Nath Mitter, claiming, on the one side, rent from Dwarka Nath Mitter as mortgagee in possession of the premises, and on the other side, repudiating liability for the rent, and denying that Dwarka Nath Mitter was in possession of the premises as mortgagee.

In July 1895 the plaintiff brought a suit in the Small Cause Court to recover from Lauter and Dwarka Nath Mitter the rent of the premises for May and June 1895. The allegation against [340] Dwarka Nath Mitter was that he was jointly liable with Lauter because he was the mortgagee in possession of the stock-in-trade; but as against Dwarka Nath Mitter the suit was withdrawn on the 21st August 1895. During the suit, a notice, dated the 14th August, was, according to the plaintiff, served on Lauter requiring possession of the premises on the 31st August, and claiming in default an enhanced rent of Rs. 500 per month in the event of his holding over. A similar notice was served on Dwarka Nath Mitter, stating that he would be held jointly liable with Lauter for the enhanced rent. They did not vacate the premises. Lauter was adjudicated insolvent on the 10th January 1896; but the plaintiff did not prove for his debt on the insolvency. Meanwhile, Dwarka Nath Mitter died. The plaintiff in January 1896 sued Lauter and the representatives of Dwarka Nath Mitter for compensation for the use and occupation of the premises during the period from September to December 1895, alleging that Dwarka Nath Mitter was a mortgagee in possession of the premises, and also that he had agreed to pay the enhanced rent. The suit was transferred to the High Court. The learned Judge who tried it (AMEER ALI, J.) found that the notice alleged had been served on Dwarka Nath Mitter; and that his alleged agreement to pay the enhanced rent was not proved; but he held that Dwarka Nath Mitter was the mortgagee in possession, and as such was as much in the occupation of the premises as Lauter himself, and that his representatives were liable for compensation for the period in respect of which the suit was brought. He, therefore, gave a decree in favour of the plaintiff with costs other than the costs of trial of the issue as to the alleged agreement.

The defendants appealed.

Mr. Palit and *Mr. H. D. Bose* for the Appellants.—Dwarka Nath Mitter was never in possession of the premises as mortgagee; he simply had a *durwan* and a clerk there to take charge of the horses, carriages, &c., and to see that they were not improperly removed, not to be in possession of the premises on his behalf.

The question raised by the learned Judge as to whether there had been use and occupation does not arise, because the plaint was based on an express contract. If Dwarka Nath Mitter had been [341] a sub-tenant of Lauter's, or

even if he had been a trespasser, he would not be liable in an action for compensation for use and occupation.

On the plaintiff's own evidence it is clear that Lauter was not holding over after the determination of the lease, for he says that Lauter made a new agreement with him to pay the enhanced rent. And that being so, there could be no holding over by Dwarka Nath Mitter. A suit and a decree for compensation for use and occupation must be based upon some tenancy. No contract of tenancy can be created in such a case as the present. *Marquis of Camden v. Batterbury*, (1860) 7 C. B. (N. S.) 864, (878). And in all tenancies by sufferance there is an underlying assumption that the letting was by implication: there must have been a previous permission to enter into possession. [PRINSEP, J., referred to the passage in Woodfall on Landlord and Tenant, 16th edition, p. 577: "A lessee or his assignee . . . trespasser".] But the holding over must be by the tenant—in this case, Lauter; Dwarka Nath Mitter never was a tenant. The plaintiff is endeavouring to convert his notice into a contract, which he cannot do. The decision in *Hellier v. Silcox*, (1850) 19 L. J. (N. S.) Q. B., 295, on which the respondents rely, is explained in *Churchward v. Ford*, (1857) 2 H. and N. 446 (449), and does not assist them.

The Court called upon the respondent's Counsel.

Mr. Pugh (with him Mr. Hill and Mr. Dunne) for the Respondent.—The argument against us is that the question of use and occupation does not arise. But it was sufficiently raised before the lower Court. It was argued without objection on the defendants' part; and there is no ground of appeal with regard to it.

It is said that there was no holding over. But it was clearly the interest of Dwarka Nath Mitter that he and Lauter should not be ejected, but should be allowed to have the premises for carrying on the business, which otherwise would have suffered greatly. The mortgage was a mortgage, not of the stock-in-trade [342] merely, but also of the business and goodwill. Any interest that Lauter had in these premises Dwarka Nath Mitter got. He was entitled to carry on the business; and he did carry it on, through Lauter, and he got possession of the premises by his durwan and clerk. And for the purpose of looking after the stock-in-trade, he took possession of the premises. He was *de facto* in occupation of them, and it was essential that he should be, as the lease was coming to an end, and he had had the notice referred to served on him. At the time of the mortgage it was not an entry as a tenant; but even if he did not enter as a tenant at all, still the relation of landlord and tenant might arise by a notice given and a subsequent occupation. On the evidence there is use and occupation by Dwarka Nath Mitter prior to the end of August. On the 14th August the plaintiff did take steps to create the relation of landlord and tenant as from the expiration of the lease. The use and occupation by Dwarka Nath Mitter date from the time when he went into possession under the deed of assignment; Lauter's tenancy is a distinct matter. A man may occupy a place by putting his goods there; residence is not necessary. The occupation in such a case as this must be actual, *de facto*, occupation. *Robinson v. Briggs*, (1870) L. R., 6 Exch. 1. Where a grantor of a bill of sale makes over his goods in such a way that the grantee's durwans open and close the place of business (as they did in this case), and wait there to see that nothing is removed therefrom, the grantor is no longer in occupation. The assignment is of the goodwill, as well as of the stock-in-trade, and that is inseparable from the enjoyment of the premises. But then Dwarka Nath would be liable as assignee of the lease. But he has power under the assignment to let the premises on lease upon such terms as he may think fit. Lauter also agreed

to pay the rent; and the object of that was to maintain Dwarka Nath Mitter's hold on the premises. He never said so in any form; and his whole conduct indicated the contrary. It is not correct to say that an action for compensation for use and occupation must be based on a contract, express or implied; it is more accurate to say that the defendant must have held or occupied the premises as tenant thereof to the plaintiff, [343] or by his permission or sufferance—Woodfall on Landlord and Tenant, 16th ed., p. 571. The implied contract is raised by law from the fact that land belonging to the plaintiff has been occupied by the defendant by the plaintiff's permission—*Gibson v. Kirk*, (1841) 1 Q. B., 850 (856).

Mr. *Hill* on the same side.—The very assignment of the goodwill shows that it was to carry with it the right of occupation of the premises where the business was carried on. The powers of the assignee, in the event of breach of covenant by Lauter, included a power to let the premises for a term of years; and that expression, while appropriate to any lease of the business premises, is certainly not appropriate to the hire of horses. After default made, Lauter was only a licensee for the purpose of carrying on the business. No doubt the holding over would be *prima facie* a holding over by Lauter. But there are other circumstances; and those are that he could not remove the furniture, or even his name-plate on the door, nor could he carry on business elsewhere. All the fixtures and chattels were conveyed by the assignment; they passed by title, and not under any consideration operating in bankruptcy, such as apparent possession. The plaintiff was at liberty to allow both Dwarka Nath Mitter and Lauter to remain on the premises, and hold them jointly liable, though either of them was at liberty to go out. As between the landlord and Lauter, the latter could have gone out; but as between Lauter and Dwarka Nath Mitter, Lauter's hands were tied, so that the occupation was the occupation of Dwarka Nath Mitter, because he was the only person who could make any effective choice in the matter.

Mr. *Palit*, called on by the Court only as to the effect of the notice and as to the argument that the assignment passed the lease of the premises, cited in reply *Churchward v. Ford*, (1857) 2 H. and N., 446; *Toverson v. Jackson*, L. R., (1891) 2 Q. B., 484; *Ibbs v. Richardson*, (1839) 9 Ad. & E., 849; *Moore v. Greg*, (1848) 2 Phillips, 717, and *Cox v. Bishop*, (1857) 8 De. G. M. and G., 815.

[344] Mr. *Pugh* in reply on the authorities.

The following judgments were delivered by the Court (MACLEAN, C.J., and PRINSEP and HILL, JJ.):—

Maclean, C.J.—On the 29th of August 1891, the plaintiff in the present suit granted a lease of certain premises No. 159-160, Dhurumtollah Street, in Calcutta, to one Joseph Lauter for a term which expired on the 31st August 1895. On the 30th September 1893, Joseph Lauter assigned the goodwill and interest and the stock-in-trade, trade fixtures, &c., in the business which he then carried on as a veterinary surgeon and livery stable-keeper, on the above premises, to one Dwarka Nath Mitter, who has since died, and whose representatives are the defendants in the present case.

I will deal at once with the question of the construction of the above assignment before going into the further facts of the case. It is contended for the plaintiff that the assignment passed the lease as well as the stock-in-trade and trade fixtures, etc., but that contention is not, in my opinion, well founded. A distinction is drawn between the household premises themselves and the goods and chattels in and upon them. The plaintiff says that the lease passed under the terms, "goodwill and interest of the said Joseph Lauter in the business of

veterinary surgeon ;" but I am unable to accept this view, or to say that under these words Dwarka Nath Mitter became the assignee of the lease, and in expressing this opinion I am not unmindful of the clause to be found at page 29 of the Paper Book, which gives Dwarka Nath Mitter a power in certain events, not only to sell the chattels, but also to grant a lease of the premises. But in the view I take of the case I am not satisfied that this question is very material.

Passing on to the history of the case, it appears that on the 18th of July 1865, a suit was brought by the plaintiff in the Small Cause Court against Joseph Lauter and Dwarka Nath Mitter to recover Rs. 740 as the rent of the premises for the months of May and June 1895, at the rate of Rs.370 per month. It is clear from the letter of the 11th of June 1895, which is set out at page 45 of the Paper Book, what was the position which the plaintiff thought the appellant occupied in relation to those premises.

[345] The plaintiff treated Dwarka Nath Mitter as mortgagee in possession of the premises themselves and as jointly liable with Joseph Lauter for the rent. That position Dwarka Nath Mitter repudiated, and doubtless, in consequence of the letter of the 19th of August 1895, which is set out at page 47 of the Paper Book, the suit in the Small Cause Court was withdrawn as against Dwarka Nath Mitter, and the plaintiff had to pay his costs. In that letter, Dwarka Nath Mitter, through his pleader, repudiates any tenancy, and tells the plaintiff what his position is. He says: "What he" (meaning his client, Dwarka Nath Mitter) "contends is that he is not the tenant of your client, nor he is bound to pay to your client the rent which he had sued him for. Your client well knows the fact that my client has a lien over the stock-in-trade of the said Joseph Lauter, as he has advanced Rs. 15,000 to him on the security of the same."

On the 14th August 1895, the plaintiff served Dwarka Nath Mitter with the notice, which will be found at page 25 of the Paper Book, and great reliance is placed by the respondent on this notice. The plaintiff also sent a notice to Joseph Lauter, which will be found at page 34 of the Paper Book.

According to the statement in the plaint Joseph Lauter "consented to the said enhancement of rent," which means, if it mean anything, that he consented to hold over on those terms. Dwarka Nath Mitter died on the 21st of November 1895, Lauter became a bankrupt on the 10th of January 1896, and on the 23rd of January 1896, this suit was instituted, claiming as against the representatives of Dwarka Nath Mitter Rs. 2,000 for the rent, use and occupation of the premises for four months, viz., September, October, November and December 1895.

Mr. Justice AMEER ALI gave judgment in favour of the plaintiff, and hence the present appeal by the representatives of Dwarka Nath Mitter.

Two questions arise for our consideration: *Firstly*, whether the allegation made by the plaintiff that Dwarka Nath Mitter agreed to become tenant of the premises upon the terms of paying Rs. 500 a month is made out, and, if not; *secondly*, whether the plaintiff is entitled to recover the sum of Rs. 2,000 upon the footing of use and occupation of the premises by Dwarka Nath Mitter.

[346] The learned Judge in the Court below has found as a fact that the agreement set up by the plaintiff has not been made out, but the respondents invite us to reverse that conclusion.

The agreement is not supported by any documentary evidence, and virtually the only evidence in support of it is the evidence of Harish Chunder Biswas, who was the sirkar of the plaintiff. He speaks of a certain conversation with Dwarka Nath Mitter, but no rent-bills are produced, and, as

against a dead man, I am not disposed to place much reliance on this evidence, in which there are passages which show that it must be accepted with the greatest caution. For instance, he tells us at page 12 of the Paper Book that the reason for not making out rent-bills was because of the uncertainty as to who was to pay the rent. But how could there be any uncertainty as to that, if there was, as he says, a clear agreement that Dwarka Nath Mitter was to pay it? Furthermore this story is inconsistent with the evidence of Joseph Lauter, who was called as a witness for the plaintiff, and he says at page 20: "There was a conversation between us as to notice at the end of September. I said, the "lease is over, and Mr. Gupta has put the rent to Rs. 500. What am I to do. I can't get money enough in. Will you help me?" And he said he would. He said, "Sonnie, I will help you. I will give you Rs. 2,000, and he will help with the rent up to the end of the season. This was the conversation when the two nephews were present. I cannot give you the exact date. I would know the nephews if I see them." That is the evidence of their own witness, and it is perfectly inconsistent with the view that Dwarka Nath Mitter was under the impression that he had entered into an agreement with the plaintiff to pay any rent in respect of these premises, or to become, as between himself and the plaintiff, the tenant of the premises. Again, after Dwarka Nath Mitter's death, the plaintiff treated Lauter as in occupation of the premises, as appears from the letter of the 18th of January 1896 set out at page 60 of the Paper Book: "We are instructed by Babu Nundo Lal Gupta, owner of the premises Nos. 159-160, Dhurum-tollah Street, hitherto in the occupation of the insolvent above named, to request you will be so good as to see that the property belonging to the said insolvent is removed at once, and the premises vacated in the course [347] of a day or two," and so forth. That is only a few days before the present plaint was filed, and that letter shows that the view then taken by the plaintiff was that the premises were, up to the time of the letter, in the occupation, not of Dwarka Nath Mitter, but of the insolvent, and is absolutely inconsistent with the idea of any agreement by Dwarka Nath Mitter to become the tenant. I agree with Mr. Justice AMEER ALI upon this part of the case.

Then, is the plaintiff entitled to recover any thing upon the footing of use and occupation? To enable the plaintiff to recover upon that footing, there must be a tenancy, expressed or implied, there must be evidence of the existence of the relation of landlord and tenant, and of an entry into and occupation of the premises attributable to that tenancy. Where are those requisites to be found in the present case? There is no evidence to support a claim upon the footing of use and occupation.

I have already pointed out that by his plaint the plaintiff says that Lauter consented to hold over, and this is consistent with the letter of the 18th of January which treats Lauter as in occupation of the premises. The case made by the plaintiff is that Dwarka Nath Mitter was in possession of the leasehold premises as mortgagee in possession. To my mind he was nothing of the sort. Under the deed he was entitled to keep a durwan on the premises, and clerk in charge of the books, &c. He put the durwan and clerk on the premises not to take possession of the premises, but to look after the chattels assigned to him by way of mortgage, and he did so on the very day that the deed was executed; and so matters remained up to the time of Dwarka Nath Mitter's death. There was no change in the position, and he never took possession as mortgagee of the leasehold premises. But if he had, I do not appreciate how this would have assisted the plaintiff. The mere fact of his being in possession

would not constitute the relation of landlord and tenant, so as to entitle the plaintiff to sue for use and occupation.

But it is said that a tenancy is to be implied from the notice of the 14th of August, Dwarka Nath Mitter being in possession as mortgagee of the leasehold premises. I have exposed the fallacy of this latter view.

But, even if he were, the mere service of such a notice—and [348] when it was served Dwarka Nath Mitter according to the plaintiff's evidence, that of the man who took the notice, said he had nothing to do with it—will not constitute a tenancy. A mere notice such as that given in this case does not constitute a contract. When the tenancy terminated on the 31st of August the plaintiff could have adopted one of two courses. He could have turned Lauter and his horses and carts and chattels into the street, or he could have made a bargain with him or with Dwarka Nath Mitter for a fresh tenancy. As regards the latter, he adopted neither of these courses, but on his own statement, he did make a bargain with Lauter to hold over on an enhanced rent.

There was no express tenancy between the plaintiff and Dwarka Nath Mitter, nor is there anything in the circumstances from which any such tenancy can be reasonably implied. The facts all tend the other way.

Upon this part of the case I am unable to agree with the learned Judge in the Court below, and speaking with every respect I am at a loss to appreciate the bearing of the case upon which he appears to place so much reliance, namely, the case of *Ex parte National Guardian Assurance Co. In re Francis*, (1878) L. R., 10 Ch. D., 408 (413), a long quotation from which is set out in the judgment. I may add that I scarcely think we should have heard of the present claim had Lauter not become a bankrupt.

For the reasons I have given, the appeal must be allowed. The suit ought to have been dismissed, and must now be dismissed with costs as against the representatives of Dwarka Nath Mitter, including the costs of the appeal.

Prinsep, J.—I concur and have nothing to add.

Hill, J.—I also agree with the views expressed by the Chief Justice.

Appeal allowed.

Attorneys for the Appellant : Messrs. *Sen & Co.*

Attorneys for the Respondents : Messrs. *Morgan & Co.*

H. W.

[349] ORIGINAL CIVIL.

The 12th January, 1899.

PRESENT :

MR. JUSTICE SALE.

Lutchmanen Chetty

. *versus*

Siva Prokasa Modelar.*

*Hindu Law—Joint family—Partnership—Infant sons—Mitakshara law—
Promissory note, Suit on—Non-joinder of parties—Pleas in bar of suit.*

In a suit on a promissory note executed by the defendant in favour of a firm whose original partners were two brothers, one of whom had previously died, leaving an infant son surviving, while the other, who also had infant sons, was at the date of the execution of the note, sole surviving partner of the firm :

Held, that a Hindu infant who by birth or inheritance becomes entitled to an interest in a joint family business does not necessarily become a member of the trading partnership carrying on the business. There must be some consentient act to that effect on the part of the infant and his partners. Even, therefore, where parties are governed by the Mitakshara law an infant need not be joined as a co-plaintiff in a suit by the father to recover a trade debt. Decrees obtained in such suits by or against the managers of the business are presumed to have been obtained by or against them in their representative capacity, and will be binding on the whole joint family.

Bissessur Lall Sahoo v. Luchmessur Singh, (1879) L. R., 6 I. A., 233 ; *Petum Doss v. Ramdhone Doss*, (1848) Taylor, 279, and *Ramsebuk v. Ramlall Koondoo*, (1881) I. L. R., 6 Cal., 815, referred to.

THE plaintiff and one A. R. L. N. Ramanathen Chetty were undivided brothers constituting a joint family governed by the Mitakshara law. They carried on a business together at Davakotta in the Madras Presidency, and subsequently opened a branch business in Calcutta in the name of Ramanath Chetty, who was the elder brother, which was managed on their behalf by a *gomastah* of the name of Viena Ramanathen Chetty. In 1889 moneys were advanced to the defendant by the Calcutta firm through the *gomastah*. In March 1890 the plaintiff's brother, Ramanathen Chetty, died intestate leaving an only son. The business continued in the name of the deceased brother, and there were further monetary transactions between the firm and the [350] defendant, and an account was finally taken and adjusted of the dealings between the defendant and the firm of Ramanathen Chetty, when a sum of Rs. 12,000 was found due by the defendant to the firm, and for that sum and interest a promissory note, the subject of this suit, was executed by the defendant in favour of the firm on 31st January 1891, and given by the defendant to the *gomastah* Viena Ramanathen Chetty for and in respect of the debt due to the firm.

The defendant relied mainly in bar of the suit on the plea that all necessary parties to the suit had not been joined as plaintiffs.

The plaintiff, it was proved, had four sons living, the eldest of whom was nine or nine and-a-half, while the youngest was born since the institution of the suit. The son of the deceased brother Ramanathen Chetty died after the institution of the suit, leaving only a daughter. The plaintiff and his brother Ramanathen Chetty carried on their business both in Calcutta and at Davakotta

* Original Civil Suit No. 65 of 1895.

jointly for the benefit of themselves and their families, and since the death of the plaintiff's brother the businesses were carried on for the benefit of the members of the joint family by the plaintiff as the manager or head of the family.

The defendant raised the contention that as the family was governed by the Mitakshara law the plaintiff's sons on birth became co-sharers in the joint family properties, which included the note in suit; that they succeeded to a share in the joint family property by inheritance on the death of their father's brother Ramanathen Chetty; that as such co-sharers they were necessary parties to the suit, and should have been joined as plaintiffs. It was not, however, shown that the infants had been admitted into the trading partnership or taken any part in the business or exercised any control therein, or that the business was an ancestral business, or that the Calcutta business was started by the brothers with ancestral funds as distinguished from their own acquisitions.

None of the plaintiff's sons were in existence at the time the dealings with the defendant commenced. At the date of the execution of the note in suit the plaintiff's eldest son was probably in existence, and the plaintiff's brother's son was also in existence, but it did not appear when he was born.

[351] Mr. *Chakravarti* (Mr. *Woodroffe* with him) for the Plaintiff.—This suit is brought on a promissory note executed for the sum of Rs. 12,000. The execution of the note is admitted, and the only defence is whether the plaintiff is entitled alone to maintain this suit. The note is in the name of the firm under which the Calcutta business was carried on. The note remained with the agent of the firm and was afterwards made over to the custody of the plaintiff. At the time the note was given the plaintiff was the sole partner of the business. His other partner was dead. We are now suing as the sole partner of the firm in whose favour the note was given. *Lindley on Partnership*, 5th Ed., p. 274. There is no question as to any assignment. At the date the note was given there is no doubt that the plaintiff's brother was dead.

Mr. *Henderson* (Mr. *Knight* with him) for the Defendant.—The property of the firm was joint. The suit should be brought in the joint names and not in the name of the plaintiff alone. *Ramsebak v. Ramlall Koondoo*, (1881) I. L. R., 6 Cal., 815. The eldest son of the plaintiff was alive at the time of these transactions, and, if it was joint property, each son at the time of birth became interested in the firm. At no time was Lutchmanen Chetty entitled to the exclusion of his sons. *Suryu Prasad Singh v. Kwahish Ali*, (1882) I. L. R., 4 All. 512, *Woodroffe's Evidence Act*, pp. 620, 692.

Mr. *Chakravarti* in reply.—The fact that an infant has an interest in the firm does not make him a necessary party to the suit, see section 247, *Indian Contract Act*. The case of *Ramsebak v. Ramlall Koondoo*, (1881) I. L. R., 6 Cal., 815, does not assist the Court. There was no question there as to any party being an infant. There the parties were the actual partners. There was no infant. But if a member of a family takes out funds and starts a business of his own there is no presumption that there is any joint family business. If the infants do not become partners why cannot the sole surviving partner alone sue. In the case of the minor the contract must have been with the guardian. Every partner is entitled to give a discharge, but an infant cannot: *Rampartab Samrathrai v. Foolibai*, (1895) I. L. R., 20 Bom., 767. [352] Besides, three or four members of a Mitakshara family may start a business and all contribute out of the joint funds of their family, but that does not make it a joint family business. The cases cited are cases of an ancestral business where the right accrues by inheritance.

There is no evidence here that the infants were taken in as partners. If two persons choose to start a business of their own and a son is born does he immediately become a partner in the business? He must be admitted or become so by law. Each partner is an agent of the other, but an infant cannot be the agent of all. [SALE, J.—An infant can be made liable by a manager to a certain extent in an ancestral business.] Persons without their consent cannot be made partners, and these infants are of such tender years that they cannot give their consent. The letters of administration show that this was a business started with their own money by the brothers. Mayne's Hindu Law, section 274; Trevelyan on Minors, p. 185. *Bungsee Singh v. Soodist Lall*, (1881) I. L. R., 7 Cal., 739, and *Arunachala Pillai v. Vythialinga Mudaliyar*, (1882) I. L. R., 6 Mad., 27. The plaintiff besides is the manager of the family.

SALE, J.—The plaintiff in this case claims judgment for the amount of principal and interest due on a promissory note executed by the defendant on the 31st January 1891.

The note is executed in favour of A. R. L. N. Ramanathen Chetty. It appears that the plaintiff and one A. R. L. N. Ramanathen Chetty were undivided brothers constituting a joint family governed by the Mitakshara law. They carried on a business together at Devakotta in the Madras Presidency and subsequently opened a branch business in Calcutta in the name of Ramanath Chetty, who was the elder brother, which was managed on their behalf by a *gomastah* of the name of Viena Ramanathen Chetty. In the year 1889, dealings were commenced with the defendant, moneys being advanced to him by the Calcutta firm through their *gomastah* Viena Ramanathen Chetty. In the month of March 1890 the plaintiff's brother Ramanathen Chetty died intestate leaving an only son. The business in Calcutta was continued in the name of the deceased brother, and there were further dealings between the [383] firm of Ramanathen Chetty and the defendant till some time shortly before the execution of the promissory note in suit. It has been proved that an account was taken and adjusted of the dealings between the defendant and the firm of Ramanathen Chetty; that a sum of Rs. 12,000 was found due by the defendant to the firm; and that for that sum and interest the note in suit was executed in the name of the firm and was given by the defendant to the *gomastah* Viena Ramanathen Chetty for and in respect of the debt due to the firm. The defendant has filed three different written statements raising various grounds of defence, and there has been a considerable body of evidence adduced both at the hearing and on two commissions which were issued by this Court. At the hearing no serious attempt was made upon the evidence to contest the plaintiff's claim on the merits, but a plea of non-joinder of parties as plaintiffs was relied on in bar of the suit. The plea was raised in the second and third written statements after evidence had been taken on the first of the commissions issued by this Court. The facts which have been proved, and which it is necessary to state relative to this plea, are as follows. The plaintiff has now four sons living, the eldest of whom is nine or nine and-a-half years old, the youngest having been born since the institution of this suit. The son of the plaintiff's brother Ramanathen Chetty has died since the institution of this suit leaving only a daughter. The plaintiff and his brother Ramanathen Chetty carried on their business both in Calcutta and at Devakotta jointly for the benefit of themselves and of their families, and since the death of Ramanathen Chetty the businesses have been carried on for the benefit of the members of the joint family by the plaintiff as the manager or head of the family. It has not been shown by whom the Devakotta business was started, nor has it been shewn that it was ancestral business, that is to say, a business

which descended to the plaintiff and his brother from their father or their ancestors. Nor does it appear that the Calcutta business was started by the brothers with ancestral funds, as distinguished from their own acquisitions. None of the plaintiff's sons were in existence at the time the dealings with the defendant commenced. At the date of the execution of the note in suit [354] the plaintiff's eldest son was probably in existence, and the plaintiff's brother's son was also in existence, but it does not appear when he was born.

* It is contended that the family being governed by the Mitakshara law, the plaintiff's sons on birth became co-shareis in the joint family properties, which included the note in suit, and that moreover they succeeded to a share in the joint family property by inheritance on the death of their father's brother Ramnath Chetty, and that as such co-sharers they are necessary parties to the suit, and should have been joined as plaintiffs. A plea of non-joinder of plaintiffs in an action of contract is a plea in bar of the suit, and if established at the hearing must, as explained in the case of *Ramsebuk v. Ramlall Koondoo*, (1881) 1. L. R., 6 Cal., 815, result in the dismissal of the suit.

No authority has been cited to show that infant members of a Hindu co-parcenary must be joined as co-plaintiffs in suits to recover claims arising out of a joint family business managed by adult members of the family. A debtor of a firm carrying on a joint family business is no doubt entitled to insist that all his co-contractors should join as plaintiffs in a suit instituted to recover the debt, but on what principal can it be said that infants, possibly of tender years as in this case, who are not shown to have been admitted into the trading partnership or to have taken any part in the business or exercised any control therein, are in any sense co-contractors of the debtor? A trade like other personal property is descendible amongst Hindus, but it does not follow that a Hindu infant, who by birth or inheritance becomes entitled to an interest in a joint family business, becomes at the same time a member of the trading partnership which carries on the business. He can only become a member of the partnership by a consentient act on the part of himself and his partners, and it was on this ground held by the late Supreme Court that an infant of tender years, whose name was used in a partnership business, need not be joined as a co-plaintiff in a suit by the father to recover a trade debt. *Petum Doss v. Ramdhone Doss*, (1848) Taylor, 279.

[355] It is true that the parties in that case were not governed by the Mitakshara law, and that the infant was not entitled to a share in the joint estate, but it seems to me that the same principle would have applied if the infant had been a member of a co-parcenary governed by the Mitakshara law.

In the case of *Ramsebuk v. Ramlall Koondoo*, already cited, the plea of non-joinder was held to be established on principles applicable to a case of an ordinary contractual partnership, although the plaintiffs, both original and added, were all members of a joint family governed by the Mitakshara law, and the debt sought to be recovered was a debt due in respect of the joint family business. Moreover, it is not necessary, in order to bind the interest of infant members of a Hindu co-parcenary, that they should be joined as co-plaintiffs in suits instituted by the adult members of the family who carry on the joint family business or contracts entered into with the firm, because decrees obtained in such suits by or against the managers of the business will be presumed to have been obtained by or against them in their representative capacity, and will be binding on the whole joint family—*Bissessur Lall Sahoo v. Euchmessur Singh*, (1879) L. R., 6 I. A., 233. It is settled law in England that dormant partners may join as co-plaintiffs in suits on contracts entered into with

the firm, but that they need not do so—Lindley on Partnership, 5th Edition, Vol. I, p. 276.

It would seem that this rule would apply with greater force to the case of infant co-sharers of a Hindu joint family, who have not in fact been admitted into the trading partnership by which the family business is carried on for the mutual benefit of all the members of the family.

In the present case the evidence shows that the only original partners of the firm in whose name the note in suit was given were the plaintiff and his brother Ramanathen Chetty, and upon the death of the latter, and at the date of the note, the plaintiff was the sole surviving partner of the firm, and that as such and as the managing member of the family he continued to carry on the business of the firm in Calcutta, until it was closed.

[356] These facts in my opinion are sufficient to establish the plaintiff's right to maintain this suit in his own name, without joining his sons as co-plaintiffs. Nor is the *gomastah* Viena Ramanathen Chetty a necessary party to this suit, as it has been shown that the defendant's dealings with him throughout were as agent of the firm, and that it was in that capacity the note in suit was given to him.

The result is that there must be judgment for the plaintiff for the amount claimed with costs of suit, including the costs of the commissions on scale 2.

Attorneys for the Defendant : Messrs. Orr, Robertson & Burton.

Attorneys for the Plaintiff : Messrs. Wilson & Chatterjee.

C. E. G.

NOTES.

[As regards the liability of an infant member, see also 21 M.L.J., 630 : 26 Mad., 336; (1906) 29 All., 176; (1903) 25 All., 378; 19 I.C., 6 (Cal.).]

As regards the manager's representative capacity, see also 34 Bom., 72; 32 Mad., 284; 32 All., 183; 30 Bom., 477; 29 Cal., 583; 27 M.L.J., 621; 36 All., 383.]

[26 Cal. 356]

APPELLATE CIVIL.

The 18th January, 1899.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Kashi Chandra Chuckerbutty.....Plaintiff

versus

Kailash Chandra Bandopadhyya and others.....Defendants*

Mesne profits, Suit for—Turn of worship—Right of suit—A suit for wasilat in respect of profits derived from a turn of worship, whether maintainable.

A suit for *wasilat* in respect of profits derived from a turn of worship, which are in their nature uncertain and voluntary, is not maintainable.

Ramessur Mookerjee v. Ishan Chunder Mookerjee, (1868) 10 W. L., 457, followed.

THIS appeal arose out of an action for mesne profits. The allegation of the plaintiff was that he had purchased a *jama* out of the *debutter* of a goddess

* Appeal from Appellate Decree No. 1427 of 1897, against the decree of Babu Jogendra Nath Roy, Subordinate Judge of Jessore, dated the 5th of May 1897, reversing the decree of Babu Purna Chandra Chowdhry, Munsif of Narail, dated the 27th of May, 1896.

Kali in "the village of Lakshmipur, as also the right to the turn of worship of the said goddess, in the name of his wife, but that the defendants dispossessed him from the said *jama* and turn of worship on the 1st Aughran 1299; that he had then to institute a suit against the defendants to recover possession of the said *jama* and turn of worship, a decree was passed in his favour, and in execution of that decree he had obtained possession of the land in dispute, as well as of the turn of worship. The plaintiff thereupon brought this action for recovery of profits, (realized from the land as well as from the turn of worship), which were unjustly appropriated by the defendants, for the period he was kept out of possession by them. The defence mainly was that the suit was not maintainable, and that the claim was excessive. The Court of First Instance decreed the plaintiff's suit against the defendants Nos. 1 and 3 for a certain amount, and dismissed the suit against defendant No. 2. On appeal by defendant No. 3 to the Subordinate Judge the whole suit of the plaintiff was dismissed. From this decision the plaintiff appealed to the High Court.

Babu Surendra Chunder Sen for the Appellant.

Babu Tara Kishore Chowdhry and Babu Bidhu Bhusan Ganguli, for the Respondents.

The judgment of the High Court (Banerjee and Rampini, J.) was as follows :—

This appeal arises out of a suit for *wasilat* in respect of a certain turn of worship and of certain land. The suit was brought against three persons. Their defence was, shortly, a denial of liability.

The Court of First Instance decreed the suit against defendants Nos. 1 and 3 for a certain amount, and dismissed the suit as against defendant No. 2. Thereupon defendant No. 3 preferred an appeal, and, on the appeal of that defendant, the whole suit has been dismissed by the Lower Appellate Court, on the ground that no suit for *wasilat* could lie in respect of profits derived from a turn of worship.

In second appeal it is contended, on behalf of the plaintiff appellant, *first*, that the Lower Appellate Court is wrong in holding that no suit for *wasilat*, in respect of profits derived from a turn of worship, could lie; and, *secondly*, that the Lower Appellate Court is wrong in dismissing the whole suit when a part of the claim was for *wasilat* in respect of land.

[358] We are of opinion that the first contention of the appellant is untenable. It has been found, and it is practically undisputed, that the offerings to the idol, which constituted the profits of the *shebait* during his turn of worship, are in their nature uncertain and voluntary. That being so it cannot be said that the plaintiff is entitled to recover from the defendants that which they have received out of the offerings made by votaries during the time that the worship was performed by them, even if the plaintiff was the person entitled to perform the worship during that time. In so far as the offerings were intended for the idol the plaintiff can have no personal claim to them, and in so far as they were intended for the *shebait* of the idol they, being in their nature voluntary, must be taken to have been intended for the person who was then performing the worship, whether rightfully or wrongfully, as against any other person who had a better title to perform the worship during the same time.

Upon neither view can the plaintiff claim to recover the amount.

It has been argued that, if the plaintiff's right to perform the worship during his proper turn had not been interfered with by the defendant, he would have made some profit. But what the amount of that profit would have

been is wholly uncertain, and there is no knowing whether any votaries would have paid anything if they knew that it would go to the plaintiff, and not to the defendant, who was then actually performing the duties of a *shebart*.

The view we take is in accordance with the decision of this Court in the case of *Ramessur Mookerjee v. Ishan Chunder Mookerjee*, (1868) 10 W.R., 457.

The second contention of the appellant is one on which he is entitled to succeed. The plaint shows that the suit was for *wasilat* in respect, not only of a turn of worship, but also of certain land; and, so far as the latter claim goes, it is not disputed that the suit is maintainable.

The learned Vakil for defendant No. 3 asks us to absolve his [359] client from liability on the ground that defendant No. 3 did not interfere with the possession of the plaintiff.

Whether that is so or not is a question of fact which will have to be determined by the Lower Appellate Court.

The result is that the decree of the Lower Appellate Court must be set aside and the case sent back to that Court in order that it may dispose of the appeal after determining the question, what is the amount the plaintiff is entitled to recover as mesne profits on account of his having been kept out of possession of the land referred to in the plaint, and against which of the defendants. Other questions arising in the case will also have to be dealt with by the Lower Appellate Court.

The costs of this appeal will abide the result, and will be awarded in proportion to the success and failure of the parties in the Lower Appellate Court.

S. C. G.

Appeal allowed. Case remanded.

NOTES.

[This was dissented from in (1907) 17 M. L. J. 493 ; see also (1899) 27 Cal. 30.]

[26 Cal. 359]

CRIMINAL REVISION.

The 22nd February, 1899.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Chandra Mohan Banerjee.....Petitioner

versus

Balfour.....Opposite Party.*

*Sanction for Prosecution—Criminal Procedure Code (Act V of 1898),
section 195—Presidency Magistrate, Jurisdiction of—Penal Code
(Act XLV of 1860), sections 116, 193—Abetment—
Instigating person to give false evidence.*

B, without having obtained sanction under section 195 of the Criminal Procedure Code, charged *C* before the Chief Presidency Magistrate with instigating her to give false evidence in a certain divorce suit in which *C* was co-respondent.

* Criminal Revision No. 945 of 1898, made against the order passed by T. A. Pearson, Esq., Chief Presidency Magistrate, Calcutta, dated 20th December 1898.

Held, that the Chief Presidency Magistrate had no jurisdiction to try the case without the sanction of the Court before which the divorce proceedings were pending, as the offence charged was alleged to have been committed in relation to those proceedings.

For the purpose of this report the facts are sufficiently stated in the judgment.

Sir Griffith Evans, Mr. Allen, Mr. J. G. Woodroffe, and Baboo Dasarathi Sanyal, for the Petitioner.

Mr. P. L. Roy for the Opposite Party.

The judgment of the Court (Prinsep and Stanley, JJ.) was as follows:—

After a petition for a divorce had been made on the Original Side of this Court, Mrs. Mary Balfour complained to the Magistrate that an offence, being one under sections 116* and 193 of the Indian Penal Code, had been committed in reference to her, inasmuch as an attempt had been made to instigate her to give false evidence in that matter on behalf of the co-respondent. An objection was at once taken that the Magistrate had no jurisdiction to take cognizance of the offence without sanction of the Court before which the proceedings in the matter of the divorce case were pending, and the Chief Presidency Magistrate has over-ruled this objection, holding that no sanction was necessary. It seems to us, having regard to the terms of sub-section (h), clause (1), section 195, of the Code of Criminal Procedure read with clause (3), that the sanction of the Court, before which the divorce suit is pending and in which Mrs. Mary Balfour is a witness, is absolutely necessary. The alleged offence is in relation to the proceedings in that Court. The rule will, therefore, be made absolute, and the proceedings in the Presidency Magistrate's Court set aside.

F. K. D.

Rule absolute.

NOTES.

[See also (1899) 26 Cal., 786.]

* [Sec. 116 :—Whoever abets an offence punishable with imprisonment shall, if that

Abetment of an offence punishable with imprisonment, if the offence be not committed in consequence of the abetment.

or with both; and if the abettor

If the abettor or the person abetted be a public servant whose duty it is to prevent the offence.

offence be not committed in consequence of the abetment, and no express provision is made by this code for the punishment of such abetment, he punished with imprisonment of any description provided for that offence, for a term which may extend to one-fourth part of the longest term provided for that offence, or with such fine as is provided for that offence, or the person abetted is a public servant, whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for the offence, or with such fine as is provided for the offence, or with both.]

[361] APPEAL FROM ORIGINAL CIVIL.

The 17th February, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN K.C.I.E., CHIEF JUSTICE, MR. JUSTICE
PRINSEP, AND MR. JUSTICE AMEER ALI.

Toolsee Money Dassee and others.....Defendants

versus

Sudevi Dassee and others.....Plaintiffs.*

*Appeal—Order refusing to set aside award—Letters Patent, High Court,
1865, clause 15—Code of Civil Procedure (Act XIV of 1862),
sections 2, 588—Preliminary Objection to Appeal—Costs.*

An order made by a Judge of the High Court in the exercise of original civil jurisdiction refusing to set aside an award is a "judgment" within the meaning of clause 15 of the Letters Patent of the High Court; and an appeal therefore lies from such an order to the High Court in its appellate jurisdiction.

Such an appeal is not restricted by section 588 of the Code of Civil Procedure.

Hurrish Chunder Chowdhry v. Kali Sunderi Debi, (1882) 1. L. R., 9 Cal., 482; L. R., 10 1. A., 4, referred to.

On an application to have an award set aside by reason of misconduct on the part of the arbitrators their action alleged was held not to amount to misconduct, and therefore the defendants were not entitled to have the award set aside.

An appeal was dismissed with costs notwithstanding that almost the whole time occupied in the hearing of the case on appeal was taken up by the argument on a preliminary objection that no appeal lay, which was taken by the respondents and was unsuccessful.

THIS suit was brought for the return of certain jewelry, and in the course of it, the questions at issue between the parties were referred to arbitrators. The order of reference, together with the record, was sent to them on the 26th May 1897. Notice was given to the parties that the first meeting before the arbitrators would be held on the 15th August 1897. The appellants (defendants in the suit) attended, and found that some of the other parties were represented by their attorneys; they therefore applied for, and obtained, a postponement of the meeting to the [362] 18th August. Several other meetings were held without any definite result. The sixth meeting was fixed for Sunday, the 21st November; and the appellants' attorney wrote to the arbitrators, protesting against the holding of meetings on Sundays or out of office hours, threatening that if the meetings were so held he would withdraw from the proceedings. The meeting, however, was adjourned for three weeks. It was subsequently postponed to the 3rd January 1898 and then to the 1st February. On the 7th January the arbitrators suddenly issued notices for the meeting to be held that evening at 6-30; this notice was sent to the appellants but not to their attorney. Objection was raised and the meeting was convened the next morning at 7-30. The defendants were not present either in person or by their attorney.

A correspondence ensued; the award was made; and the defendants applied to SALE, J., to set aside the award. He refused the application by an order made on the 22nd March 1898.

* Appeal from Original Civil No. 10 of 1898 from the order of Mr. Justice SALE in suit No. 586 of 1895.

The learned Judge made his decree in the suit subsequently, namely, on the 5th May 1898.

The defendants appealed against the order of the 22nd March 1898.

Mr. Woodroffe and Mr. Garth for the Appellants.

Mr. Bonnerjee and Mr. Dunne for the Respondents, raised a preliminary objection to the appeal. This is an interlocutory order, and is not appealable. If the defendants had waited until the decree of the 5th May, and had then appealed, they could in that appeal have questioned the propriety of this order; but they filed the present appeal in April. No appeal lies against this order; because clause 15 of the Letters Patent of 1865 is made subject to the legislative powers of the Governor-General in Council and the Civil Procedure Code has modified it; and, to the extent that appeals are limited by section 588, has prevented any appeal, under clause 15 of the Letters Patent, from an interlocutory order. There is a unanimous series of decisions in the Indian Courts that clause 15 of the Letters Patent must be taken to be modified by section 588 of the Code—*Achaya v. [363] Ratnavelu*, (1885) I. L. R., 9 Mad., 253; *In re Rajagopal*, (1886) I. L. R., 9 Mad., 447; *Vasudeva Upadhyaya v. Visvaraja Thirthasami*, (1897) I. L. R., 20 Mad., 407; *Banno Bibi v. Mehdi Husain*, (1889) I. L. R., 11 All., 375. Clause 44 of the Letters Patent expressly makes the powers of the High Court, thereby conferred, subject to the legislative powers of the Governor-General in Council.

The decision in the case of *Hurrish Chunder Chowdhry v. Kali Sunderi Debi*, (1882) I. L. R., 9 Cal., 482, is, no doubt, against me; but the observations of the Privy Council as to the right of appeal there must be taken as having reference only to that particular case, and not as laying down a general principle of such far-reaching consequences.

The order now questioned is not a final order, and it has been followed by a judgment; the order cannot under any circumstances be called a "judgment," but is governed by section 591 of the Code. Such orders then as are contemplated by section 588 are orders made before the final decree in the case, i.e., are interlocutory orders. Those orders not referred to in section 588 may be made the subject of an appeal if the decree by which they are followed is appealable. If this Court sets aside this order, the result will be that the award and the decree will stand while the order itself would be set aside. [AMEER ALI, J.—In *In the Goods of Indra Chandra Singh*, (1896) I. L. R., 23 Cal., 580, PIGOT, J., seems to take the observations of the Privy Council in *Hurrish Chunder Chowdhry's* case, (1882) I. L. R., 9 Cal., 482, as laying down principles of general application]. The judgment of this Court in that case may be explained by saying that there the Court held that SALE, J., had no jurisdiction to make the order, and the Appeal Court, therefore, was entitled to hear an appeal from it and to set it aside; and the case came before the Court, not under the Code, but under the Probate and Administration Act. An order setting aside an award is an interlocutory order, and is not open to appeal except in an [364] appeal from the decree—*Mothooranath Tewaree v. Brindaban Tewaree*, (1870) 14 W. R., 327. In all civil matters of original jurisdiction coming before the Court, clause 15 of the Letters Patent is governed by the Civil Procedure Code—*Narivahoo v. Narotamdas Candas*, (1882) I. L. R., 7 Bom., 5; *Justices of the Peace for Calcutta v. Oriental Gas Company*, (1872) 8 B. L. R., 433 (453). Section 588 of the Code, taken with section 591, deals with interlocutory orders; section 244 deals with orders made after a final decree. An appeal lies against a decree given in accordance with an award under section 522 of the Code; and that section has

recently been held to include an invalid or illegal award—*Kali Prosanne Ghose v. Rajani Kant Chatterjee*, (1898) I. L. R., 25 Cal., 141.

Mr. Woodroffe for the Appellants.—A Judge exercising the original civil jurisdiction of the High Court is not subordinate to the High Court; he is "the High Court." No appeal lies or can lie, under the Civil Procedure Code, from the decree or order of the High Court in the exercise of its original civil jurisdiction; the appeal is by virtue of clause 15 of the Letters Patent. Chapter XLI of the Code deals with appeals from one Court to another and higher Court, and not with appeals from one branch of the High Court to another. Section 588 of the Code no doubt governs the High Court in all matters coming before it under the Code; but it does not touch the right of appeal under the Letters Patent. The case of *In re Rajagopal*, (1886) I. L. R., 9 Mad., 447 is not in point, because section 413 of the Code makes the rejection of an application to sue *in forma pauperis* a bar to any further proceedings except on compliance with certain terms; and the matter, therefore, was regulated by the Code. The same observation applies to the decision in *Banno Bibi v. Mehdi Husain*, (1889) I. L. R., 11 All., 375. The case of *Navivahoo v. Narotamdas Candas*, (1882) I.L.R., 7 Bom., 5, was decided before the Privy Council's judgment was given in *Hurrish Chunder Chowdhry's* case, (1882) I.L.R., 9 Cal., 482: L.R., 10 I. A., 4, and the decision in *Vasudeva Upad-[365] yaya v. Visvaraja Thurthasami*, (1897) I. L. R., 20 Mad., 407, is not consistent with itself. A refusal to confirm an award is a "judgment" and is appealable—*Howard v. Wilson*, (1878) I. L. R., 4 Cal., 231, and a refusal to set aside the award should likewise be deemed so. In the case cited the order came under the Letters Patent; in the case of *Ambica Dasia v. Nadyar Chand Pal*, (1885) I.L.R., 11 Cal., 172, which dissented from *Howard v. Wilson*, the order did not come under the Letters Patent but under the Code. The word "judgment" in the Letters Patent is purposely used so as to include decisions whether interlocutory or final; and the authorities show that anything is a "judgment" within clause 15 of the Letters Patent which determines any right. The order we complain of did determine a right; the decree merely followed it as a matter of course.

Mr. Bonnerjee in reply on the objection.—The argument that appeals from the Original Side of the Court can only be made under the Letters Patent is not sound; because, under section 2 of the Civil Procedure Code, the term "District Court" includes the High Court in its original civil jurisdiction. Section 540 applies to the High Court, because it is not one of the excepted sections; and therefore the High Court exercising original civil jurisdiction is in reality distinct from the High Court exercising appellate jurisdiction.

If the contention of the appellants as to clause 15 of the Letters Patent is correct, then, if under section 321, SALE, J., had set aside this award there would have been an appeal; but no such appeal would be allowed in the mofussil because it would be a mere interlocutory order, so that there would be more appeals from the Original Side of the High Court than from mofussil Courts.

[Their Lordships decided to hear the appeal. After a little time, the Court, without calling upon Mr. Bonnerjee, expressed itself opposed to the appellants on the merits, and called upon Counsel to argue the question of costs.]

[366] Mr. Woodroffe.—If the appeal had been heard as to its merits on the first day it would, as we have seen, been quickly disposed of. The respondents, however, have raised the preliminary objection, and it has taken about two whole days to discuss it. The objection has been over-ruled, and the appellants ought to have the costs of these two days—*Tarachand Mookerjee v. Jadoonath Mookerjee*, (1862) Marsh, 79.

Mr. *Bonnerjee*.—When an appeal is brought, the respondent is entitled to raise a preliminary objection as to its admissibility, and if it be not unreasonable he ought not to be made to pay all costs relating to it if the objection is disallowed.

The following judgments were delivered by the Court (MACLEAN, C. J., and PRINSEP and AMEER ALI, JJ.)

Maclean, C.J.—This is an appeal from an order of Mr. Justice SALE, dated the 22nd March 1898, refusing to set aside an award made in the suit.

The suit was for the recovery of jewellery of the value of Rs. 2,600 or thereabouts: it was by consent referred to arbitration on the 22nd February 1897, and the award, which the present appellants seek to set aside, was made on the 9th January 1898.

It is sought to set aside the award on the ground of the misconduct of the arbitrators.

A preliminary objection, however, has been taken on behalf of the respondents (the successful plaintiffs in the suit) that no appeal lies to this Court, and that contention is based on two grounds, (1) that the right of appeal from the decision of a single Judge conferred by clause 15 of the Letters Patent of 1865 is controlled by section 588 of the Code of Civil Procedure, and (2) that the decision of Mr. Justice SALE is not a "judgment" within the meaning of clause 15 of the Letters Patent.

To my mind the first of these points has been authoritatively decided against the view of the present respondents by the Judicial Committee of the Privy Council in the case of *Hurnish [367] Chunder Chowdhry v. Kali Sunderi Debi*, (1882) I. L. R., 9 Cal., 482; L. R., 10 I. A., 4. I need not travel into the facts of that case, but there their Lordships said at page 494 of the report in the Indian Law Reports: "It only remains to observe that their Lordships do not think that section 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this where the appeal is from one of the Judges of the Court to the Full Court." It is clear from the report that the point was elaborately argued, and the clear expression of their Lordships' opinion must be read in connection with that argument. But we are told there are reported decisions of the High Courts of India which conflict with this view of the Privy Council, and that there is virtually a current of judicial authorities in this country against that view. Great reliance is placed upon a decision of the Allahabad High Court in *Banno Bibi v. Mehdi Husain*, (1889) I. L. R., 11, All 375, but the reasons there given for distinguishing that case from the one in the Privy Council are not to my mind sufficiently convincing. In a later case, *Muhammad Narmullah Khan v. Ishanullah Khan*, (1892) I. L. R., 14 All., 226 (230), the same Court assigns other possible reasons for the decision of the Privy Council, but it seems a little forced to say these were the reasons of the Privy Council when their Lordships have said that section 588 does not apply, "when the appeal is from one of the Judges of the Court to the Full Court." Then again we are referred to two cases of the Madras High Court—*Achaya v. Ratnavelu*, (1885) I.L.R., 9 Mad., 253, and *In re Rajagopal*, (1886) I.L.R., 9 Mad., 447. But in neither of these cases, which were respectively decided in 1885 and 1886, was the case in the Privy Council cited, though previously decided in 1882, so they can scarcely carry much weight. In the case of *Vasudeva Upadhyaya v. Visvaraja Thirthasami*, (1897) I.L.R., 20 Mad., 407, Mr. Justice BENSON at page 412 tells us what, in his opinion, their Lordships' language in the Privy council amounts to, and it is this: "Section 588 no doubt has the effect of restricting appeals in the case of orders which are not decrees, but it does not apply

to such a case as this before us, [368] which is an order in execution and, therefore, a 'decree.' When, therefore, such an order has been made by a single Judge an appeal lies to the Full Court." This may be what their Lordships meant, but it is not what they have said. And the learned Judge goes on to say at the same page: "It is impossible to suppose that their Lordships, in a mere observation of four lines, without any explanation or reasoning, laid down a rule of such far-reaching importance and opposed to what appears to be the plain language and intention of the Legislature."

To my mind the language of the Judicial Committee is not very aptly described as "a mere observation."

Mr. Justice BENSON'S opinion, however, is not shared by his learned colleague in the case, and I am not disposed to accept the view that, in advising Her Majesty, the members of the Judicial Committee of the Privy Council are so unguarded in their language—especially when the precise point has been urged before them by most experienced Counsel—as Mr. Justice BENSON seems inclined to assume. I am but little disposed to whittle away decisions of the Privy Council. I prefer to accept, and, as I am bound, to follow them if really in point, and if they be regarded as requiring reconsideration to let them be reconsidered by the members of the Judicial Committee themselves. I notice that two of the members of the Judicial Committee on this occasion were retired Chief Justices of Bengal, and I may add that the majority of the Judges of this Court held that an appeal would lie, and that GARTH, C.J., dissented only because he doubted whether Mr. Justice PONTIFEX'S decision was a "judgment" within the meaning of clause 15 of the Letters Patent.

In my opinion then the first question is concluded by the decision of the Privy Council. So also virtually is the second, for the decision proceeds upon the footing that Mr. Justice PONTIFEX'S order was a "judgment" within the meaning of clause 15 of the Letters Patent of 1865. But whether that be so or not, I am clearly [of] opinion that Mr. Justice SALE'S order was a "judgment" within the meaning of that section. I concur in the definition of a "judgment" given in the case of *The Justices of the Peace of Calcutta v. Oriental Gas Company*, (1872) 8 B.L.R., 433 (452). Mr. [369] Justice SALE'S order was a decision upon the question of whether the award was to stand or to be set aside. If this be not a "judgment," I scarcely see what a judgment can well be. I therefore overrule the preliminary objection.

I will now pass to the merits. The appellants charge the arbitrators with misconduct, and upon this they base their claims to have the award set aside.

The arbitration commenced on the 15th August. Certain witnesses were examined and cross-examined, and adjournments were from time to time made, and although there was a little skirmishing as to whether the arbitrators should sit on Sundays or out of office hours, no case of misconduct is alleged against the arbitrators up to the early part of January 1898.

But on the 3rd January 1898 the defendants' attorney received a letter from the plaintiffs' attorney, saying that the hearing of the arbitration would be postponed for four weeks on account of the absence from Calcutta of one of the arbitrators. Notwithstanding that intimation, on the 7th January the arbitrators sent a notice to the defendants that they intended to proceed with the arbitration at 6-30 that same evening. This to my mind was not a reasonable conduct on their part having regard to their notice a few days before, that the meeting had been adjourned for a month, and if the arbitrators had insisted on proceeding with the arbitration that evening, I am not prepared to say that my conclusion on the case would not have been adverse to the plaintiffs. The

defendants say they did not receive this notice until 5 o'clock, but be that as it may, they attended the meeting and the hearing was postponed until 7-30 on the following morning, although, as the defendants say, they protested that this was too short an adjournment, and that they would not have time to consult their attorney. The plaintiffs say they heard nothing of any such protest. Except extending the time for making the award nothing was done at this meeting. The fact of fixing so early an hour in the morning for the meeting may appear somewhat strange to European ideas; but it must be remembered that this was an arbitration between native litigants with native arbitrators, and that the evidence shows it was to be [370] conducted out of office hours, and in that view a meeting at such an hour is, perhaps, nothing very extraordinary. However, on the 8th January the defendants did not appear at the meeting, and after waiting nearly two hours, the arbitrators adjourned till 8 A.M. on the 9th notice of which was given in the forenoon of the 8th to the defendants and to their attorney. But on the 8th the defendants' attorney wrote the letters set out at pages 9 and 10 of the Paper Book. After that at page 9 had been written—but whether or not before it had been sent is not apparent on the evidence—the defendants' attorney received the notice of the postponement of the meeting until the 9th, and thereupon wrote the letter on p. 10 saying "the whole thing seems to be a farce; my clients will have nothing further to do with the arbitration." Now, were the defendants under these circumstances justified in withdrawing from the arbitration? I think not. The arbitrators to put it at the lowest had displayed a readiness to adjourn the case when the defendants said they were not prepared to go on; they adjourned the meeting on the 7th, and again they adjourned it on the 8th, and proceeded on the 9th only after they had been told that the defendants had withdrawn. It is their action on these occasions which is said to constitute the misconduct on their part. I do not think such action amounts to misconduct. On the contrary I think the defendants, under the circumstances, put themselves in the wrong by withdrawing from the arbitration. When they were told the meeting was adjourned until the 9th, their reasonable course would have been to have appeared before the arbitrators, and urged the necessity, if it existed, of a further and reasonable adjournment. Looking at some of the objections raised from time to time by the defendants' attorney I am not disposed to think that the defendants were over-anxious that the arbitration should proceed with too much rapidity. However, be that as it may, I agree with Mr. Justice SALE that there was no misconduct on the part of the arbitrators, and the rule must be discharged with costs.

Prinsep, J.—This appeal is against an order of Mr. Justice SALE under section 522 of the Code of Civil Procedure refusing to set aside an award.

[371] A preliminary objection has been taken to the hearing of this appeal on the ground, first, that it is barred by section 588 of the Code of Civil Procedure, and next that if not so barred it is not appealable as a "judgment" within the terms of clause 15 of the Letters Patent.

Briefly the law bearing on this subject may be thus stated:—Suits brought in the ordinary original civil jurisdiction may be tried by one Judge, whose proceedings are regulated by rules and orders made by the High Court as far as possible in accordance with the Code of Civil Procedure.

Clause 15 of the Letters Patent, 1865, declares that an appeal shall lie to the High Court from the judgment, not being a sentence or order passed or made in a criminal trial of one Judge. Clause 15 therefore constitutes a Court of Appeal in such cases, and it further declared that the appeal shall lie from a judgment of a single Judge.

It is contended that this clause of the Letters Patent, 1865, has been modified by the Code of Civil Procedure, 1882, and especially by section 588 of that Code. The Supreme Legislative Council has the power to amend the Letters Patent (clause 44), but the question is whether such power has been exercised in this respect.

Clause 15 of the Letters Patent, 1865 is like the Bengal Civil Courts Act and similar Acts constituting a Court to hear appeals in cases where the right of appeal is given by law, but clause 15 goes farther than those Acts, because it limits the cases appealable. It provides for an appeal to the High Court against the judgment of a single Judge of that Court not being a sentence or order passed or made in a criminal trial, and this applies where such judgment may have been passed by such Judge sitting as a Division Court in the exercise of civil jurisdiction, either as a Court of Appeal or as a Court of Original Jurisdiction. But the right of appeal is against a judgment only and against a judgment of only a single Judge. I do not refer to the other part of this clause because it is irrelevant for the purposes of the case now before us. Without clause 15 of the Letters Patent, although an appeal might lie under the Code of Civil Procedure, 1882, there would be no Court constituted to hear the appeal against a judgment decree or order on the Original Civil Jurisdiction of the High Court, for clause 16 relates to a different matter, and it would confer no such appellate jurisdiction, and the portions of the Code of Civil Procedure, which relate to appeals to Her Majesty in Council, would give the right of appeal only in a small number of cases of a special character, either in regard to the points of issue or the value of the subject-matter of the particular suit. We have it, therefore, that if beyond clause 15 of the Letters Patent 1865, section 588 of the Code of Civil Procedure gives the right of appeal against any order of the description specified therein, there is no Court of Appeal constituted to hear it, if such order not being a judgment had been made by the Judge on the Original Side of the High Court. There would be another difficulty, which it is inconceivable that the Legislature should have contemplated. If irrespective of clause 15 of the Letters Patent an appeal lies under section 588 of the Code it must be against an order passed by any Divisional Court exercising the Original Civil Jurisdiction of the High Court. To what Court would it lie? There is no Court constituted by the Letters Patent or by any local law to hear it. Clause 16 of the Letters Patent does not apply, nor does clause 15. Then, again, if such an order be appealable, it would be appealable if passed by a Division Court consisting of more than one Judge. The Court might have consisted of the majority or even of all of the Judges of the High Court. I would also point out that the same difficulty would arise if an order of remand be passed by a Division Court hearing an appeal whether that appeal be from the High Court in its Original Jurisdiction or from a subordinate Court such as the Court of a District Judge or Subordinate Judge. These considerations lead me to conclude that it was never intended by the Legislature to alter the effect of clause 15 of the Letters Patent by such indirect legislation. If it had been intended to do so the alteration in the law would have been expressly declared, and such difficulties as I have indicated would have been provided for. The contention of the learned Counsel proceeds upon sections 632 and 638 of the Code of 1882. Section 632 provides that "except as provided in this chapter the provisions of this [373] Code apply to such" that is, to all "High Courts" established by 24 and 25 Victoria, chapter 104, and section 638 sets out the sections of the Code which are so excepted. Amongst these sections 588 does not appear, and so it is contended that an appeal lies under section 588 against an order passed

on the Original Civil Jurisdiction of the High Court; that only such orders as are specified in section 588 are appealable; and lastly that as the order on the case before us is not within section 588 it is not appealable. But to complete this line of argument it would be necessary to go further and to hold that the term "judgment" in clause 15 of the Letters Patent must be read as synonymous with "decree" as defined in the Code. There is no authority for this, and we cannot alter the meaning of "judgment" in the Letters Patent, 1865, as it has always been accepted, by inferentially making it synonymous with the definition of "decree" as given in the Code of 1882.

I have so far considered this matter as if it were *res integra*. But fortunately we have authority for our guide. In *Hurrish Chunder Chowdhry v. Kali Sunderi Debi*, (1882) I. L. R., 9 Cal., 482: L. R., 10 I. A., 4, their Lordships of the Privy Council held that an order made by Mr. Justice PONTIFEX on the Original Side of the High Court under section 610 of the Code rejecting an application to execute an order of Her Majesty in Council was a "judgment"; and in dealing with that case their Lordships were pressed with the argument that the right of appeal in that case was regulated by section 588 of the Code of Civil Procedure which had modified clause 15 of the Letters Patent. Their Lordships of the Privy Council disposed of this in these words: "It remains only to observe that their Lordships do not think that section 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the Full Court." I observe that Act X of 1877 is here mentioned, but as a matter of fact the order under appeal was passed in 1880, and was consequently under the Act of 1877, as modified by Act XII of 1879, and the Code of Civil Procedure in this respect is the same as the Code of [374] 1882, which is now in force. I understand this to mean that section 588 does not affect any matter coming within clause 15 of the Letters Patent, and, if I may venture to say so, the reasons which led to the expression of that opinion and which have not been given in the judgment reported may be those stated by me for arriving at the same conclusion. It is much to be regretted that the terms of section 638 of the Code should have been so expressed as to give good ground for entertaining a doubt, but in my opinion the matter has been definitively settled by the highest authority in the case mentioned by me.

Some cases have been cited to us, in which there has been a reluctance to accept this expression of opinion regarding the operation of section 588. An endeavour has been made to explain it as not binding to the full extent of the meaning. I find myself unable to accept this view of the law, both because the terms of this expression of opinion by their Lordships are clear and emphatic, and also because, if I may be permitted to say so, a careful examination of the law on the subject fully bears it out.

In *Banno Bibi v. Meldhi Husain*, (1889) I. L. R., 11 All., 375, the case of *Hurrish Chundra Chowdhry v. Kali Sunderi Debi*, (1882) I. L. R., 9 Cal., 482: L. R., 10 I. A., 4, was considered, and that case was distinguished having regard to the matter then before their Lordships of the Privy Council. With every respect to the learned Judges I am unable to agree with their views of the distinction. Whatever may have been the grounds upon which two of the Judges (WHITE and MITTER, JJ.) in *Hurrish Chunder Chowdhry's* case may have decided that matter it was considered by their Lordships of the Privy Council that they had held Mr. Justice PONTIFEX's order was "a 'judgment' within the meaning of clause 15 of the Letters Patent;" and in their observations in dealing with the dissentient judgment of GARTH, C.J., they show no indication of any doubt on this point. On the contrary they follow this up

by adding " their Lordships do not think that section 588 of Act X of 1877 (Code of Civil Procedure) which has the effect of restricting certain appeals applies to such a case as this where the appeal is from one of the Judges of the [375] Court to the Full Court." I observe that EDGE, C.J., in this case states that " considerable difference exists between section 588 of the present Code and section 588 of Act X of 1877 which was the Act under consideration in the case before the Judicial Committee." I cannot find to what the learned Chief Justice refers, for after a careful comparison of these sections of the two Codes of 1877 as amended by the Act of 1879 and of 1882, I am unable to find any difference affecting this particular matter.

Two cases *Achaya v. Ratnavelu*, (1885) I. L. R., 9 Mad., 253, and *In re Rajagopal* (1886) I. L. R., 9 Mad., 447, were relied upon in the case of *Banno Bibi v. Mehdi Husain*, (1889) I. L. R., 11 All., 375. In the first of these cases it was held that, notwithstanding clause 15 of the Letters Patent, there was no appeal against the order of a single Judge of the High Court rejecting an application for review of judgment. The reason given for this was that clause 15 of the Letters Patent was controlled by section 659 of the Code, which declared that such an order shall be final. The other case is exactly in point, and it was there held that clause 15 of the Letters Patent was controlled by section 588 of the Code, which gave no appeal against an order rejecting an application to sue *in forma pauperis*. But the reports of these cases show that in neither of them was the judgment of their Lordships of the Privy Council cited or considered. I do not, therefore, propose to discuss them in detail. It is sufficient to state that they express a different view of the law, which I am not disposed to follow against the higher authority of the Judicial Committee of the Privy Council.

In *Muhammad Naimullah Khan v. Ishanullah Khan*, (1892) I. L. R., 14 All., 226, (230), the case of *Hurish Chunder Chowdhry v. Kali Sunderi Debi* is incidentally referred to, the interpretation of that expressed in the earlier case of the Allahabad Court being maintained.

The matter was also considered by the Madras High Court in *Vasudeva Upadyaya v. Visvaraja Thirthasami*, (1897) I. L. R., 20 Mad., 407, which was [376] an appeal under clause 15 of the Letters Patent, 1865, against the order of a single Judge of the High Court dismissing an appeal against an order passed by a Lower Appellate Court remanding a suit. The learned Judges in that case (BENSON and SUBRAMANYA AYYAR, J.J.) did not take the same view of the law regarding the effect of section 588 of the Code of Civil Procedure on clause 15 of the Letters Patent. The order under consideration was, I would again state it so as to express the case clearly, an order passed by a single Judge of the High Court sitting as an Appellate Court on an appeal under section 588 from the order of a Lower Appellate Court remanding a suit. BENSON, J., held that clause 15 of the Letters Patent had been modified by section 588 of the Code, that is to say, of the Code of 1882; that the order in question was not appealable under section 588 because it was an order passed by a single Judge in an appeal which had been heard under section 588, and the concluding words of section 588 barred a further appeal; whether such an order would be a " judgment " within the terms of clause 15 of the Letters Patent apparently was not considered. Mr. Justice BENSON referred to the case before the Privy Council, and notwithstanding the emphatic terms in which their Lordships expressed their opinion that section 588 does not apply to a case such as that before them, in which the appeal is from one of the Judges of the High Court to the Full Court, he stated that in his opinion " these words refer only to the actual case before the Privy Council." Whatever may have

been the case before their Lordships their observations clearly were directed to every case in which "the appeal is from one of the Judges of the High Court to the Full Court," which I understand to be that, notwithstanding section 588 of the Code, clause 15 of the Letters Patent, 1865, remains in full force and untouched, and I certainly do not agree in the paraphrase of those observations as expressed by that learned Judge in page 412 of the report.

Mr. Justice SUBRAMANYA AYYAR, on the other hand, reluctantly yielded to the force of authority in previous cases of the Madras High Court supported by the Allahabad cases which I have mentioned; but he was not prepared to set aside the opinion of [377] their Lordships of the Privy Council as mere *dicta*. He says: "The tenor of the observations seem clearly to indicate that they were intended to be a decision on the point irrespective of the circumstances of the particular case in which the observations were made," and he left the matter to be finally settled at some future time by a Full Bench of the Madras High Court. I may here state that in another case, *Sankaran v. Raman Kutti*, (1896) I. L. R., 20 Mad., 152, the Madras High Court (COLLINS, C.J., and BENSON, J.) held that in a similar case an appeal did not lie by reason of the concluding words of section 588 against an order passed on appeal by a single Judge of that Court against the orders of a Lower Appellate Court remanding a suit. The case before the Privy Council was not referred to in the report of that case. The High Court followed previous cases on the subject, and amongst these the case of *Loki Mahto v. Aghoree Ajail Lall*, (1879) I. L. R., 5 Cal., 144. I have not referred to that case, as it was decided before the Privy Council case was decided. There are only two reported cases of this High Court in which the case of *Hurriah Chunder Chowdhry v. Kali Sunderi Debi* has been referred to, and in each of these cases that case was explained and distinguished in this way, that their Lordships held that where the order of a single Judge decided finally or otherwise any question at issue in the case of the rights of any of the parties to the suit it is appealable to this Court under clause 15 of the Letters Patent. How far section 588 of the Code has touched clause 15 of the Letters Patent, 1865, has never, that I am aware of, been considered until now.

I do not desire to discuss this subject any further. I entirely agree with the manner in which Mr. Justice SUBRAMANYA AYYAR had expressed himself in the words which I have quoted from the case of *Vasudeva Upadyaya v. Visvaraja Thirithasami*, (1897) I. L. R., 20 Mad., 407 (417), and I have no doubt that we are bound to follow to the fullest extent the opinion expressed by their Lordships of the Privy Council that section 588 of the Code does not apply to the case now before us, and that this matter has thus become settled law.

[378] I confess, however, to have had some doubt whether the order under section 522 of the Code refusing the application to set aside the award is a "judgment" within the terms of clause 15 of the Letters Patent, and whether the appeal before us has not been prematurely made. Section 522 declares that after such an order "the Code shall proceed to give judgment according to the award" and that "upon judgment so given a decree shall follow."

This appeal has been preferred before judgment and decree on the case, and it seems therefore to have been somewhat premature. This, however, is after all a mere matter of form. The question is whether the order is a "judgment" within clause 15 of the Letters Patent, 1865. The order is so far final that judgment must follow on it on the terms of the award, and it so far concludes the rights of the parties in the suit. So far, therefore, as held in *Hurriah Chunder Chowdhry v. Kali Sunderi Debi* it is a "judgment" within the

meaning of section 15 of the Letters Patent. There are other cases to the same effect to which I might refer, but this is unnecessary.

On the merits of this appeal I agree with the judgment of my Lord the Chief Justice just delivered.

Ameer Ali, J.—After the well-reasoned judgments just delivered, it only remains for me to express my entire concurrence with them.

I only wish to observe that where the Legislature intended to give finality to an order, whether made by a single Judge of a High Court established by Royal Charter or by any other Judge, it has declared so in explicit terms. The effect, therefore, of acceding to the objection taken by the learned Counsel for the respondents, would be to cut down by implication the provisions of clause 15 of the Letters Patent, which I think would be against all principle; for a right or power vested by statute can be taken away or divested only by express enactment and not by mere suggestion based upon inferences. In my opinion section 588 of the Code of Civil Procedure applies only to orders made by subordinate Courts, which derive their powers from the Code. The Civil Procedure Code is applicable to the Original [379] Side of the High Court in so far as the procedure is concerned, and some of its provisions have no doubt had the effect of curtailing the right of appeal by giving finality to certain orders of a Judge exercising singly the ordinary Original Civil jurisdiction of the High Court. In other words, it lays down uniform procedure for all Courts of Original Civil jurisdiction, including the High Court on its original side. But the powers of the High Court are not derived from the Code, and consequently an order of a Judge of the High Court exercising its Original Civil jurisdiction, though made in accordance with the procedure laid down in the Code, can hardly be said to be made "under the Code." Besides, section 589 of the Code indicates to my mind that the preceding section was applicable only to the orders of subordinate Courts.

Another argument advanced on behalf of the respondent requires some attention. It was contended that it would be anomalous to give a right of appeal from every order of a Judge of the High Court exercising singly its ordinary civil jurisdiction whilst restricting that right in the case of orders made by a subordinate Court. To my mind the anomaly suggested is hypothetical. In the first place, only such orders of a Judge of this Court are appealable under clause 15 as fall within the category of "judgments." In the second place many of the orders of subordinate Courts not appealable under section 588 are subject to revision under section 622 of the Code. And as this section is not applicable to the High Court, the Legislature, it seems to me, has advisedly left untouched the provisions of clause 15. Apart, therefore, from the express ruling in the case of *Hurrish Chunder Chowdhry v. Kali Sunderi Debi*, (1882) I.L.R., 9 Cal., 482 : L.R., 10 I.A., 4, I am of opinion that the objection is untenable. The Madras and Allahabad High Courts have tried to restrict the decision of their Lordships on the point in question to what is called "the facts" of the particular case. I am not prepared to adopt either the reasoning or follow the views expressed by the learned Judges. The scope of their Lordships' decision must be understood by the light of the contention raised before them.

[380] As regards the contention that the order appealed against is not a "judgment" within the meaning of clause 15, it must be remembered that it was made under section 521 of the Code, which provides the different grounds on which (and no other) an award shall be set aside, one being the corruption or misconduct of the arbitrators or umpire. And it decides the merits of the question between the parties by determining the right of the appellant to have

the award set aside on the ground of the misconduct of the arbitrators. Section 522 does not affect the character of the decision under section 521, for the judgment under section 522 follows as a matter of course when the right of the party questioning the award is once determined or adjudicated. The order therefore, falls strictly within the definition of the word "judgment," in clause 15, given by COUCH, C.J., in the case of *Justices of the Peace for Calcutta v. The Oriental Gas Company*, (1872) 8 B. L. R., 433.

"I agree, therefore, in holding that the present appeal is maintainable.

As regards the merits of the case it seems to me difficult to say that the view taken by Mr. Justice SALE is incorrect. It is possible that the arbitrators acted somewhat unreasonably in cancelling the date fixed on the 3rd of January and taking up the case on the evening of the 7th. That evening, however, nothing was done in consequence of the protest of the appellants, and the arbitrators appointed next morning to proceed with the arbitration on the 8th. Neither the appellants nor their attorney appeared, and the case was again adjourned. On that same date Mr. Rutter, attorney for the appellant, wrote to the arbitrators the letter to which attention has already been called. No step was taken to obtain an adjournment from the arbitrators or to represent to them in a proper spirit that the hasty manner in which they were proceeding prejudiced the appellants, and that they (the appellants) required more time to get themselves ready. Had the arbitrators refused to accede to such an application, matters might have stood on a different footing, but in the face of Mr. Rutter's letter it is difficult to say that the learned Judge in the Court [381] below is wrong in holding that the appellants had failed to make out a sufficient case for setting aside the award. I therefore agree in dismissing appeal No. 11 of 1898.

Appeal dismissed.

Attorney for the Appellants: Mr. Rutter.

Attorney for the Respondents: Mr. S. D. Bonnerjee.

H. W.

NOTES.

[As regards appeal, these are similar decisions :—(1899) 22 Mad. 68 ; (1902) 25 Mad. 555 ; (1904) 4 Bom. L. R. 342 ; but the contrary was held in the Allahabad cases (1889) 11 All., 375 ; (1892) 14 All. 226. Messrs. Woodroffe and Ameer Ali in their Civil Procedure Code, 1908, (1 Edn. 1908), p. 407 footnote (6), remark :—In 26 Cal., 361, "however, no mention is made of the fact that the first cited case 9 Mad., 253 referred not to sec. 598 but to sec. 629. The result may or may not be the same, but whatever it be, it must be arrived at on a construction of the particular section in question."]

[26 Cal. 381]

The 8th, 9th and 12th December, 1895.

PRESENT:

SIR FRANCIS W. MACLEAN, K. C. I. E., CHIEF JUSTICE,
MR. JUSTICE PRINSEP AND MR. JUSTICE AMEER ALI.

Brohmo Dutt.....Defendant
versus
Dharmo Das Ghose.....Plaintiff.*

Estoppel—Minor—Mortgage by Minor—Attorney for both Mortgagor and Mortgagee— Notice of minority—Evidence Act (I of 1872), section 115— Contract Act (IX of 1872), sections 11, 64—Avoiding Contract— Compensation—Specific Relief Act (I of 1877), sections 38, 41.

Section 115† of the Evidence Act has no application to contracts by infants; but the term “person” in that section applies only to a person of full age and competent to enter into contracts.

The words “person” and “party” in section 64‡ of the Contract Act are interchangeable, and mean such a person as is referred to in section 11§ of that Act, i.e., a person competent to contract.

A mortgagee employing an attorney, who also acts for the mortgagor in the mortgage transaction, must be taken to have notice of all facts brought to the knowledge of the attorney; and, therefore, where the Court rescinded the contract of mortgage on the ground of the mortgagor's infancy, and found that the attorney had notice of the infancy, or was put upon enquiry as to it, *Held*, (affirming the decision of JENKINS, J.) that the mortgagee was not entitled to compensation under the provisions of sections 38|| and 41** of the Specific Relief Act.

Ganes Lala v. Bapu, (1895) I. L. R., 21 Bom., 198, dissented from. *Mills v. Fox*, (1888) L. R., 37 Ch. D. 153, distinguished.

THE facts of this case are fully stated in the judgment of JENKINS, J., which is reported in I. L. R., 25 Cal., 616. His decision was in favour of the plaintiff.

* Appeal No. 7 of 1898 from the decree of Mr. Justice Jenkins in Original Civil Suit No. 630 of 1895.

† [Sec. 115:—When one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative

shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.]

‡ [Sec. 64:—When a person, at whose option a contract is voidable, rescinds it, the other

party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as

may be, to the person from whom it was received.]

§ [Sec. 11:—Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.]

Who are competent to contract.

Court may require party rescinding to do equity.

Power to require party for whom instrument is cancelled to make compensation.

|| [Sec. 38:—On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.]

** [Sec. 41:—On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.]

[382] The defendant appealed.

Mr. J. T. Woodroffe (with him Mr. Garth, Mr. A. Chowdhry, and Mr. J. G. Woodroffe) for the appellant.—Even if the plaintiff was not actually of age, he was even on the finding of the lower Court, within two months of his majority. It was proved that the plaintiff had instituted legal proceedings in his own name as a person *sui juris*, and on the very day that he executed the mortgage deed in favour of the defendant, he made a declaration, before a notary, that he was of age. He is, therefore, though an infant, estopped from asserting the contrary,—*Ganesh Lala v. Bapu*, (1895) I.L.R., 21 Bom., 198. We submit that that decision is good law although JENKINS, J., has held that it is not, and is of opinion that an infant, though not excepted by section 115 of the Evidence Act, does not impliedly come within it.

Section 229 of the Contract Act, as to notice, does not apply to a case like the present where the agent is the agent of both parties: the language of the section is limited to the case of third parties. Either the attorney had notice of the plaintiff's minority or he had not. If he had not, the defendant is entitled to the return of the money he lent: if he had, he was conspiring with the plaintiff to defraud the defendant. And where an attorney acts fraudulently, notice is not necessarily to be imputed to the client—*Cave v. Cave*, (1880) L. R., 15 Ch. D., 639 (643), because the fact raises a presumption against the communication being made to the client; *Espin v. Pemberton*, (1859) 3 De. G. & J., 547. Fraud is not an essential ingredient of estoppel—*Sarat Chunder Dey v. Gopal Chunder Laha*, (1893) I. L. R., 20 Cal., 296. The result of acceding to this argument would be not to take away the protection the law gives to an infant but would merely be to prevent him from committing a fraud, and depriving the person who had dealt with him in good faith of the benefit of the transaction. The Privy Council has laid it down that an infant may be of such an age as either to consent or to bind himself by his conduct. And it is submitted that even if he cannot contract he can make a representation binding on himself—*Mills v. Fox*, (1888) L. R., 37 Ch. D., 153. In *Raj Coomary Dassee v. Preo Madhub Nundy*, (1897) 1 C. W. N., 453, JENKINS, J., held that a contract made by an infant was not void, but only voidable.

Under section 64 of the Contract Act, the defendant is entitled to a refund of the money advanced. The word "person" in that section must not be limited to mean a person of full age: such a construction would unduly narrow the scope of the section, and is not justifiable. [Mr. Bonnerjee—Section 64 evidently refers to a contract voidable under section 19.] It does not follow that section 64 refers only to cases falling within section 19; because section 19 is not exhaustive. But even if the defendant should not succeed under section 64 of the Contract Act, then, if this mortgage deed is cancelled, he would be entitled to a *restitutio in integrum* under sections 38 and 41 of the Specific Relief Act.

Mr. Garth on the same side.—The discretion vested in the Court should in the present case be exercised on behalf of the defendant. The case of *Sarat Chand Mitter v. Mohun Bibi*, (1898) I. L. R., 25 Cal., 371, is distinguishable; for there the lender admittedly knew that the borrower was a minor. All that the defendant asks is that the Court will not give the plaintiff the equity he asks, without doing equity to the defendant. It should not be forgotten that it is the plaintiff who invokes the equity of the Court; and if he seeks equity he must do equity.

* As to imputing any knowledge to the defendant about the plaintiff's age,—it is clear that not even the attorney had or could have any such knowledge; nobody could have, until the case was decided in Court after the hearing

of all the evidence; and the Court, in order to come to any conclusion, had to have before it the evidence on oath of all persons able to assist it in the matter.

Mr. *Bonnerjee* (with him Mr. *Chuckerbutty*) for the Respondent.—Section 64 of the Contract Act contemplates contracts voidable under section 19, and does not apply to contracts voidable under other circumstances than those of section 19. Section 11 shows what persons are incapable of entering into a [384] contract, and, among others, persons not of age according to the law to which they are subject. Apart from that argument, the illustrations to section 65 show that contracts with minors are not contemplated.

Section 38 of the Specific Relief Act has no application to the present case. The suit was for cancellation of the mortgage deed; section 39 (if any) was the only one applicable. The appellant has shown no case upon which he is entitled to say, in the words of section 41, that "justice requires" that compensation should be given him.

Mills v. Fox, (1888) L. R., 37 Ch. D., 153, is no authority in support of the defendant's case; all that it shows is that the representation by the settlor, in the course of negotiations under the Infants' Settlement Act, 1855, that she was entitled to deal with her property, should be made good in equity. And *Buckmaster v. Buckmaster*, (1887) L. R., 35 Ch. D., 21, (taken to the House of Lords under the name of *Seaton v. Seaton*, (1888) L. R., 13 App. Cas., 61) shows that that Act has removed the disability of infancy only as regards settlements made by minors in contemplation of marriage and with the sanction of the Court of Chancery; and the judgment of STERLING, J., must be taken to have reference only to that Act.

Mr. *Woodroffe* in reply.

The following judgments were delivered by the Court (MACLEAN, C. J., and PRINSEP and AMEER ALI, JJ.)

Maclean, C.J.—This is an appeal from the decision of Mr. Justice JENKINS, in which he held that a certain alleged mortgage deed executed by the plaintiff on the 20th of July 1895, was void and inoperative, and ought to be cancelled.

The circumstances of the case are these: The suit is brought by a minor, suing by his mother as his next friend, to set aside a mortgage which the plaintiff had undoubtedly executed. I will take it for the purposes of this judgment that the contract was not a void one, but a voidable contract.

[385] The defence was that, even if the plaintiff were a minor, he fraudulently represented that he was of age and that fraudulent representation was acted upon, and that consequently, by a well recognised principle of equity, the plaintiff was not entitled to succeed.

The first point for consideration is, whether or not the plaintiff, on the 20th of July 1895, was a minor or of full age. Upon that part of the case, we have heard but little argument from the appellant's Counsel. The learned Judge in the Court below has stated that he had no hesitation in holding that the plaintiff was not of the age of twenty-one years, on the 20th of July 1895; and substantially that issue has not been contested before us, although, during the course of the argument, it was rather feebly suggested that Mr. Justice JENKINS, in allowing the mother to refresh her memory from a certain document which was shown to her when giving evidence, had admitted evidence which was not admissible. That point, however, is not raised as one of the grounds of appeal, and under these circumstances we declined to allow the matter to be gone into. Upon the first issue then, I see no ground whatever to dissent from the view expressed by the Judge in the Court below; that on the 20th July 1895 the present plaintiff was a minor.

The next question is, did the plaintiff fraudulently represent to the defendant that he was of age? This representation is alleged to have been made in a declaration, which he swore, and which is set out at page 132 of the Paper Book. It is a long document, but the pith of it lies in the last paragraph, in which the plaintiff says or is made to say that he came of age on the 17th of June then last past, that would be the 17th of June 1895. This is the alleged fraudulent representation.

Now, let us consider the circumstances under which that document was obtained. One Kedar Nath Mitter, an attorney of this Court, was acting as solicitor both for the present appellant (the intending mortgagee) and for the plaintiff, the intending mortgagor. It appears that on the 15th of July this attorney received a letter from the solicitor of the mother [386] and guardian of the infant, (she having been appointed guardian by an order of Court) telling him in the clearest terms that the plaintiff was not of age. There was a dispute upon the evidence as to whether or not Kedar Nath Mitter ever received that letter. I do not entertain the slightest doubt that he did receive it, and, notwithstanding his denial, I am satisfied that the letter is the letter which is spoken of as a "thundering letter" by his own witness, whose evidence will be found at page 100 of the Paper Book. In consequence of that letter what does Kedar Nath Mitter do? Although he is told in the most explicit terms by the attorney of the mother that the plaintiff is an infant, under the age of 21 years, and that any one lending money to him would do so at his own risk and peril, he thinks fit to proceed, and obtains a declaration on the 19th July from one Nanda Lal Ghose, and from another person, who is described as the family astrologer, and both these declarants say that the plaintiff was of age. But Kedar Nath Mitter does not rest there. Although he was acting as the solicitor of the plaintiff, and it was his clear duty, as such solicitor, to protect him, he thinks it right to obtain the declaration in question from him. That declaration is obviously prepared and drawn up by Kedar Nath Mitter himself. Its language is not the language of the plaintiff, it is the language of Kedar Nath Mitter, and to my mind it was a most reprehensible act on the part of Kedar Nath Mitter to have prepared, and allowed his client to have sworn, this declaration, when he had received the clearest notice from the mother that her son, as has proved to be the case, was a minor. The declaration was not prepared or sworn until after the mortgage had been prepared, and when it was ready for execution: and when according to the defendant's own story, negotiations had been going on regarding it, since the previous May. It was prepared and sworn, in fact, at the very last moment. These are the circumstances under which this declaration was taken.

Now taking that declaration to contain a fraudulent representation as to the plaintiff's age, was this attorney misled or defrauded by it. He had received the clearest notice, by the letter of the 15th of July, that the plaintiff was not then of [387] age, he pays no heed to that notice, he obtains this declaration under the circumstances I have mentioned, and it is to my mind almost absurd to ask us to believe that he was deceived by any statement contained in it. I entirely agree with the conclusion arrived at by Mr. Justice JENKINS that Kedar Nath Mitter was not misled by it.

But then it is said that, although Kedar Nath Mitter may not have been misled by it, there is nothing to show that the defendant himself, who was advancing the money, was not misled by it. That is an argument to which I am quite unable to accede. The defendant thought fit to employ this attorney in the matter, and the knowledge acquired by the attorney in a case such as this must be taken to be the knowledge of the defendant

himself, and the attorney must be taken in an ordinary mortgage transaction such as the present, to have communicated to his client the facts which were communicated to him. At any rate as between the plaintiff and defendant it does not lie in the defendant's mouth to say that he was not bound by the knowledge which his agent, whom he employed in this transaction, had acquired.

Then it is urged that Kedar Nath Mitter practised a fraud, not upon the infant plaintiff, but upon the defendant, and we are asked upon that footing to adopt the view laid down by Lord CHELMSFORD in the case of *Espin v. Pemberton*, (1859) De G. and J., 547, where he says: "I would rather say that the commission of the fraud broke off the relation of principal and agent, or was beyond the scope of the authority, and, therefore, it prevented the possibility of imputing the knowledge of the agent to his principal. I think that Pemberton was not the solicitor of Browne in the assignment, as there is not only no proof of consent that he should act in that capacity, but something approaching to proof of the contrary."

We are invited upon that principle to hold that any knowledge acquired by Kedar Nath Mitter could not be fairly imputable as knowledge acquired by the defendant himself. This is a perfectly new case; no such case was ever suggested [388] in the Court below, and there is no evidence to support such a case; on the contrary the evidence shows that Kedar Nath Mitter, so far from practising any fraud upon the defendant, took this declaration from the plaintiff, either with the object of holding it *in terrorem* over him, when he attained his majority, as a lever, possibly, for a threat of criminal proceedings, or, alternatively as a basis for his present contention that the plaintiff, even though a minor, could not take advantage of his own fraud. It would appear, therefore, that Kedar Nath Mitter obtained the declaration, not with the view of defrauding the defendant, but of protecting the defendant's interest.

Then it is contended that under section 115 of the Evidence Act, the plaintiff, though a minor at the time, is estopped from saying that he did not make the representation in question. In my opinion, this section has no application to the case of a minor. A minor cannot be estopped by a deed or by the recitals in a deed, and if he cannot be so estopped, it seems incongruous to say that he can be estopped by a parol declaration, for this is the contention. We must read the language of the Legislature if we can, so as to make it harmonize, and not conflict, with the general law, though remembering at the same time that the office of the Legislature by its legislative Acts is to define, and even alter, the law. The term "person" in section 115 is amply satisfied by holding it to apply to one who is of full age, and competent to enter into a contract, and I cannot bring myself to think that it could have been the intention of the Legislature, by such a general expression, to institute such a grave change in the law of estoppel in relation to minors.

Our attention has been directed to a case decided by the High Court at Bombay, which holds that section 115 of the Evidence Act is applicable to the case of a minor. Speaking with every respect, I am unable to assent to that view, and I may point out that the cases upon which the learned Judges in that Court rely as substantiating their proposition when carefully examined appear to me not to warrant the conclusion arrived at. This has been pointed out by Mr. Justice JENKINS, and concurring as I do in his criticism I need not refer to what he [389] has said. The case of *Mills v. Fox*, (1888) L. R., 37 Ch. D., 153, is quite distinguishable. That was a case under the Infants' Settlement Act, which for the purposes of the settlement treats the infant *pro tanto*, as *sui juris*, and I am satisfied that Mr. Justice STERLING

in that case did not intend to lay down any such proposition in relation to estoppel against a minor, as that for which the present appellant now contends.

Now I pass on to the argument raised in relation to section 64 of the Contract Act. Section 64 again speaks of a "person" and the "party," and I think that the terms "person" and "party" must be regarded as interchangeable terms.

The observations I have made as to the meaning of the term "person" in section 115 of the Evidence Act apply with even greater force to that expression as used in section 64 of the Contract Act.

In my opinion the term "person" in section 64 means such a person as is referred to in section 11, that is to say, a person competent to contract who is of the age of majority according to the law to which he is subject, and it would be an extraordinary result to hold that this section applies to the case of a minor. Moreover, as was pointed out by Mr. *Bonnerjee*, although it is unnecessary for us to decide the point, it is certainly open to argument that, when section 64 of the Contract Act speaks of "voidable" contracts, it refers to such contracts as are spoken of as voidable in section 19 of the same Act. But I express no final opinion on this point. If we were to accede to the appellant's argument as to the application of section 64, the protection, which the law has so carefully thrown around minors in relation to matters of this nature, would be virtually destroyed, or I might almost say shifted to protect the very parties who prey upon the weakness and folly of the young.

Then, we are asked to exercise the discretionary powers vested in us under sections 28 and 41 of the Specific Relief Act. That is a matter for the discretion of the Court; the learned Judge in the Court below has exercised his discretion adversely to the [390] appellant, and I see no reason which would justify us in differing from that conclusion. On the contrary I do not think that in a case of this class where a man, who has been told that the person with whom he is dealing is a minor, still chooses to lend him money, "justice requires" that it should be returned to him.

The last point was that the minor when he had attained majority ratified the bargain, but there really is no evidence to support this view, and I agree with Mr. Justice JENKINS upon the point. I have now dealt with the many points which have been urged for the appellant; in my opinion they all fail, and the appeal must be dismissed with costs.

Prinsep, J.—I agree in dismissing the appeal with costs for the reasons just given by my Lord, the Chief Justice.

Ameer Ali, J.—As the questions raised in this case are of some importance, I desire to add a few observations. It was urged in the first place that assuming the letter of the 15th of July 1895 was received by Kedar Nath Mitter, it did not amount to a notice such as would compel him to make any enquiry with reference to the statement contained therein. It was further urged that notice to Kedar Nath would not affect the defendant in the case; and that, as a matter of fact, Kedar Nath acted fraudulently towards Brahma Dutt, the defendant.

In considering these questions it is necessary to bear in mind some of the salient facts of the case. It has been abundantly proved, amongst other things, that the defendant is a money-lender, who, at the time of the transaction under enquiry, was not in Calcutta, and that all his business here was managed by his *monib gomasta* Dudraj. This man admits in his deposition that the defendant's entire business was in his charge, and that throughout the transaction Kedar Nath acted on behalf of his master. He admits further that

he had known Kedar Nath for about twelve years, and that during that period a considerable amount of business had been done for him by the latter. The evidence of Dudraj clearly shows that he was on intimate terms with Kedar Nath Mitter. Dudraj states that when the question of the plaintiff's minority was broached before him, he told Kedar "to remove all doubts about the man's infancy," whilst Kedar says [391] that "he obtained the declaration of the plaintiff concerning his age and the Exhibits 10 and 11 for the greater security of the interest of my client" meaning the defendant. Throughout the evidence of Kedar Nath or Dudraj there is not the faintest ground for the suggestion that the former was acting fraudulently towards the defendant or his *gomasta*. Not only is there no ground in support of that suggestion, but the evidence given in the case directly contradicts it.

As regards the contention that the letter of the 15th of July 1895 did not amount to a notice, according to my apprehension of the subject, any information which puts a person upon enquiry is a notice. Apart from what is admitted by Dudraj and Kedar Nath Mitter, namely, that the plaintiff himself stated to the latter, that there was a question about his majority, I entertain no doubt whatever, upon the evidence, that Kedar Nath did, on the 15th of July, receive the letter which was addressed to him by Babu Bhupendra Nath Bose on behalf of the mother and constituted guardian of the infant. I do not attach the smallest credence to Kedar Nath Mitter's denial of the fact; and, if he did receive that letter, it undoubtedly did put him upon enquiry. The information conveyed to him in that letter was as clear and explicit as it could well be. And what did Kedar Nath, who was the defendant's attorney, do upon receipt of that letter? If he had been acting as he ought to have done, he would have told the plaintiff that, if he had attained his majority he should go and get his guardian discharged. Instead of doing that, he goes and induces the plaintiff to make a declaration of the character already described. Instead of going to the mother or the mother's brother for further information on the subject of the plaintiff's minority he obtains some affidavits from two persons, one of whom cannot be regarded as otherwise than his creature. Nanda Lall Ghose is an attorney's clerk, who is or was in the habit of bringing work to Kedar Nath, as he says. We all know what that means. This Nanda Lall Ghose is said to be an uncle of the plaintiff, but it is in evidence that he was litigating with the plaintiff's mother, that he has lost all his property, and for a considerable number of years has held no communication with the plaintiff's family. It was upon these declarations that Kedar [392] Nath proceeded, as he says, to get this money advanced to the plaintiff. There can, therefore, be no doubt that, so far as Kedar Nath was concerned, he was not misled by any statement made by the plaintiff regarding his age. The plaintiff himself stated to Kedar that there was a doubt about his age, and that his mother was questioning his majority. The mother's attorney wrote to Kedar Nath on the subject, so that when he advanced the money to the plaintiff he advanced it with his eyes open.

The contention that notice to the attorney is not notice to the defendant is, I must say, wholly unsupported by authority. There is a presumption that the solicitor or attorney does his duty. It was Kedar Nath's duty to convey to the defendants the information which was given to him in that letter of the 15th of July, and if he failed to do so, the defendant must take the consequences.

In *Boursot v. Savage*, (1866) L. R., 2 Eq., 134, the same question that has been attempted to be raised in the case before us was presented for decision. In that case one Holmer, a solicitor, was one of the trustees under a certain indenture of trust. By an indenture in which he forged the names of his

co-trustees Holmer assigned to the defendant Savage certain leasehold hereditaments covered by the trust. Upon the discovery of the fraud the beneficiary sued for the cancellation of the indenture of assignment. At the trial it was proved that Savage had no knowledge of the forgery or fraud committed by Holmer; but it was not disputed that he had acted in the transaction as the defendant's solicitor. On the question of notice to Savage in respect of the trust, it was contended by his Counsel that Holmer had acted as solicitor for both parties, and that when the fraud commenced the connection of solicitor and client was broken off. Dealing with this contention **KINDERSLEY, V.C.**, at pages 141 and 142 of the report, expressed himself as follows: "Supposing, however, that actual knowledge of the existence of a trust cannot be imputed to the defendant Savage, still I think he is affected by constructive notice. He employed Holmer as his solicitor in the transaction of the purchase; and, according to the doctrine of Equity, a purchaser **[393]** has constructive notice of that which his solicitor, in the transaction of the purchase, knows with respect to the existence of the rights which other persons have in the property." He then goes on to say: "It is a moot question upon what principle this doctrine rests. I confess my own impression is that the principle on which the doctrine rests is this: that my solicitor is *alter ego*; he is myself; I stand in precisely the same position as he does in the transaction, and therefore his knowledge is my knowledge; and it would be a monstrous injustice that I should have the advantage of what he knows without the disadvantage. But, whatever be the principle upon which the doctrine rests, the doctrine itself is unquestionable. It is insisted, however, that the doctrine cannot apply to this case because Holmer was committing a fraud, and the client is not to be affected with constructive notice of a fraud committed by his solicitor. But if the client would be affected with constructive notice of a trust, the existence of which is known to his solicitor, in the case where there is no fraud, the fact that the solicitor is committing a fraud in relation to that trust cannot afford any reason, why the client should not be affected with constructive notice of the existence of the trust. It is the existence of the trust, and not the fraud, of which he is held to have constructive notice, and the constructive notice of the existence of the trust must be imputed to him, whether there is a fraud relating to it or not."

I am not aware that that case has been overruled or dissented from in any subsequent case. On the contrary in the case of *Bradley v. Riches*, (1878) L. R., 9 Ch. D., 189, L. J. FRY gave expression to the same view, in other words that the knowledge of the solicitor was the imputed knowledge of the client.

But I go further and hold upon the evidence that the present case does not rest upon constructive notice. For Dudraj admits that a day or two before the execution of the deed he was informed that there was a question as to the plaintiff's age, and I regard that as sufficient information to put him upon enquiry. If the **[394]** enquiry is not sufficient, if it turns out that he did not take proper steps to satisfy himself, and if, afterwards, it is established by judicial investigation that the fact of which he purported to be satisfied was not the true fact, he must take the consequences.

Then it was argued that the plaintiff was estopped under section 115 of the Evidence Act by his representation in respect of his age. To hold that an infant may be estopped in regard to contracts by conduct or misrepresentation would be practically to sweep away all the limitations the law has imposed on the capacity to contract; and a person labouring under a disability would

be enabled to enlarge by his own act his legal capacity to contract. * *In the Liverpool Adelphi Loan Association v. Fairhurst*, (1854) 9 Exch., 422, it was held that a person under a disability to contract was not liable upon the contract, nor for a wrong arising out of or directly connected with the contract, and which is the means of effecting it and parcel of the same transaction. The same principle was followed in *Bartlett v. Welles*, (1862) 1 B. & S., 836.

It follows, therefore, that when the present law declares that an infant shall not be liable upon a contract, or in respect of a fraud in connection with a contract, he cannot be made liable upon the same contract by means of an estoppel under section 115. I, therefore, agree that there is no estoppel whatsoever in this case founded upon any representation or alleged representation on the part of the plaintiff.

As regards section 64 of the Contract Act, I agree that the contracts there referred to are contracts by persons who have the capacity to contract or who are not labouring under any disability from contracting. As at present advised I agree with the decision of this Court holding that the contract of an infant is voidable at his option, but that must be understood as meaning that it is voidable to his advantage and not to his disadvantage. No reason has been shown in this case for the exercise of the equitable jurisdiction of this Court. Undoubtedly a Court of Equity has the power, if the minor has derived any benefit by [395] means of a fraudulent representation—to order compensation, to use a common maxim—to compel a person seeking equity to do equity. In the present case I see absolutely no foundation whatever for the defendant's invoking the equitable jurisdiction of the Court. I agree, therefore, in dismissing this appeal.

Appeal dismissed.

Attorneys for the Appellant: Messrs. *Manuel and Augurwallah*.

Attorney for the Respondent: *Babu B. N. Bose*.

NOTES.

[On appeal, the Privy Council held that an infant's contract was void under the Indian Contract Act, 1872, and that the question of estoppel did not arise as there was no change due to the representations:—(1902) 30 Cal., 339.]

As regards estoppel, see also (1908) 31 All., 21 : 5 A.L.J., 674.]

[26 Cal. 395]
PRIVY COUNCIL.

The 11th November, 1898.

PRESENT :

LORDS HOBHOUSE, MACNAGHTEN AND MORRIS, AND SIR R. COUCH.

The Land Mortgage Bank of India.....Defendants

versus

Abul Kasim Khan and others.....Plaintiffs.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Mortgage—Construction of Mortgage—Operative words in a Mortgage deed—General language.

A mortgage deed having specifically charged the property originally offered as security, extended the operation of the mortgage by general language to include all interests in the mehals, villages, and lands, comprised in the sanad of a talukhdari estate. It was now questioned whether one of the villages comprised in the sanad was part of the mortgaged property. The operative words, uncontrolled by anything in any recital, declared all the above subject to the mortgage. The deed was, accordingly, *held* to include the village in question, effect being given to the operative words in their ordinary meaning.

APPEAL from a decree (25th July 1889) of the Judicial Commissioner of Oudh, reversing a decree (31st March 1888) of the District Judge of Faizabad.

This suit was brought on the 30th May 1887 by the representatives of Umres Singh, a talukhdar, deceased in 1880. They claimed the right of possession against the appellant, the Land Mortgage Bank, of the village Bazidpur in the Faizabad District, alleging that the Bank had no title thereto, as the result of a judicial sale in execution of a decree obtained by the Bank against Umree Singh upon a mortgage, dated the 23rd August 1871. The plaintiffs, respondents, alleged that Bazidpur [396] was not entered in the schedule of the mortgaged property that accompanied the mortgage deed, and that this village had been wrongly attached and sold on the 3rd March 1877, in execution of a decree obtained by them in 1875 for Rs. 1,22,131 against Umres Singh. The defence was that an entire taluk named Meopur Baragaon, comprising the village Bazidpur, in question, was included in the mortgage of 1871; not only the mauzas specified in the schedule to the mortgage having been mortgaged but also all other mauzas appertaining to that taluk, which included Bazidpur. Also that the sale, after contest on application to have it set aside, had been confirmed by the Deputy Commissioner of the Faizabad District on the 3rd April 1877. On the 17th September 1878 the appellants sold the village to the other defendants in the present suit.

In evidence was the mortgage deed of the 23rd August 1871, executed by Umres Singh in favour of the appellants, by which he conveyed, subject to the mortgage, all the estate known by the above name, the particulars being given in a schedule annexed to the deed. It was added in the deed that the estate was granted to Umres Singh by sanad under the hand of the Chief Commissioner of Oudh; and the deed conveyed, also, all other, if any, the mouzas, mehals, villages, lands, and shares of and interests in the same, comprised in the said sanad. Also was in evidence the decree of the 1st June 1875

in favour of the Bank for the above sum, and declaring their lien on Meopur Baragaon till payment.

The District Judge decided that the deed of the 23rd August 1871 mortgaged all the villages in the taluk and not merely those specified in the schedule. But he held the suit to be barred by limitation.

On the plaintiffs' appeal, the Judicial Commissioner was of opinion that there was no bar by lapse of time. But his judgment was that Bazidpur was not intentionally included in the mortgaged property, and was therefore excluded by his decree.

On this appeal,—

Mr. J. D. Mayne, for the Appellants, argued that Bazidpur was included in the mortgage by the general language of the deed of 1871.

[397] Mr. A. Cohen, Q. C., and Mr. C. W. Arathoon, for the Respondents argued that as the earlier language of the deed differed from the later, and as a reference to what had been mentioned in the preliminary arrangements did not make it appear that the parties to the mortgage intended to effect the inclusion of Bazidpur, their intention should be taken to be against the inclusion of the village. The principle of construction in the case of general language following and exceeding more detailed description was that the object and intention of the parties must be regarded.

There was here a resemblance to the cases of discrepancy between recital and conveyance; and in the latter cases where the recital clearly indicated what was intended to be conveyed, and operative words of a general character went beyond that recital, the operative words were construed with a restriction. They cited *Jenner v. Jenner*, (1866) L. R., 1 Eq., 361; *Rooke v. Lord Kennington*, (1856) 2 K. & J., 753.

Mr. J. D. Mayne was not heard in reply.

Their Lordships' judgment was then given by

Lord Macnaghten.—The learned Counsel in this case have very properly agreed that if their Lordships should be of opinion that the village of Bazidpur is included in the mortgage, the appeal must succeed. It appears to their Lordships perfectly plain that the village is included. After conveying by specific description the property originally offered in security, the mortgage deed throws in as an additional subject of conveyance "all other (if any) the mauzas, mehals, villages, lands, and shares of and interest in mauzas, mehals, villages, and lands comprised in the said sanad." It is admitted that this village was comprised in the sanad; it follows therefore that it passed by words, which include everything that the sanad comprised. There is no contradictory recital. After noticing the original application for the loan, the narrative winds up by saying that the Bank have agreed to make the advance on having repayment of the sum advanced and interest thereon secured "in manner hereinafter appearing." That recital points to the operative part of the deed as complete in itself, without [398] anything in the preamble to control or confuse the natural and ordinary meaning of the language used. There is surely nothing so very strange in finding that a mortgage deed as finally settled contains something more than the security originally proposed. The reference to the sanad in the original proposal seems to suggest the course which the negotiations must have taken. Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed, and the suit dismissed with costs in the Courts below. The respondents must pay the costs of the appeal.

Appeal allowed.

Solicitors for the Appellants: Messrs. Ashurst, Morris, Crisp and Co.

Solicitors for the Respondents: Messrs. T. L. Wilson and Co.

C.B.

NOTES.

[See also (1903) 30 Cal., 556 ; (1905) 7 Bom. L.R., 407 ; (1902) 9 C.W.N., 710.]

[26 Cal. 398]

The 17th November, 1898.

PRESENT :

LORDS ASHBOURNE, HOBHOUSE, MACNAGHTEN AND MORRIS,
AND SIR R. COUCH.

The Rivers Steam Navigation Company.....Defendants
versus
Choutmull Doogar and others.....Plaintiffs.

[On appeal from the High Court at Fort William in Bengal.]

*Carriers' Act (III of 1865), sections 6, 8, and 9—Negligence—Accident,
Loss by—Burden of proof in a suit for damages for non-delivery.*

The plaintiffs sued a company, who were common carriers, for damages for the non-delivery of goods entrusted to them for carriage, destruction of the goods by fire having taken place on board the company's flat when moored off the place of destination. How the fire originated was not shown. The company did not prove absence of negligence on their part nor was there placed before the Original Court a case inconsistent with their negligence.

The Judicial Committee dismissed an appeal from the decree of the Appellate High Court, which proceeded on the 9th section of the Carriers' Act (III of 1865), that Court having taken the non-delivery as placing the burden of proving absence of negligence on the carriers.

There were facts showing that no adequate means had been provided by the defendants for extinguishing a fire on board, and that the watch was inefficient. The defendants, accordingly, had failed to exonerate themselves.

APPEAL from a decree (29th January 1897) of the Appellate High Court, reversing a decree (26th February 1896) of the [399] High Court in its original jurisdiction. The plaintiffs, who now appealed, were merchants trading at Calcutta and at Serajgunge. The company defending the suit were common carriers by inland navigation. The suit was to recover the value of 432 drums of jute received on board their flat *Khyber* by the Company in November 1893 at Serajgunge, to be delivered to the plaintiffs at Calcutta. The flat arrived there; but whilst moored off Jagarnath Ghat (where the jute had to be delivered) on the morning of the 7th December 1893, the flat and its cargo were destroyed by fire, the origin of which did not appear.

The forwarding note contained the following :—

“The Company will not be under liability for damages, or compensation, in respect of loss or damage to goods . . . except such liability as they are, or may be, subject to under the provisions of any law for the time being in force, or of any contract other than this, for the time being in existence between the company and the shipper.”

The question raised and decided on this appeal was whether the appellants were liable as common carriers by river for the loss of the goods.

The circumstances of the loss are stated in their Lordships' judgment, and also appear in the report of *Choutmull Doogar v. The Rivers Steam Navigation Company*, (1897) I. L. R., 24 Cal., 786. The plaintiffs filed this suit in the Court below on the 5th January 1895, charging that the defendants were liable as common carriers for the loss of the jute. The defendants in their written statement alleged that the goods were received by them to be carried, on the terms of the forwarding note, and that they had been lost without any negligence on their part.

By the Carriers' Act (III of 1865), it is provided as follows:—

Section 6. "The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any public notice, but any such carrier not being the owner of a railroad or tramroad, constructed under the provisions of Act XXII of 1863 may by special contract, signed by the owner of such property so delivered as last aforesaid or some person duly authorised in that behalf by such owner, limit his liability in respect of the same."

[400] Section 8. "Notwithstanding anything hereinbefore contained every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried when such loss or damage shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants."

Section 9. "In any suit brought against a common carrier for the loss, damage, or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss or damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants, or agents."

The suit was heard by SALE, J., in the original jurisdiction of the High Court. The principal issue was whether the loss was due to the negligence of the defendant Company, and whether the forwarding note protected them. On the latter point the Judge held that the defendant Company were relieved from liability for loss not occasioned by their negligence. On the issue of fact he held that the Company had proved that the loss was not so occasioned, thereby discharging the burden imposed upon them by the Carriers' Act.

Upon the evidence he came to the conclusion that the fire did not originate from anything on the flat, and that all reasonable precautions had been taken to prevent the cargo from taking fire from outside. He was also of opinion that the appliances on board for extinguishing fire were fairly sufficient, and that the inability of the crew to put out the fire was caused by the rapidity with which it spread. The Judge accordingly dismissed the suit with costs.

On appeal the Appellate High Court (MACLEAN, C.J., and MACPHERSON and TREVELYAN, JJ.) reversed the above judgment on the ground that the defendants had not discharged the burden cast upon them of showing that the loss was not due to their negligence. The decree was that the defendants should pay to the plaintiffs Rs. 3,324, with interest thereon at 6 per cent. with costs.

The judgments are reported at length in I. L. R., 24 Cal., 786.

On this appeal—

[401] Mr. Joseph Walton, Q.C., and Mr. J. F. Clerk, appeared for the Appellants.

Mr. A. Cohen, Q.C., and Mr. A. Phillips, for the Respondents.

The argument for the appellants was that the defendants had proved that the loss was not caused by their negligence or default or by any act or omission on the part of their servants.

Counsel for the respondents were not called upon.

Their Lordships' judgment was delivered by

Lord Morris.—Their Lordships do not require to hear Counsel in support of the decision of the High Court, as they are of opinion that there has been no case shown to alter the judgment that was pronounced by that Court.

It appears that the jute in question was put on board the appellants' vessel, and put on board, so far as can be ascertained, in a proper manner, in a proper flat, properly arranged, and under proper circumstances. It appears that upon the night in question, about half-past twelve, from some rather incomprehensible cause or other, the jute caught fire, and the whole cargo was burnt.

The plaintiffs do not rely upon any special construction of the forwarding note other than that which is relied upon by the defendants, who contend that they have brought themselves within the protection of the Carriers' Act; that is, that they are exempt, if they satisfy the onus which is imposed upon them of showing that there was no negligence on their part.

The plaintiffs have also given up any question as to holding the defendants liable on the ground of having deviated from the agreement, and therefore the question comes to the simple and—in form, at all events—narrow one, whether the defendants have exonerated themselves by showing that there was no negligence on their part.

A fire took place, and it is the common case that it did not arise from spontaneous combustion. It, therefore, must have arisen from some cause either external to the flat or internal in the flat. If it occurred from a fire within, it would appear that the onus is not discharged by the defendants, because they had [402] the control of the flat. If the fire took place inside, they must have done something or other, or something must have happened on the vessel inside of the flat, which led to the fire. They are, therefore, driven to suggest causes for its occurring from something external to the flat; and it certainly is a very remote, and rather a fanciful, suggestion that it arose from some spark coming from certain dinghies or smaller boats that were in the neighbourhood.

In the first place, on the evidence of the captain and of the serang, the fires were put out in those small boats about 9 P.M. It was suggested that a man throwing the end of a cigar or lighting a pipe might have caused the fire. But that seems most improbable, because the flat was guarded by the corrugated iron at the top and bottom, and by a purdah or thick canvas all round about it, and it would have taken the fire a very considerable time to reach the jute if it had arisen externally. Therefore it appears that the fire must have originated from some cause inside. If the cause was inside, as has been said, the onus is not discharged, because the whole of the flat was under the control and management and care of the defendants.

Again, they were bound to watch; that is their own case; and accordingly they allege that they did watch, and that about 12 o'clock, just shortly before the fire, two persons named Tamiz-ud-din and Omed Ali were the watchmen; that Tamiz-ud-din was to watch on the starboard side and that Omed Ali was to watch upon the port side. Tamiz-ud-din did not watch on the starboard side. If he had watched, and the fire had arisen from any external cause, he would have perceived it almost at once, and if he had not been for a very considerable time engaged in rather a curious sort of investigation (he appears, namely, to have been watching an accumulation of jungle upon an anchor that was hung up and no way concerned in the anchoring of the vessel, or in directing its course, or in keeping it where it was) he would have seen the fire arise, and

he could have given outcry at the time, and notice that would have led in all probability to its being extinguished. The fire, however, had taken such hold of the jute that it had gone too far by the time he noticed it, a [403] notice which really arose not from his looking at the matter at all, but by the fires being reflected by the water, which he appears to have been watching, instead of watching that which he was put there to watch, namely, the flat.

Then the absence of the other witness, as described by the Chief Justice of the High Court, is, to say the least of it, unfortunate. It is very unfortunate, because he might have shown that Tamiz was much longer absent than seven or eight minutes—a most peculiar time for him to select, as if anybody could distinguish between seven or eight minutes and a quarter of an hour, or 17, or 18, or four or five minutes, when their attention was not directed to investigating it at the time.

At all events the observation of Tamiz-ud-din was for such a substantial time withdrawn from the matter which it was his proper business to watch, that all the misfortune occurred, practically speaking, by reason of his not watching. If he had been walking up and down on the starboard side, as he ought to have been, he would have observed this fire coming against the purdah; or he would have observed the fire from within, and not have waited to observe it from the glare in the water. It appears that the defendants have not at all exonerated themselves from the onus cast upon them of showing that the fire originated from causes over which they had no control, and could not have been expected to have had any control; and the evidence would really go to show that the fire must have originated from within the flat, and therefore from a place for which they were liable for its being in a proper position, and free from any inflammatory article that would have set the jute on fire when it could not have got on fire of itself.

In addition to that it also appears that when the fire did take place there was an utter absence of any power of extinguishing it, except by the primitive mode of the crew throwing buckets of water upon it. There were two pumps, and they were both useless—the pump in the fore part of the vessel was useless because the captain was alone there, and he could not work the pump by himself, and the men could not get there. Why had he not the men at his disposal? What is the use of having a [404] pump if you have nobody to work it? Then there was a pump aft; and that pump could not be worked because it appears that the jute was piled up close to the bulkhead, and that the hose was too short; so both the pumps become utterly useless, and the conflagration goes on until, not alone is the jute destroyed, but the vessel sinks.

Their Lordships are clearly of opinion that there is no reason for disturbing the conclusion come to by the High Court upon both grounds.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court should be affirmed. The appellants will pay the costs.

Appeal dismissed.

Solicitors for the Appellants : Messrs. *Budd, Johnson and Yecks.*

Solicitor for the Respondents : Mr. *W. W. Box.*

C. B.

NOTES.

[See also 26 Cal., 465 ; (1911) 14 Bom. L.R., 165.]

[26 Cal. 405]

TESTAMENTARY JURISDICTION.

The 24th March, 1899.

PRESENT :

MR. JUSTICE SALE.

In the Goods of P. J. Avdall, Deceased.

Letters of Administration—Administrator-General's Act (II of 1874), section 12—Verification of Petition—Court Fees Amendment Act (XI of 1899).

The Administrator-General as a public officer is exempted from verifying otherwise than by his signature any petition presented by him under the provisions of Act II of 1874.

In the goods of McComiskey, (1893) I.L.R., 20 Cal., 879, followed.

The form of affidavit prescribed by Act XI of 1899 indicates that it does not apply to an application by the Administrator-General.

THIS was an application by the Administrator-General for letters of administration to the above estate. The sole question raised was whether the signature of the Administrator-General was a sufficient verification to the petition, or whether he was required to make an affidavit. The petition of the Administrator General was as follows :—

[405] *First.*—That Paul Johannes Avdall, the deceased abovenamed, who was an Armenian inhabitant of the Town of Calcutta, and who was an Insurance Broker, departed this life at No. 29, Pollock Street, in the Town of Calcutta, on the 11th day of January 1899 intestate, leaving property and effects within the jurisdiction of this Hon'ble Court to be administered unto and leaving, as your petitioner is informed and believes, a brother named Peter Johannes Avdall and a sister named Elizabeth Sarkies, who, your petitioner is informed and believes, is the widow of Carapiet Johannes Sarkies, deceased, and who your petitioner is also informed and believes is seriously ill, his only next of kin him surviving.

Second.—That the amount and value of the assets left by the said deceased which are likely to come to your petitioner's hands, in case letters of administration be granted to him, will not, as your petitioner verily believes, exceed the sum of Rs. 6,000, and that the same consists of the property, estate and effects appearing in the Schedule hereunder written :—

Schedule of assets left by the deceased.

	Rs.
I. Household furniture and effects, carriages and horses in Calcutta of the estimated value of	2,000
II. Amount of commission due to the deceased abovenamed by Messrs. Walker, Goward & Company of the Strand Road in Calcutta estimated at	4,000
TOTAL	6,000

Third.—That your petitioner is informed and believes that the said Peter Johannes Avdall, who, your petitioner is also informed, is the brother of the said deceased, and who resides at No. 4 Shurruf Duftry's Lane in Calcutta, is of unsound mind, and incapable of managing his affairs, and your petitioner is also informed and believes that the said Elizabeth Sarkies, the sister of the deceased abovenamed, is seriously ill and unable to sign her consent at foot of this petition.

Fourth.—That more than a month has elapsed since the date of the death of the said Paul Johannes Avdall, deceased, and, as your petitioner is informed and believes, none of the next-of-kin of the said deceased have applied for a grant of letters of administration to his estate.

Fifth.—That no previous application has been made to this Hon'ble Court, or to any other Court for grant of probate of any will of the deceased abovenamed, or for letters of administration of the property, assets, credits and effects of the deceased abovenamed, as appears from the certificate of the Registrar of this Hon'ble Court herewith produced.

Sixth.—That your petitioner is desirous of obtaining an order that letters of administration, as in case of intestacy, to the property, assets, credits and [406] effects of the deceased abovenamed be granted to your petitioner with effect throughout the Province of Bengal.

Your petitioner therefore humbly prays your Lordships for an order that letters of administration as in case of intestacy to the property assets credits and effects of the deceased abovenamed be granted to your petitioner with effect throughout the Province of Bengal.

The petition was verified only by the signature of the Administrator-General, without affidavit.

Sale, J.—This is an application by the Administrator-General for letters of administration. The petition contains a schedule of assets, from which no deduction is claimed. The only question is whether the signature of the Administrator-General should be accepted as a sufficient verification under section 12 of the Administrator-General's Act II of 1874, or whether he should be required to make an affidavit in the form prescribed by Act XI of 1899. The form of affidavit prescribed by this Act in itself sufficiently indicates that it was intended to be used by applicants other than the Administrator-General. The Administrator-General, as a public officer by section 12 of Act II of 1874, is exempted from verifying otherwise than by his signature any petition presented by him under the provisions of the Act. See *In the Goods of McComiskey*, (1893) 1. L. R., 20 Cal., 879. This section, unless expressly repealed, cannot be treated as having ceased to be operative.

Under the circumstances an order for grant of letters of administration may be made on a certificate being produced from the Registrar that the administration duty has been paid and a statement to that effect being inserted in the petition.

Attorney for the Petitioners : Mr. *Camell*.

C. E. G.

[407] *The 6th April, 1899.*

PRESENT ::

MR. JUSTICE SALE.

In the Goods of Omda Bibbe.....Deceased.

Letters of Administration—Court Fees Act (VII of 1870), section 3, Schedule 1, Art. 11, section 19.H.—Court Fees Amendment Act (XI of 1899)—Practice—Payment of ad valorem fee on Probate or Letters of Administration.

In an application for probate or letters of administration the *ad valorem* fee prescribed by Statute should be prepaid to the satisfaction of the Court. Such payment must be made to the Registrar and certified by him or by the Taxing Officer where an exemption is claimed and allowed. This certificate should be produced to the Court with the application and affidavit of valuation.

IN this case an exemption from the total amount of the *ad valorem* fee payable to the Court was claimed, but no certificate from the Taxing Officer was produced to the Court at the time of the application for letters of administration.

Sale, J.—In the High Court the fee mentioned in article 11 of the first Schedule to the Court Fees Act is, under section 3 of the Act, payable to the Registrar. In case of difference as to the fee or the amount thereof payable, the question is by section 5 of the Act referred to the Taxing Officer. These sections have not been repealed by the amending Act XI of 1899. By that Act the High Court, when an application is made to it for probate or letters of administration, is required to cause notice to be given to the chief controlling revenue authority, that is to the Board of Revenue. The object is not to delay the grant, which may be made as soon as the Court is satisfied that the *ad valorem* fee payable on the valuation of the assets furnished in the prescribed form has been paid. The fee is required to be prepaid to the satisfaction of the Court. Such payment should be made to the Registrar and certified by him to the Court. This certificate or a certificate from the Taxing Officer, where exemption is claimed and allowed, should be produced to the Court with the application and the affidavit of valuation.

This petition may, therefore, be returned to the applicant in order that it may be re-submitted with a certificate from the Taxing Officer.

Attorney for the Petitioner : Mr. N. C. Boše.

C E. G

[408] *The 28th March, 1899.*

.PRESENT :

MR. JUSTICE SALE.

In the Goods of A. S. Gubboy.....Deceased.

*Letters of Administration—Bond, Form of—Succession Act
(X of 1865), section 256—Practice.*

The Indian Succession Act, section 256, requires that an administration bond should be taken in every case. It may, however, be varied, by special order of the Court, in the case of a limited or special administration and follow the English form.

THIS was an application for letters of administration in limited form, and it was prayed that, having regard to the limited nature of the grant asked for, an administration bond might be dispensed with :—

Sale, J.—This is an application for a grant of letters of administration of the property and credits of Aaron Shalome Gubboy, deceased, limited for the purpose of reconveying the premises comprised in a mortgage to the mortgagor.

It is stated in a petition verified in the usual way that the "deceased died without leaving any properties or effects to be administered unto," and that he had no beneficial interest in the mortgage the premises comprised in which are to be reconveyed.

It appears that this mortgage has been treated as belonging to the estate of the brother of the deceased, and that the *ad valorem* fee on the amount secured thereby has been paid.

It is said that having regard to the nature of the limited grant prayed for, no assets can come into the hands of the administrator, and that this is a case in which an administration bond may be dispensed with. But the law does not admit of this being done. Section 256 of the Indian Succession Act requires a bond to be given in every case, but in such form as the Judge shall from time to time by any general or special order direct. It is only open to the Court to make a special order as to the form of the bond.

In England an administration bond is also required to be given in all cases, and the bond in the case of a limited or special administration provides that the administrator "will [409] exhibit a true and perfect inventory of the said estate and effects *limited as aforesaid* and render a just and true account thereof whenever required by law so to do." Coote, p. 663. This form may, it seems to me, be adopted in the present case, and I direct that this may be done.

Attorneys for the Petitioners : Messrs. *Gregory and Jones.*

C. E. G.

[26 Cal. 409]

FULL BENCH.

The 31st January, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, MR. JUSTICE PRINSEP,
MR. JUSTICE O'KINEALY, MR. JUSTICE BANERJEE, AND MR. JUSTICE HILL.

Pyari Mohun Bose.....Plaintiff

versus

Kedarnath Roy and others.....Defendants.*

*Parties—Co-contractors—Right of some of several co-contractors to sue alone—
Refusal to join in the suit as plaintiff, Effect of.*

Where two parties contract with a third party, a suit by one of them making the other a co-defendant ought not to be dismissed, merely because the plaintiff has not proved that the co-defendant had refused to join as a co-plaintiff.

THIS case was referred to a Full Bench by O'KINEALY and GUPTA, JJ., on the 30th June 1898. The ORDER OF REFERENCE was as follows :—

The question raised in this reference is that where two parties contract with a third party, can a suit by one of the two, making the other a co-defendant, be dismissed under our procedure, because the plaintiff had not proved that the co-defendant had refused to join as plaintiff.

This very point was raised in the case of *Tarini Kant Lahiri v. Nund Kishore Patronovis*, (1882) 12 C. L. R., 588, and with reference to it the Judge said : " It may be that the proper course would be to ask him to join as a plaintiff, but it is a matter of perfect indifference to the substantial defendant whether the co-sharer is joined as a plaintiff, or joined as a defendant. The tenant is concerned to have all [410] parties interested in the rent made parties to the suit, so that he may not be liable in a subsequent suit for rent. If the third defendant were to complain that he has been made a defendant without being asked to join as a plaintiff, there might have been ground of complaint, and the mistake might be undone by amending the plaint, or it might be a ground for giving him his costs, but it is not a ground for dismissing the suit at all."

This decision was followed by another Divisional Bench of this Court in the case of *Bissesswar Roy Chowdhry v. Brojo Kant Roy Chowdhry*, (1897) 1 C. W. N., 221.

In the case of *Dwarka Nath Mitter v. Tara Prosunna Roy*, (1889) I.L.R., 17 Cal., 160, a Divisional Bench of this Court, on the authority of *Luke v. South Kensington Hotel Co.*, (1879) L.R., 11 Ch.D., 121, decided that some of the parties interested as plaintiffs cannot sue alone unless the co-sharers have refused to join or have otherwise acted prejudicially to the plaintiffs, and the suit was dismissed on this ground. That case was followed in the case of *Soshee Shekhareswar Roy v. Giris Chandra Lahiri*, (1897) 1 C. W. N., 659.

It must be borne in mind that under our Code no person can be made a plaintiff without his consent. In England this consent must be given in writing ; so that the rules point to consent and not to refusal. Under section 32, the Court has the greatest powers for transferring parties, and under section

* Reference to the Full Bench in Appeal from Appellate Decree No. 1469 of 1896,

34 all objections in regard to parties must be taken at the earliest opportunity, or else they are regarded as waived. In all these points the rules of our Court conform more or less to the rules of the Supreme Court in England, and their dismissal for want of a co-plaintiff is unknown. See *Roberts v. Holland*, (1893) L. R., 1 Q. B., 665 (669).

We, therefore, refer this second appeal to a Full Bench for disposal.

Babu Dwarka Nath Chuckerbutty for the Appellant.

Dr. Ashutosh Mookerjee, Babu Gyanendra Nath Bose, and Babu Biraj Mohun Mazumdar, for the Respondents.

[411] Babu Dwarka Nath Chuckerbutty—It is not necessary for the plaintiff to make out that the co-contractor refused to join. In this case the co-contractor was made a defendant, and if she liked, she could have got herself added as a plaintiff—see the cases of *Tarini Kant Lahiri v. Nund Kishore Patronovis*, (1882) 12 C. L. R., 588; and *Bissesswar Roy Chowdhry v. Brojo Kant Roy Chowdhry*, (1897) 1 C. W. N., 221. The case of *Soshee Shekhareswar Roy v. Giris Chander Lahiri*, (1897) 1 C. W. N., 659, was not correctly decided. The case of *Dwarka Nath Mitter v. Tara Prosunna Roy*, (1889) I. L. R., 17 Cal., 160, is distinguishable, and that was not a rent suit. A suit ought not to be dismissed if the plaintiff does not make out a refusal: see *Roberts v. Holland*, (1893) L. R., 1 Q. B., 665; *Ram Chunder Chuckerbutty v. Giridhar Dutt*, (1891) I. L. R., 19 Cal., 755; *Chuni Singh v. Hera Mahto*, (1881) I. L. R., 7 Cal., 633; and *Guni Mahomed v. Moran*, (1878) I. L. R., 4 Cal., 96.

Dr. Ashutosh Mookerjee for the Respondents.—The principle laid down in *Dwarka Nath Mitter v. Tara Prosunna Roy*, (1889) I. L. R., 17 Cal., 160, is correct: see also Indian Contract Act, section 45. One of the several joint promisees can sue alone only when some special circumstance is shewn—see *Luke v. South Kensington Hotel Co.*, (1879) L. R., 11 Ch., D., 121. The rule in India has always been the same. See *Ramsebuk v. Ram Lal Koondoo*, (1881) I. L. R., 6 Cal., 815 (822); *Jagadamba Das v. Haran Chandra Dutt*, (1868) 6 B. L. R., 526 note; 10 W. R., 108; *Uma Sundari Das v. Ramji Haldar*, (1881) I. L. R., 7 Cal., 242; *Jibanti Nath Khan v. Gokool Chunder Chowdhry*, (1891) I. L. R., 19 Cal., 760; *Bindu Bashini Das v. Peari Mohun Bose*, (1891) I. L. R., 20 Cal., 107; and *Jagdeo Sing v. Pudarath Ahir*, (1897) I. L. R., 25 Cal., 285 (289). Having reference to [412] section 188 of the Bengal Tenancy Act, the suit is also not maintainable—See the case of *Baidya Nath De v. Ilum*, (1897) I. L. R., 25 Cal., 917.

Babu Dwarka Nath Chuckerbutty in reply.

The opinion of the Full Bench was delivered by MACLEAN, C. J., (PRINSEP, O'KINEALY, BANERJEE and HILL, JJ., concurring).

Maclean, C. J.—The question raised on this reference is whether, where two parties contract with a third party, a suit by one of them, making the other a co-defendant, ought to be dismissed because the plaintiff has not proved that the co-defendant had refused to join as co-plaintiff. Upon this question, there is some diversity of opinion in the decisions of this Court. In the case of *Tarini Kant Lahiri v. Nund Kishore Patronovis*, (1882) 12 C. L. R., 588, it was held that such non-joinder was not sufficient ground to justify the dismissal of the suit, and that view has been given effect to by another Division Bench of this Court in the case of *Bissesswar Roy Chowdhry v. Brojo Kant Roy Chowdhry*, (1897) 1 C. W. N., 221. It has been considered that the opposite view was taken by another Division Bench of this Court in the case of *Dwarka Nath Mitter v. Tara Prosunna Roy*, (1889) I. L. R., 17 Cal., 160, and in the case of *Soshee Shekhareswar Roy v. Giris Chandra Lahiri*, (1897) 1 C. W. N., 659. The

case of *Dwarka Nath Mitter v. Tara Prosunna Roy*, (1889) I. L. R., 17 Cal., 160, was a case of an exceptional nature, and upon a minute examination of its facts, it is at least questionable whether it intended to lay down any such general proposition as that for which it has been cited as an authority governing the present case. As a general rule all co-contractors ought to be joined as plaintiffs, but at the same time where, as here, there are three co-contractors, say three co-sharers, two of them co-plaintiffs, and the other a co-defendant (being all the parties interested under the contract), the suit ought not in my opinion to be dismissed simply because it has not been shown that the co-sharer defendant has refused to join as a co-plaintiff. If so, in each such [413] case there would have to be a preliminary issue as to such refusal, and the inconvenience of that is shown by the proceedings in the present case, where one Judge has decided there was such refusal, and another Judge has decided the very opposite. In cases of this class the defendant—the active defendant, not the co-sharer defendant—should, as soon as the trial is commenced, direct the Court's attention to the supposed non-joinder; the Court would then call upon the defendant co-sharer to say whether he was willing to be a co-plaintiff: if he say "yes," he can then be shifted from the ranks of the defendants to the side of the plaintiffs and be made a co-plaintiff; and if, as the result of that shifting, the active defendant satisfy the Court that he ought to have an opportunity of considering the new position, the Court can adjourn the trial, upon such terms as to payment of any costs thrown away, as it may deem just: but if the co-sharer defendant decline to be made a co-plaintiff then the trial can proceed with him as a co-defendant. I certainly do not think the suit ought to be dismissed, simply by reason of such non-joinder when at any rate, all the parties interested are before the Court, which has ample power to do what I have said under section 32 of the Code of Civil Procedure. In order to avoid the throwing away of costs, and to ensure the saving of time, an objection as to non-joinder ought to be taken in the written statement, and when so taken the plaintiff should use his best endeavours to get the other co-sharer to join, and if successful, apply at once to have him joined as a co-plaintiff, and if unsuccessful, he would then be in a better position to satisfy the Court, when the objection is raised at the trial, that he has done his best to have him made a co-plaintiff.

We are asked, however, what is to happen if the co-sharer defendant be not represented, or present, at the trial? I think the answer is simple. His absence would indicate that he took no real interest in the dispute, and would raise a strong inference that he did not wish to be made a co-plaintiff, in which case the trial could proceed with him as a co-defendant.

As regards the other question whether the point in relation to section 188 of the Bengal Tenancy Act has been decided by the Lower Appellate Court, looking at the first judgment of [414] the Subordinate Judge, it is so very doubtful, that in my opinion that question ought to be regarded as still open, and as one to be dealt with on the remand.

The case must be remanded to the Subordinate Judge, and the costs will abide the result.

Prinsep, J.—I agree in the judgment which has just been delivered.

O'Kinealy, J.—I agree.

Banerjee, J.—I agree with the learned Chief Justice in the view taken by him in this case.

Hill, J.—I also agree.

S. C. G.

Appeal allowed ; case remanded.

NOTES.

[The suit should not be dismissed merely because the defendant was not called upon to join as plaintiff.—(1899) 26 Cal., 409; (1902) 24 All., 226; (1902) 26 Mad., 461; (1903) 26 Mad., 649; (1906) 29 Mad., 302; (1908) 18 M.L.J., 425; (1909) 13 C.W.N., 509; 9 C.L.J., 331; (1913) 19 C.L.J., 327; (1910) 20 M.L.J., 951; 8 M.L.T., 208; see (1904) 9 C.W.N., 34 and also (1907) 7 C.L.J., 251, as regards limitation.

In (1907) 35 Cal., 331 the Privy Council with reference to sec. 188 of the Bengal Tenancy Act observed, "It was suggested in argument that this section precludes a suit under the Act, for the aggregate rent of the tenure, unless all those entitled to share in the rent join as plaintiffs. Their Lordships are not impressed by this argument. The filing of a suit is not a thing which the landlord is, under the Act, required or authorised to do. It is an application to the Court for relief against an alleged grievance, which the plaintiff is entitled to submit, not by reason of any provision of the Tenancy Act, but under the general law."]

[26 Cal. 415]

The 30th January, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, MR. JUSTICE PRINSEP,
MR. JUSTICE O'KINEALY, MR. JUSTICE BANERJEE, AND
MR. JUSTICE HILL.

Bishambhur Haldar.....Defendant No. 2
versus
Bonomali Haldar and others.....Plaintiffs*

*Public Demands Recovery Act (Bengal Act VII of 1880), sections 2 and 7—
Bengal Act VII of 1868, section 8—Certificate of Sale—Evidence of
sufficiency of service of notice—Act XI of 1859, s. 28.*

Section 8 of Bengal Act VII of 1868 does not apply to a certificate of title granted to a purchaser at a sale in execution of a certificate issued under section 7 of Bengal Act VII of 1880, for arrears of rent alleged to be due to an estate under the Court of Wards, but it is limited in its application to the two descriptions of certificates of title therein referred to, namely, certificates granted under section 28 of Act XI of 1859, and those granted under section 11 of Bengal Act VII of 1868.

Pulin Chandra Roy v. Akbar Hossein, (1893) 1 L. R., 21 Cal., 350, and *Bhola Nath Maity v. Mohimuddin Mahomed*, (1894) 1 L. R., 21 Cal., 350 note, approved.

THIS case was referred to a Full Bench by BANERJEE and [415] PRATT, J.J., on the 8th July 1898. The reference was in the following terms:—

This appeal arises out of a suit brought by the plaintiff-respondent for cancellation of a certificate under Bengal Act VII of 1880, made on the 2nd of April 1890, in favour of defendant No. 1, and of a sale in execution of the certificate at which certain immoveable property of the plaintiff was purchased by defendant No. 2, and for confirmation of the plaintiff's possession of such property. The material allegations of the plaintiff are that the certificate is invalid, because the arrears of rent in respect of which it was made were not really due, the party in whose favour it was made was not in separate receipt of rent of the tenure in question, and the officer by whom it was signed was not the Collector of the District; that no notice of such certificate was issued; that the plaintiff was kept out of knowledge of the certificate and of the proceeding, and sale in execution thereof by the fraud of defendant No. 2; and that the plaintiff came to know of the sale on the 29th of July.

The defence was that the suit was barred by limitation; that the suit was not maintainable as the plaintiff did not proceed in accordance with section 8 (b) of Bengal Act VII of 1880; and that the certificate and the sale in execution thereof were valid and not tainted with fraud.

* Reference to the Full Bench in Appeal from Appellate Decree No. 335 of 1897,

The Courts below have found for the plaintiff and decreed the suit. In second appeal it is contended for the defendant No. 2, *first*, that the suit is barred by limitation; and, *secondly*, that the suit is not maintainable as the plaintiff did not proceed according to section 8, clause (b) of Bengal Act VII of 1880.

In support of the first contention, it is urged that as the sale was confirmed on the 28th of May 1894 and the suit was instituted on the 29th of July 1895, that is, after more than one year, the time allowed by article 12, clause (b) of the second schedule of the Limitation Act, which governs the case, the suit is barred by limitation, and that the Lower Appellate Court is wrong in excluding the time during which the plaintiff's appeal to the Commissioner was pending, the [416] said appeal having failed not "from defect of jurisdiction or other cause of a like nature" within the meaning of section 14 of the Limitation Act, and the deduction of time allowed by that section being claimable only in favour of a proceeding resorted to by the plaintiff under a *bond fide* mistake of fact, and not in favour of one resorted to under a mistake of law even though *bond fide*. On the other hand, it is contended for the plaintiff-respondent, that the plaintiff is not only entitled to the deduction of time allowed by the Lower Appellate Court under section 14 of the Limitation Act, but is further entitled under section 18 of that Act to reckon time from the 29th of July 1894, the date on which he became aware of the fraud of the defendants by which, as found by the first Court, he had been kept out of the knowledge of the sale now sought to be set aside.

If the finding of the first Court on the question of fraud had been affirmed by the Lower Appellate Court, the plea of limitation would no doubt have been completely met. But the Lower Appellate Court has based its decision upon the question of limitation on the provisions of section 14 of the Limitation Act, without advertting to those of section 18 or affirming the finding of the first Court on the question of fraud. So that if that decision is incorrect, and if the suit does not fail on the ground involved in the second contention of the appellant, it will be necessary to remand the case to the Lower Appellate Court, in order that it may determine whether section 18 of the Limitation Act does not save the suit from being barred.

Turning now to the contention of the learned Vakil for the appellant upon the question of limitation, we are of opinion that the second branch of that contention, namely that the deduction of time under section 14 of the Limitation Act is not available for a party who resorted to the previous infructuous proceeding under a mistake of law though *bond fide*, is not sound. There is nothing in the language of the section to warrant this view, and we think it would be unreasonable to restrict its operation in the manner contended for [417] seeing that a *bond fide* mistake of law upon a doubtful point of jurisdiction or procedure is as much entitled to the benefit of the section as a *bond fide* mistake of fact. As for the case of *Ramjiwan Mal v. Chando Mal*, (1888) I.L.R., 10 All., 587, cited for the appellant, it is sufficient to say that it has been dissented from by a Full Bench of the Allahabad High Court in *Brij Mohan Das v. Mannu Bibi*, (1897) I. L. R., 19 All., 348. Nor do we think that the mere fact of the Commissioner having rejected the appeal on the ground of limitation is sufficient to disentitle the plaintiff to the deduction of the time during which that appeal was pending, if, in the opinion of the Court which has to determine the question whether this suit is barred by limitation, that appeal was not really out of time, but failed "from defect of jurisdiction or other cause of a like nature" within the meaning of section 14 of the Limitation Act. But in this case the appeal to the Commissioner was clearly out of time as well under section 2 of Bengal Act VII of 1868 as under section 16

of Bengal Act VII of 1880, the only provisions of the law under which such an appeal could lie; and though under section 5 of the Limitation Act, the appeal could be admitted for sufficient cause though out of time, it was for the Court to which the appeal was made to say whether there was any sufficient cause for admitting it. As no such sufficient cause was shown before the Commissioner, the appeal to him must be taken to have been barred by limitation, and it, therefore, failed for a reason other than "defect of jurisdiction or other cause of a like nature" within the meaning of section 14 of the Limitation Act.

The ground upon which the Lower Appellate Court has overruled the plea of limitation is therefore not sound, and if the suit is not open to the objection raised in the second contention of the appellant, it will be necessary to remand the case to the Court of Appeal below to determine whether the plaintiff is, as has in effect been held by the first Court, entitled to reckon time under section 18 of the Limitation Act from the date when he became aware of the sale of which he had been kept out of knowledge by the fraud of the defendant No. 2.

[418] This brings us to the consideration of the second contention of the learned Vakil for the appellant. It is argued that a suit like the present for cancellation of a certificate under Bengal Act VII of 1880 can be entertained only if the preliminary step required by section 8, clause (b) of the Act, has been taken, or good cause is shown why it was not taken; and as this has not been done, the suit is not maintainable. The first Court in its judgment on the 4th issue which raised this point has found that no notice (that is notice under section 10 of the Act) was served, nor was any sale proclamation published, and so the plaintiff was not bound to proceed under section 12 as required by section 8, clause (b) of the Act, and he was not debarred from maintaining the suit; and the correctness of that finding of the first Court was not questioned in the Lower Appellate Court, nor was it questioned before us. And if that finding be correct, the conclusion based upon it, namely, that the plaintiff was not bound to proceed under section 12 of Bengal Act VII of 1880 and was not debarred from maintaining this suit, must also be correct—See *Saroda Charan Bandopadhyaya v. Kisto Mohun Bhattacharjee*, (1897) 1 C. W. N., 516. But the learned Vakil for the appellant argued that, as a certificate of sale had been granted to the auction-purchaser, defendant No. 2, it was under section 8 of Bengal Act VII of 1868, which is by section 2 of Bengal Act VII of 1880 to be construed as one with the last mentioned Act, conclusive evidence that all necessary notices have been duly served, and that it was not open to the Courts below to inquire whether the notice in question was served or not; and in support of this argument the case of *Rajoni Kanto Roy v. Champa Dasi*, (1898) 2 C. W. N., (S. N.) colli, is cited. That case no doubt supports the contention for the appellant, but it is opposed to two earlier cases, not referred to in it, namely, *Pulin Chandra Roy v. Akbar Hossein*, (1893) I. L. R., 21 Cal., 350; and *Bhola Nath Marti v. Mohinuddin Mahomud*, (1894) I. L. R., 21 Cal., 350 (note); and we must, therefore, refer the matter to a Full Bench. We should add that our own opinion is in favour [419] of the view taken in the two earlier cases, for the reasons given in those cases.

The question for the determination of which this case is referred to a Full Bench is, whether section 8 of Bengal Act VII of 1868 applies to a certificate of title granted to a purchaser at a sale in execution of a certificate issued under section 7 of Bengal Act VII of 1880 for arrears of rent alleged to be due to an estate under the Court of Wards, or whether it is limited in its application to the two descriptions of certificates of title therein referred to, namely, certificates granted under section 28 of Act XI of 1859, and those granted under section 11 of Bengal Act VII of 1868.

As the question arises in a second appeal, according to the rules relating to Full Bench references, the whole case must be referred for decision to a Full Bench.

Dr. Ashutosh Mookerjee, Babu Jnanendra Nath Bose, and Babu Biraj Mohun Mazoomdar, for the Appellant.

Babu Shyma Prosunna Mazumdar, for the Respondents.

Dr. Ashutosh Mookerjee.—The question is whether section 8 of Bengal Act VII of 1868 applies to a certificate of title issued under Bengal Act VII of 1880; in other words what is the meaning of section 2 of Bengal Act VII of 1880? Practically, therefore, the question is, under what section is the certificate granted—whether it is under section 28 of Act XI of 1859, read with section 2 of Bengal Act VII of 1880, or under section 316 of the Code of Civil Procedure? It is clear from the language of section 19 of Bengal Act VII of 1880 that section 316 of the Civil Procedure Code does not apply. I, therefore, submit that the certificate in question, which on the face of it purports to have been granted under section 28 of Act XI of 1859, was rightly granted. Section 2 of Bengal Act VII of 1880 incorporates Act XI of 1859 and Bengal Act VII of 1880 and Bengal Act VII of 1868 into one Code. The case of *Sadhu Saran Singh v. Panchdeo Lal*, (1886) I.L.R., 14 Cal., 1, shows that sections 311 and 312 of the Civil Procedure Code do not apply to sales under a certificate issued under Bengal Act VII of 1880; from this it would follow that section 316 of the Code also will not [420] apply. See also the case of *Monindra Nath Mookerji v. Saraswati Dasi*, (1890) I. L. R., 18 Cal., 125. It has no doubt been recently held in the cases of *Mohibul Huq v. Shew Sahay Singh*, (1897) I. L. R., 25 Cal., 85, and *Mahomed Abdul Hye v. Gajraj Sahai*, (1897) I. L. R., 25 Cal., 283, that sections 33 and 34 of Act XI of 1859 are not applicable to sales under Bengal Act VII of 1880, but the terms of those sections are quite different from those of section 28 of Act XI of 1859. There is nothing in the terms of section 28 of Act XI of 1859 which would contradict the view that it is applicable to sales under Bengal Act VII of 1880. The case of *Rajoni Kanta Roy v. Champa Dasi*, (1898) 2 C. W. N., (S.N.) celi, supports my contention.

Babu Shyma Prosunna Mazumdar for the Respondents.—Section 8 of Bengal Act VII of 1868 enacts a provision of a stringent character, and the scope of the section ought not to be extended beyond what has been expressly mentioned by the Legislature. The heading of the certificate in this case may show that it was granted under section 28 of Act XI of 1859, but that cannot be conclusive. The body of it is substantially in the form prescribed under section 316 of the Code of Civil Procedure, and not in the form prescribed under Schedule A of Act XI of 1859. Then there is a vital distinction. In the case of a certificate under Act XI of 1859 the title of the purchaser accrues from the date fixed for the last day of payment, whereas in this case the title purports to accrue from the day of the confirmation of the sale. It was never intended by the Legislature that Act XI of 1859, Bengal Act VII of 1868, and Bengal Act VII of 1880, should be read together as one Act. The qualifying words in section 2 of Bengal Act VII of 1880 “so far as is consistent with the tenor thereof,” are important and ought not to be lost sight of. Section 10 of Bengal Act VII of 1880 makes the notice imperative. Their Lordships of the Privy Council observe in the case of *Bajinath Sahai v. Ramgut Singh*, (1896) I. L. R., 23 Cal., 775: L. R., 23 I. A., 45, that the forms required by the Act are matters of substance. See also the cases of *Saroda Charan Bandopadhyaya v. Kisto Mohun Bhattacharjee*, (1897) 1 C. W. N., 516; *Uzir Ali v. [421] Kartick*, (1897) 2 C. W. N., 363. As for the three Acts being read together as one, see the remarks of PIGOT and RAMPINI, JJ., in the case of

Gujraj Sahai v. The Secretary of State for India, (1899) I. L. R., 17 Cal., 414. The policies of the two sets of Acts are different. The notice under section 10 of Bengal Act VII of 1880 is to be issued in accordance with the provisions of the Civil Procedure Code; see *Rakhal Chandra Rai Chowdhuri v. The Secretary of State for India*, (1886) I. L. R., 12 Cal., 603, whereas in Act XI of 1859, or Bengal Act VII of 1868, notices and other processes are required to be served in accordance with the special provisions contained therein. The cases of *Pulin Chandra Roy v. Akbar Hossein*, (1893) I. L. R., 21 Cal., 350, and *Bhola Nath Maiti v. Mohinuddin Mahomed*, (1894) I. L. R., 21 Cal., 350, note, are rightly decided. The case of *Rajoni Kanta Roy v. Champa Dasi*, (1898) 2 C. W. N., (S. N.) ccli., cannot be regarded as an authority, inasmuch as it loses sight of the important saving clause in section 2 of Bengal Act VII of 1880, and also because it does not notice the previous cases. The case of *Sadhu Saran Singh v. Panchdeo Lal*, (1886) I. L. R., 14 Cal., 1, proceeds upon a different principle. The remarks of PETHERAM, C.J., in the case of *Monindra Nath Mookerji v. Saraswati Dasi*, (1890) I. L. R., 18 Cal., 125, would show that a sale under Bengal Act VII of 1880 would require to be confirmed under section 314 of the Civil Procedure Code. The case of *Mahomed Abdul Hye v. Gajraj Sahai*, (1897) I. L. R., 25 Cal., 283, and the case of *Mahibul Huq v. Shew Sahay Singh*, (1897) I. L. R., 25 Cal., 85, cited by the other side support my contention.

Dr. Ashutosh Mookerjee in reply.

The following judgments were delivered by the Full Bench :—

Maclean, C. J.—In this case I agree with the view expressed by the two referring Judges, which is in accord with [422] that expressed in the two cases of *Pulin Chandra Roy v. Akbar Hossein*, (1893) I. L. R., 21 Cal., 350, and *Bhola Nath Maiti v. Mohinuddin Mahomed*, (1894) I. L. R., 21 Cal., 350, note. Agreeing as I do with the reasons upon which those decisions are based, no useful object will be attained by my merely repeating them. The question then must be answered in the negative, and the case must be remanded, as is suggested in the reference, for the purpose of ascertaining whether the case is brought within section 18* of the Limitation Act, Act XV of 1877.

The costs will abide the results of the re-trial.

Prinsep, J.—I am of the same opinion. The difficulty in this case has arisen from the attempt to consolidate, by reading as one Act, three different Acts of a different character, and passed after some interval of time, relating to the recovery of public demands. To provide against any possible confusion that may arise from such circumstances the words "so far as is consistent with the tenor" of the Acts specified in section 2 of Bengal Act VII of 1880, have been used in that section; and accordingly it has now fallen upon us to decide what is the real meaning and effect of section 8 of Bengal Act VII of 1868, as applied to proceedings taken under the Act of 1880. The conclusion that I have arrived at, after giving full consideration to the matter, is that the terms

* [Sec. 18 :—When any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him,

the time limited for instituting a suit or making an application

(a) against the person guilty of the fraud or accessory thereto, or,

(b) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.]

of section 8 of Bengal Act VII of 1868, must be limited to sales held in respect of arrears of public revenue provided for by Act XI of 1859, and to none other, and that it does not apply to sales held to realize public demands under section 8 of Bengal Act VII of 1880.

O'Kinealy, J.—I agree with the decision in the case of *Pulin Chandra Roy v. Akbar Hossein*, (1893) I. L. R., 21 Cal., 350, and think that the certificate in this case is not one under section 28 of Act XI of 1859.

Banerjee, J.—I am of the same opinion. The question for the determination of which this case has been referred to a Full Bench is, "whether section 8 of Bengal Act VII of 1868 applies [423] to a certificate of title granted to a purchaser at a sale in execution of a certificate issued under section 7 of Bengal Act VII of 1880, for arrears of rent alleged to be due to an estate under the Court of Wards, or whether it is limited in its application to the two descriptions of certificates of title therein referred to, namely, certificates granted under section 28 of Act XI of 1859 and those granted under section 11 of Bengal Act VII of 1868."

Upon that question, besides certain cases which have only an indirect bearing, there are three cases having a direct bearing, namely, the cases of *Pulin Chandra Roy v. Akbar Hossein*, (1893) I. L. R., 21 Cal., 350, and *Bhola Nath Maht v. Mohinuddin Mahomed*, (1894) I.L.R., 21 Cal., 350, note, referred to, and the case of *Rajoni Kanta Roy v. Champa Das*, (1898) 2 C. W. N., (S. N.) colli. Of those, the first two affirm the view indicated in the latter alternative of the question, while the last mentioned case answers the former alternative in the affirmative; and the question is, which of these two views is correct.

I am of opinion that the view taken in the two first mentioned cases is correct. Section 8 of Bengal Act VII of 1868 enacts that "Every certificate of title which may be given to any purchaser under the provisions of section 28 of the said Act XI of 1859, or of section 11 of this Act, shall be conclusive evidence in favour of such purchaser and of every person claiming under him, that all notices in or by this Act or by the said Act XI of 1859 required to be served or posted, have been duly served and posted." This being then, "an enactment" to use the language of ERLE, C.J., in the case of *Nothard v. Pepper*, (1864) 17 C. B. N. S., 39 (50), altering the law as to evidence and creating statutory evidence whereby the rights of parties may be defeated "must be construed strictly, and the plain language of the section would limit its application to the two descriptions of certificates therein expressly mentioned. But then it is contended that though section 8, standing alone, might bear that construction, yet the effect of section 2 of Bengal Act VII of 1880, under which the sale in question was held, would be to make section 8 of the Act of 1868 applicable to this case. In support of this contention certain [424] cases have been referred to as showing, in the first place, that section 316 of the Code of Civil Procedure, the only other provision of law under which the certificate in question could possibly be held, regard being had to section 19 of Bengal Act VII of 1880, to have been granted, is inapplicable to this case; and as showing further, that certain sections of Act XI of 1859 and of Bengal Act VII of 1868, namely, section 27 of the former and section 2 of the latter, have, notwithstanding that they are not in terms applicable to such cases, been held to be applicable to sales under Bengal Act VII of 1880. And it is argued that, if that is so, there is no reason why section 28 of Act XI of 1859 should not be held applicable to this case, and the certificate of sale in question should not be held to have been granted under that section and to come within the scope of section 8 of Bengal Act VII of 1868.

With reference to the first branch of this contention, I do not think that there is any good reason for holding that section 316 of the Code of Civil Procedure is inapplicable to this case, and that the certificate of sale in question could not have been granted under that section.

Section 19 of Bengal Act VII of 1880 says that a certificate of public demand may be enforced and executed by all or any of the ways and means mentioned and provided in and by the Code of Civil Procedure for the enforcement and execution of decrees for money, and all the practice and procedure provided by the said Code of Civil Procedure in respect of sales in execution of decrees and in respect of certain other matters specifically mentioned, shall apply to every execution issued to enforce such certificate. That would make the provisions of the Code of Civil Procedure for the granting of a certificate of sale applicable. But then it is said that that view is opposed to the decision of this Court in the cases of *Sadhu Saran Singh v. Panchdeo Lal*, (1886) I. L. R., 14 Cal., 1; and *Ram Logan Ojha v. Bhawan Ojha*, (1886) I. L. R., 14 Cal., 9. I do not think that that view is opposed to those two decisions. It is true that, in both those cases section 312 of the Code of [425] Civil Procedure, in so far as it relates to a suit or an application for setting aside a sale, has been held to be inapplicable to a sale under the Public Demands Recovery Act (Bengal Act VII of 1880), but that does not go to show that the granting of a certificate of sale to the auction-purchaser could not have been under the Code of Civil Procedure. The passage in the judgment in the earlier of the two cases cited upon which reliance was placed is that in which the learned Judges say: "But it seems to us that the words in respect of sales in execution of decrees do not include any proceedings instituted after the sale for setting it aside." Though that may be so, it does not follow that the procedure for a sale in execution, down to its completion by the grant of a sale certificate, would be inapplicable to a sale under Bengal Act VII of 1880. The learned Judges do not say that the words of section 19 of Bengal Act VII of 1880 do not include "any proceedings instituted after the sale," but they are careful to qualify the words "proceedings instituted after the sale" by the words "for setting it aside." There is, in my opinion, a real distinction between the proceedings leading to the sale and to its completion by the grant of a certificate of sale to the auction-purchaser, and separate and antagonistic, though simultaneous, proceedings instituted by a judgment-debtor or by a decree-holder or by a third party to have the sale set aside; and it was in regard to these latter proceedings that it was held in the case relied upon, that the Code of Civil Procedure was inapplicable to a sale under Bengal Act VII of 1880, and that the proper procedure is to be found in other enactments.

The second case relied upon merely follows the case to which reference has just been made. In my opinion, therefore, there is no real conflict between the view taken in the case of *Pulin Chandra Roy v. Akbar Hossein*, (1893) I. L. R., 21 Cal., 350, and the two cases of *Sadhu Saran Singh v. Panchdeo Lal*, (1886) I. L. R., 14 Cal., 1, and *Ram Logan Ojha v. Bhawan Ojha*, (1886) I. L. R., 14 Cal., 9.

I may add that even if section 316 of the Code of Civil Procedure was not applicable to the present case, still it would [426] not follow that a certificate granted to an auction-purchaser at a sale held under Bengal Act VII of 1880 comes within the scope of either section 28 of Act XI of 1859, or section 11 of Bengal Act VII of 1868, which is the position which the appellant must make out before the irrebuttable presumption under section 8 of Bengal Act VII of 1868 can be raised in his favour. Now it is conceded, as it must

be, that the certificate of sale in question cannot come within the scope of section 11 of Bengal Act VII of 1868. It must, therefore, be shown to come under section 28 of Act XI of 1859 before the presumption just referred to can arise.

This brings me to the consideration of the latter branch of the contention, namely, that as certain other provisions of Act XI of 1859 and Bengal Act VII of 1868 have, by virtue of section 2 of Bengal Act VII of 1880, been held to be applicable to sales under this last mentioned enactment, section 28 of Act XI of 1859 should, for the same reason, be held to be applicable to this latter class of sales. The cases which have been relied upon are the two cases of *Sadhu Saran Singh v. Panchdeo Lal*, (1886) I. L. R., 14 Cal., 1, and *Ram Logan Ojha v. Bhawani Ojha*, (1886) I. L. R., 14 Cal., 9, just referred to, and the case of *Monindra Nath Mookerji v. Saraswati Dasi*, (1890) I. L. R., 18 Cal., 125, in which it was held that section 27 of Act XI of 1859 was applicable to a sale under the Public Demands Recovery Act of 1880. But because certain sections of the earlier enactments have, by virtue of section 2 of Bengal Act VII of 1880, been held to be applicable to sales under the latter enactment, it does not follow that the section we are now dealing with, namely, section 28 of Act XI of 1859, should be held to be similarly applicable. Whether it is so applicable or not would depend upon the language of the section, and its consistency with the tenor of the enactment to which it is sought to be made applicable. Now referring to section 28 of Act XI of 1859, I find it extremely difficult to hold that the effect of section 2 of Bengal Act VII of 1880 is to make it applicable to a sale under the latter enactment. Section 28 provides that immediately upon a sale becoming final and conclusive, the Collector or [427] other officer shall give to the purchaser a certificate of title in the form prescribed in Schedule A annexed to the Act, and the form given in the schedule shows that it is intended to apply only to a sale for arrears of public revenue, and not to a sale for any other demand recoverable under any other Act.

Can it, then, be said that merely because Bengal Act VII of 1880 is by section 2 of that Act to be construed as one with Act XI of 1859, a sale of the kind to which the form of certificate referred to in section 28 of Act XI of 1859 can have no application, must, nevertheless, be held to be a sale to which that section applies. I think this question must be answered in the negative.

I may observe that section 2 of Bengal Act VII of 1880 has been held not to have the effect of making sections 33 and 34 of Act XI of 1859 applicable to sales in execution of certificates for recovery of public demands, and that section 2 of Bengal Act I of 1895, the present Public Demands Recovery Act, does not embody the rule of construction contained in section 2 of the former Act. See *Mohibul Huq v. Shew Sahay Singh*, (1897) I. L. R., 25 Cal., 85, and *Mahomed Abdul Hye v. Gajraj Sahay*, (1897) I. L. R., 25 Cal., 283.

For these reasons and the reasons given in the referring order, I think that the contention of the appellant upon the question referred to us must fail, and the case must be remanded to the Lower Appellate Court for a decision upon the question of fraud.

Hill, J.—I am of the same opinion, and all that I wish to say is that I have heard nothing here to-day to induce me to alter the opinion on either of the points raised, which I expressed in the case of *Pulin Chandra Roy v. Akbar Hossein*, (1893) I. L. R., 21 Cal., 350, and that I adhere to it.

S. C. G.

Appeal allowed. Case remanded.

NOTES.

I. Though omission to give notice under sec. 6 of B.L.R.S. Act XI of 1859 may be a mere irregularity, 34 Cal., 391; 5 C.L.J., 425; 32 Cal., 111; 8 C.W.N., 757; 31 Cal., 256; 10 C.W.N., 137; yet, the omission to give notice under sec. 5 is fatal:—32 Cal., 111; 1 C.L.J., 565. See also (1905) 3 C.L.J., 280; (1907) 29 Cal., 94; (1907) 6 C.L.J., 472.

II. As regards mistakes of law being within sec. 14, Indian Limitation Act, 1908, see also (1900) 22 All., 248; (1910) 15 C.L.J., 160; 6 C.L.J., 472.

III. "The case of (1902) 6 C.W.N., 302 which has been subsequently followed by this Court in (1905) 4 C.L.J., 68 shows that the doctrine of representation and the principle of estoppel upon which the decision of the majority of the judges in the case of (1899) 26 Cal., 414 is based, are not to be extended to cases of sales under the Public Demands Recovery Act":—*per* MOOKERJEE, J., in (1909) 10 C.L.J., 201.]

[428] *The 31st January, 1899.*

PRESENT:

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,
MR. JUSTICE PRINSEP, MR. JUSTICE O'KINEALY, MR. JUSTICE BANERJEE,
AND MR. JUSTICE HILL.

Dwarkanath Roy.....Plaintiff

versus

Ram Chand Aich and others.....Defendants.*

Res Judicata—Civil Procedure Code (Act XIV of 1882), Section 13—Suit for rent—Suit for establishment of title.

A decision in a suit for rent brought by a plaintiff against a person who is alleged to have been his tenant in respect of certain land, does not operate as *res judicata* in a subsequent suit brought by the same plaintiff for establishment of his title to the land, not only against the alleged tenant but also against the person whose title as landlord the tenant defendant had set up in the rent suit.

THIS case was referred to a Full Bench by BANERJEE and RAMPINI, JJ., on the 11th January 1899, with the following OPINION:—

This appeal arises out of a suit brought by the plaintiff appellant, to obtain a declaration that the plaintiff had a *mohatran* and *karmi njara* right to the land in suit, and that the defendant No. 1 was a *kursa ryot* under him, and to recover *khas* possession upon ejectment of the defendant No. 1. The plaintiff stated in his plaint that he had previously brought a suit for rent against the defendant No. 1; that the defendant No. 1 in that suit denied the existence of the relationship of landlord and tenant between him and the plaintiff, and alleged that a third party, who was made a defendant in this suit, was his real landlord; and that the rent suit having been dismissed the plaintiff brought the present suit.

The defence raised various points, of which it is necessary to notice only one for the purposes of this appeal, namely, that the suit was barred under section 13 of the Code of Civil Procedure.

The First Court overruled the objection of the defendant that the suit was barred as *res judicata*, and on the merits it found for the plaintiff, and accordingly a decree was made in favour of [429] the plaintiff, declaring his right to the land in dispute. And as the plaintiff did not press for *khas* possession, a further declaration was given in favour of the plaintiff that he was entitled to recover rent from the defendant No. 1 at the rate of Rs. 6 a year.

* Reference to the Full Bench in appeal from Appellate Decree No. 217 of 1897.

On appeal by the defendant the decree of the First Court has been reversed and the plaintiff's suit dismissed on the ground that it was barred as *res judicata* by reason of the decision in the rent suit brought by the plaintiff against the defendant No. 1.

In second appeal it is contended for the plaintiff appellant, that the decision of the Lower Appellate Court is wrong, and that the judgment in the rent suit cannot operate as *res judicata* in the present suit for two reasons, *first*, because the question which directly arises in this suit, namely, the question of the plaintiff's title to the land in dispute, was not raised in the former suit, and could arise, if at all, only incidentally in that suit, and *secondly*, because the former suit was not one between the same parties as those in the present suit, the alleged landlord whose title the tenant defendant set up in the previous suit being a party to the present suit, but not having been made a defendant in the previous suit.

No doubt the case of *Gopal Das v. Gopi Nath Sircar*, (1882) 12 C. L. R., 38, which is referred to in the judgment of the Lower Appellate Court, is in favour of the defendant. But with all respect for the learned Judges who decided that case we are unable to assent to the view taken by them. We are of opinion that the contention of the learned Vakil for the appellant is correct, and that the decision in the rent suit cannot operate as *res judicata* in the present suit.

The learned Vakil for the respondent argued that quite apart from the case of *Gopal Das v. Gopi Nath Sircar*, (1882) 12 C. L. R., 38, the present suit had been rightly held by the Lower Appellate Court to be barred as *res judicata*, because the prayer for ejectment having been abandoned by the plaintiff in the First Court, the only question that remained to be decided as between the plaintiff and the defendant No. 1 was whether the plaintiff [430] was entitled to claim any rent from the defendant No. 1 as his tenant, and upon that question the decision of the former suit must be held to operate as *res judicata*. We do not, however, consider the argument sound. The only question that arose for determination in the previous rent suit was whether the relation of landlord and tenant subsisted between the parties to that suit during the period for which rent was then claimed, and the question which arises for determination in the present suit, after the abandonment of the claim for ejectment, is whether the land in dispute belongs to the plaintiff, and whether if it is found in the presence of the defendants other than the tenant defendants, who are the only persons whose title was set up by the latter, that the land belongs to the plaintiff, the plaintiff is not entitled to claim rent from the tenant defendants. This question is clearly different from the question which arose in the former suit. If, therefore, the case of *Gopal Das v. Gopi Nath Sircar*, (1882) 12 C.L.R., 38, had not stood in the way, we should not have felt any hesitation in deciding the question of *res judicata* in favour of the plaintiff; but as the case just referred to is in point, and as we are unable to assent to the view taken in that case, we must refer for the decision of a Full Bench the question whether a decision in a suit for rent brought by a plaintiff against a person who is alleged to have been his tenant in respect of certain land, operates as *res judicata* in a subsequent suit brought by the same plaintiff for establishment of his title to the land, not only against the tenant but also against the person whose title as landlord the tenant defendant had set up in the rent suit. And as this question arises in a second appeal the whole case must be referred to a Full Bench.

We may add that this question was on a previous occasion referred to a Full Bench, but it became unnecessary for the Full Bench to decide the question by reason of the action taken by the parties. The case we refer to is that of *Alimuddin Biswas v. Kafiluddi*, (1898) 2 C. W. N. (s.n.) clvii.

Babu Saroda Churn Mitter for the Appellant.

Dr. Rash Behary Ghosh and Babu Mohendra Kumar Mitter for the Respondents.

[431] The Full Bench (MACLEAN, C.J., PRINSEP, O'KINEALY, BANERJEE, and HILL, J.J.) delivered the following judgments:—

Maclean, C.J.—The question submitted to us ought to be answered in the negative. The issue determined in the previous suit (a rent-suit) was, whether the relation of landlord and tenant existed at the time when that suit was instituted between the present plaintiff and the then defendant, and whether the then defendant was liable for the amount then claimed as rent for a certain period. That issue was decided against the present plaintiff, and as it is conceded that nothing has occurred in the interval to change the position of the parties, that question must be treated as *res judicata* as against the plaintiff, and in the defendants' favour. But the relief sought in the present suit is absolutely different from the relief sought in the previous suit. The present issue is, whether the land in dispute belongs to the plaintiff, and, if so, whether the plaintiff is entitled to compensation from the tenant defendant for the use of the land. That is put clearly in the reference, and I agree with the view expressed by the referring Judges, that, having regard to the nature of the relief sought in the previous suit, and the relief sought in the present suit, it is impossible to say that the plaintiff is barred in this suit from establishing his title to the land both against the alleged tenant and also against the person whose title as landlord the tenant defendant had set up in the rent-suit.

I do not propose to refer to the case of *Gopal Das v. Gopi Nath Sircar*, (1882) 12 C. L. R., 38, because it has not been relied on by the learned Vakil who argued the respondents' case.

The appeal must be allowed, and the case remanded to the Lower Appellate Court for trial on the merits, and the costs both of the hearing before the Division Bench and of this reference must abide the result.

Prinsep, J.—The question referred for our decision is, whether the proceedings in the former suit are a bar to the present suit by reason of section 13 of the Code of Civil Procedure.

In the former suit, the present plaintiff sued the tenant defendant for arrears of rent, claiming that the defendant was his tenant. [432] The defendant pleaded that he was not the plaintiff's tenant, but the tenant of a third party who was entitled to the land. That suit was dismissed. The plaintiff has now again sued the defendant tenant, joining with him the person who was in the former suit set up as the defendant's landlord, and he has asked for a decree declaring his title to the land with consequential relief in somewhat complicated terms. First of all, he has asked for consequential relief by ejectment of the defendant tenant who disputed his title in the former suit, and he has also asked for alternative relief in the shape of rent from the defendant. In the course of the suit it would seem that his legal advisers, on his behalf, withdrew the claim for ejectment, and, therefore, by his suit, as it is now presented to us, the plaintiff is seeking for a declaration of his title to the land and for the recovery of rent from the defendant tenant who had successfully disputed his right to receive rent from him in the former suit.

At first sight, it would seem that this claim is barred, inasmuch as it was made the subject of the previous suit and was adjudicated upon, for it is not

stated that at any time since the decision in the former suit fresh relations of landlord and tenant have been created between the parties so as to prevent the findings in that suit being applied to them now. But the suit, so far as the adjudication of the plaintiff's title is concerned, cannot, as I understand the law, be considered as *res judicata* in the present proceedings, inasmuch as the parties are not the same, the plaintiff having, in this case, joined with the tenant defendant who disputed his title, the person under whom that tenant professed to hold, and his object in bringing this suit is to remove the cloud which was cast upon his title by the former proceedings, and he could not effectually do so except by making, as his adversary in this suit, the person who professes to hold the title as against him. Ordinarily, he would not be entitled to consequential relief in the form of a decree for rent, because it had already been decided in the former suit between him and the tenant that he was not entitled to such rent. We have, however, to apply the terms of section 157 of the Bengal Tenancy Act, and, under that section, the plaintiff can, in my opinion, obtain a [433] decree in the form which he seeks. Section 157 enables the plaintiff in a suit for the ejectment of a trespasser, such as the present suit, to ask instead of his ejectment, that the trespasser or the person whom he seeks to eject may be declared liable to pay, for the land in his possession, a fair and equitable rent to be determined by the Court, and that, as I understand, is the form which the suit now before us has assumed.

It seems to me, therefore, that the present suit is not barred, and that the plaintiff, if he establishes his right, can obtain a decree in this form.

O'Kinealy, J.—I agree with the opinion expressed by the learned Chief Justice. In 1885, the plaintiff brought a suit for rent against the defendant No. 1, and in that suit, it was decided on issue raised, by a Court of competent jurisdiction, that the relation of landlord and tenant did not exist. That, I think, was *res judicata* that the relationship of landlord and tenant did not exist between these parties in 1885, but I agree in considering that that would not dispose of the matter, for on the day after that decree, the plaintiff could have brought an action in ejectment and have succeeded if he could have made out his title to the property and that the cause of action was not barred. He can do the same now, and if the pleadings be read as constituting an action in ejectment, the suit is good, and not barred by *res judicata*. It has been pointed out, that if the plaintiff is entitled to maintain the action, he may, under section 157 of the Bengal Tenancy Act, claim in the alternative a fair and equitable rent to be determined by the Court. I think, therefore, that the case must be disposed of on these lines.

It seems to me that there has been a misconception in regard to the case of *Gopal Das v. Gopi Nath Sircar*, (1882) 12 C. L. R., 38. In that suit Gopi Nath Sircar brought a suit against the tenant, and lost; he then brought a second suit against the same tenant and another person, who, in the first suit, was said to be the landlord, but he was made only a *pro forma* defendant and no relief was asked for as against him. We held, and held rightly, that when the title of the plaintiff to rent is in issue in both suits that would [434] be *res judicata*, and the effect of the decision is not got rid of by the plaintiff putting on the record as a party a person who is not really one.

Banerjee, J.—I agree with the learned Chief Justice. I have nothing to add to what he has said in his judgment and to what I have said in the order of reference, except this, that a right to claim rent may arise under section 157 of the Bengal Tenancy Act upon the establishment of the plaintiff's right to the land in dispute, notwithstanding that his right to receive rent from the first defendant was found to be not established in the previous suit for arrears of rent, and that the judgment in the previous rent-suit cannot therefore

operate as *res judicata*, not only as against the claim for establishment of title and recovery of possession, but also as against the claim for rent under present circumstances.

HILL, J.—I also agree with the learned Chief Justice. It appears to me that so far from its being sought in the present suit to re-open an issue already tried and determined by a competent Court, the former finding has been assumed by the plaintiff in this suit to be correct, and has been made the foundation of the relief which he now seeks.

S. C. G.

Appeal allowed. Case remanded.

NOTES.

[As regards the question of *res judicata*, see also (1901) 6 C.W.N., 66; (1906) 10 C.W.N., 820; (1912) 17 C.W.N., 76; (1913) 18 C.W.N., 116, wherein this decision is explained by JENKINS, C.J; (1912) 37 Mad., 70.]

[26 Cal. 434]

APPELLATE CIVIL.

The 13th January, 1899.

PRESENT:

SIR FRANCIS W. MACLEAN, K. C. I. E., CHIEF JUSTICE, AND MR.
JUSTICE BANERJEE.

Joy Sankari Gupta.....Plaintiff

versus

Bharat Chandra Bardhan and others.....Defendants.*

Partition—Estates' Partition Act (Bengal Act VIII of 1876), sections 112 and 128—Incumbrance created by a co-sharer before partition—Effect of partition by Collector, where the land so incumbered fell exclusively into the share of another co-sharer.

[435] On partition by the Collector under the Estates' Partition Act (Bengal Act VIII of 1876) when any land of an undivided joint estate, which was incumbered by any co-sharer, is allotted to any other co-sharer, the latter takes it free from the incumbrance so created.

Khan Ali v. Pestonji Eduljee, (1896) 1 C. W. N., 62, distinguished.

The cases of *Nuthoo Lall Chowdhry v. Saadat Lall*, (1864) Sp. Vol. W. R., 271, and *Ahmedoollah v. Ashruff Hossein*, (1870) 13 W. R., 447; 8 B. L. R., Ap. 73 note, have been overruled in effect by the decision of the Privy Council in the case of *Byjnath Lall v. Ramoodeen Chowdry*, (1873) L. R., 1 I. A., 106.

THIS appeal arose out of an action brought by the plaintiff to recover *khas* possession of a share in certain plots of land after ejectment of defendants Nos. 1 to 5. The allegation of the plaintiff was that the lands in dispute appertained to mehals Nos. 1285 and 402, which were jointly held by him and the defendants Nos. 6 and 7; that the defendant No. 7, the proprietor of mehal No. 402, had an eight annas share, and the plaintiff and defendant No. 6, as proprietor of mehal No. 1285, had a four annas share each, in the disputed lands; that there was a partition of the two estates by the Collector by which the disputed lands were allotted to defendant No. 6 and the plaintiff; and that therefore he (the plaintiff) was entitled to recover possession of the said lands

* Letters Patent Appeal No. 27 of 1897 in Appeal from Appellate Decree No. 715 of 1896 against the Decree of Mr. Justice Rampini, one of the Judges of this Court, dated the 13th of April 1897.

from the defendants. The contending defendants 1 to 5, pleaded *inter alia* that the disputed lands were held by them as *mirasdars* under the proprietors of both estates, and therefore they were not liable to ejection, and that the suit was barred by limitation. The Court of First Instance decreed the suit holding that inasmuch as by the *butwara* proceeding the disputed lands fell exclusively into the share of the plaintiff, he would be entitled to get them free of all incumbrances. On appeal to the Subordinate Judge he reversed the decision of the first Court, and dismissed the plaintiff's suit. From this decision the plaintiff appealed to the High Court, and Mr. Justice RAMPINI, sitting alone, confirmed the decision of the Lower Appellate Court. The material portion of his Lordship's judgment was as follows :—

"Now, it would seem to me that if the *miras* and *utsargo* titles set [436] up by the defendants 1 to 5 were granted by the plaintiff as well as by defendants 6 and 7, the plaintiff is unquestionably entitled to no relief, and if I were of opinion that he is entitled to relief on the assumption that the title under which the defendants 1 to 5 hold the land was created by the defendant No. 7 alone, I would consider it necessary to remand the case for a clear finding as to who created the grant or grants in favour of the Bardhan defendants.

"But I do not think that the plaintiff is entitled to any such relief as he seeks for in this case, even supposing that the grant or grants in favour of the defendants 1 to 5 were made by the defendant No. 7 alone. In the first place, there is no express provision of the law under which, on allotment of the lands of the estates, the Bardhan defendants' lease of the disputed plots of land, which are specific plots of land, will attach to the share of the estates allotted to the defendant No. 7. If the defendant No. 7 had created in favour of the Bardhan defendants an incumbrance on his share of the estates, the case would have been very different. But in this case the Bardhan defendants hold specific plots of land, and there seems no reason, as far as they are concerned, why they should exchange their plots of land for any others. The learned pleader for the appellant relies on section 128 of the Estates' Partition Act, and on the case of *Hem Chunder Ghose v. Thako Moni Debi*, (1893) I. L. R., 20 Cal., 533. But section 128 of the Estates' Partition Act, as pointed out by the Munsif, does not expressly apply; for, as above observed, the defendant No. 7 did not give his share or a portion of 'it in *putni* or other tenure of lease.' The Munsif, therefore, falls back, as he says, on 'the equitable principle underlying it.' But I do not think the Munsif or I can make a law to suit the circumstances of this case, when the Legislature has not seen fit to do so. The case of *Hem Chunder Ghose v. Thako Moni Debi*, (1893) I. L. R., 20 Cal., 533, is also not to the point. That is a case in which there was a mortgage of a share of a property, and it was held that on partition the mortgage lien attached to the share allotted to the mortgagee. In that case there was no mortgage of specific plots of land, as in the case out of which the present appeal arises.

"A case much more to the point is that of *Khan Ali v. Pestonji Eduljee*, (1896) 1 C. W. N., 62, in which there was a lease of a particular plot of land, and it was held that 'the mode in which the lands were allotted on partition between the ascertained sharers did not affect the right to any specific property.' No doubt in that case the plaintiff was required to pay a small sum of money to his other co-sharers in respect of his having obtained a more valuable property. But it does not appear that the lease granted by his other co-sharers was taken into consideration in estimating the value of his share of [437] the property, and the decision did not proceed on this ground, but on the ground stated above.

"The cases of *Nuthoo Lall Choudhry v. Saadul Lall*, (1864) Sp. Vol. W. R., 271, and *Almedoolah v. Ashruff Hossein*, (1870) 13 W. R., 447; B. L. R., Ap. 73 note, would also appear to be in favour of the respondents.

* * * * *

"It is said there is no provision of the Estates' Partition Act exactly applying to a case like this. However this may be, it is impossible for me now to interfere with the Collector's

partition, and I would, I think, be doing so, if I were to grant the plaintiff the relief she asks for in this case."

The plaintiff then appealed to the High Court under clause 15 of the Letters Patent.

Babu Lal Mohun Das for the Appellant.

Babu Harendro Narayan Mitter for the Respondents.

The judgment of the High Court (Maclean, C. J., and Banerjee, J.), was as follows :—

This appeal arises out of a suit brought by the plaintiff-appellant to recover *khas* or direct possession of a 4 annas share in certain plots of land, after ejectment of the defendants 1 to 5 therefrom, on the allegation that the plaintiff has become entitled to the aforesaid share in the disputed lands free of all incumbrances by reason of the said lands having been allotted to her and to defendant No. 6 under a partition held by the Collector. The defence was a denial of the plaintiff's right to eject the defendants 1 to 5 and 8, who claimed to hold certain of the disputed plots of land as permanent tenure holders and the remaining plots in proprietary right.

The first Court gave the plaintiff a decree. On appeal by the defendants, that decree was set aside and the suit dismissed. Against the decree of the Appellate Court dismissing her suit, the plaintiff preferred a second appeal to this Court and her second appeal having been dismissed by Mr. Justice RAMPINI, she has preferred this appeal under clause 15 of the Letters Patent.

The facts of the case as found by the Lower Appellate Court, so far as they are necessary to be referred to for the purposes of this appeal, are as follows :—Plaintiff and defendant [438] No. 6 are proprietors of estate No. 1285, and defendant No. 7 is proprietor of estate No. 402. Certain lands of the two estates, amongst which are included the lands now in dispute, were held jointly, the plaintiff and defendant No. 6 owning a 4 annas share each, and defendant No. 7 the remaining 8 annas share, and the defendants 1 to 5 and 8 holding the share as *mirasdars* : but it is not clear whether they hold under all the co-sharers or under defendant No. 7 alone. On a partition of the lands by the Collector the disputed lands were allotted to the plaintiff and defendant No. 6, so that in addition to a 4 annas share, which each of them held previously, they became entitled to another 4 annas share each ; and it is in respect of this additional 4 annas share obtained by the plaintiff that the present suit is brought.

These being the facts of the case, the question for determination in this appeal is, whether, if the *miras* tenure was created by defendant No. 7 alone, the plaintiff obtained the lands in dispute free from the tenure created by the defendant No. 7 in favour of defendants Nos. 1 to 5.

Mr. Justice RAMPINI has answered this question in the negative and affirmed the Lower Appellate Court's decree dismissing the suit.

We are of opinion that the question should be answered in the affirmative, and the case sent back to the Lower Appellate Court to dispose of the appeal after determining the question of fact whether the tenure set up was created by all the co-sharers in the lands or by defendant No. 7 alone.

If the *miras* tenure was created by defendant No. 7 alone, the case might fall within the scope of section 128 of Bengal Act VIII of 1876, and the tenure would hold good only as regards the land allotted to the share of defendant No. 7. But the point is not quite free from doubt. Mr. Justice RAMPINI is of opinion that that section does not apply to a case like this. One reason urged in support of this

view is that section 128 applies only to a case in which "a share or a portion of a share," that is an aliquot part of a share, is let out, and that it does not apply to a case like the present in which the share of the lessor in certain definite plots [439] of land is let out. The words "portion of a share" in the section are however wide enough to include a case like the present, a co-owner's share in any definite plots of land included in a joint estate being as much a "portion of a share" as an aliquot part of a share is, though the illustrations to the Section no doubt lend support to the opposite view. Another objection to the applicability of section 128 of Bengal Act VIII of 1876 was that the defendant No. 7 was not "any proprietor of an estate held in common tenancy and brought under partition," he having been the owner of estate No. 402, which had some lands in common with estate No. 1285, which was the only estate brought under partition. But the objection is sufficiently met by section 112 of Bengal Act VIII of 1876, which makes "all the provisions of the Act in respect of the allotment between the shareholders of one estate" applicable to a case like the present.

But even if section 128 of Bengal Act VIII of 1876 be not applicable to this case, still we think that, according to the general principles of equity, the *miras* tenure in question, if it was created by defendant No. 7 alone, could not affect the lands allotted to the share of any other co-sharer upon a partition by the Collector, but could hold good only in respect of lands allotted to the lessor's share. For though defendant No. 7 had power to grant a lease of his undivided share in any joint lands, he could not by so doing affect the interest of the other sharers; and those who took the lease, took it subject to the right of those sharers to enforce partition and thereby convert what was an undivided share of the whole into a portion held in severalty charged with the payment of a proportionate amount of revenue. This principle has been recognised and given effect to by the Privy Council in the case of *Byjnath Lall v. Ramooddeen Chowdry*, (1873) L. R., 1. I. A., 106, which was a case relating to a mortgage by a co-owner of joint property. Their Lordships say:—"It is clear that the mortgagor had power to pledge his own undivided share in these villages. But it is also clear that he could not by so doing affect the interest of the other sharers in them, and that the persons who took the security, took it subject to the right of those sharers to enforce partition [440] and thereby to convert what was an undivided share of the whole into a defined portion held in severalty."

It might be urged that when any lands of an undivided joint estate, which are incumbered by any co sharer, are allotted to any other co-sharer, the latter should take them subject to, and not free from, the incumbrance, the incumbered condition of such lands being taken into account in the allotment of lands to the different shareholders. That might be so in the case of a private partition. But in a partition by the Collector under Bengal Act VIII of 1876 that cannot be the case, as by sections 6 and 7 of the Act, the valuation and apportionment of the lands and the assessment of revenue upon the different separate estates created by the partition, must proceed upon the basis of the rents payable by the actual cultivators and not by any tenure-holders, except in cases in which the tenure has been created or recognised by all the co-proprietors.

This distinguishes the case of *Khan Ali v. Pestonji Eduljee*, (1896) 1 C. W. N., 62, relied upon by Mr. Justice RAMPINI, which related to a partition by the Civil Court, from the present case. As for the cases of *Nuthoo Lall Chowdhry v. Saadat Lall*, (1864) W. R., Sp. Vol., 271, and *Ahmedoolah v. Ashruff Hossein*, (1870) 13 W. R., 447: 8 B. L. R., 73 note, also relied upon

in support of the judgment appealed against, they must be taken to have been overruled in effect by the decision of the Privy Council in the case of *Byjnath Lall v. Ramooddeen Chowdry*.

We, therefore, reverse the decision appealed against and set aside the decree of the Subordinate Judge, and remand the case to the Lower Appellate Court for the determination of the question whether the *miras* tenure set up by the defendants 1 to 5 was created by the plaintiff and defendant No. 7, or by the latter alone. If the plaintiff or her predecessor in title is shown to have been a party to the creation of the tenure or to have recognised it subsequently, her suit for *khas* possession must be dismissed. If not, she will be entitled to a decree. Costs will abide the result.

S. C. G.

Appeal allowed. Case remanded.

NOTES.

[See also *Brojo Nath v. Dinesh Chandra*, (1910) 9 I.C., 67 (Cal.).]

[441] ORIGINAL CIVIL.

The 4th May, 1898.

PRESENT :

MR. JUSTICE JENKINS.

Hemanginee Dasse.....Plaintiff

versus

Kumode Chander Dass.....Defendant.*

Decree—Form of decree—Decree for maintenance—Receiver, Appointment of, in case of default—Transfer of Property Act (IV of 1882), sections 67, 99, 100.

To avoid any difficulty in executing a decree for maintenance out of property charged with payment of the allowance and make a fresh suit unnecessary in case of default in payment of the instalments a Receiver should be appointed under the decree itself with directions, in case of default in payment of the maintenance, to take possession of the estate and sell the same, and out of the sale proceeds to pay the allowance for maintenance.

THIS was a suit for maintenance and suitable accommodation for residence out of the properties in the hands of the defendant belonging to the estate of the plaintiff's husband. A preliminary decree having been made the matter was referred to the Registrar to enquire and report what would be a suitable allowance for her maintenance and suitable accommodation for her residence. On the Registrar making his report thereon the matter again came up on further directions on the report, and a question was then raised as to whether, having regard to sections 67, 99 and 100 of the Transfer of Property Act, the sale of the property to be charged with the payment of the allowance of maintenance to the plaintiff could, if necessary, be proceeded with under the decree creating the charge without having to institute another suit.

Mr. H. Mitra for the Plaintiff :—Directions for payment should be made in the decree. It is necessary to take directions for payment, because it has been held that a decree for maintenance cannot be executed. It is necessary to guard against any difficulty that may arise in case the maintenance be not paid. [JENKINS, J.—I could give you liberty to apply and the matter may be met by the appointment of a Receiver under the liberty to apply.] [442] Let the Receiver be appointed now, but not to take possession until default.

* Original Civil Suit No. 791 of 1894.

Mr. *Dunne* for the Defendant:—I do not consent to that. There must be a decree directing payment to be made and fixing the dates of payment, and there must be a charge on the property for the payment of the maintenance.

Jenkins, J.—The costs of suit and costs of allotment should be a charge on the estate. There will be an order for payment of the maintenance and arrears in terms of the report; with liberty to apply in case of default of payment of maintenance for two consecutive months.

Subsequently the Registrar was consulted and furnished the following minute as to decrees for maintenance:—

“Where a charge was created on the property of a judgment-debtor by a money decree to secure the amount payable thereunder, the plaintiff afterwards obtained an order in the form of the usual decree for an account and sale in a mortgage suit,—Belchamber’s Practice, 336, and the cases there cited. This practice, which obtained prior to the Transfer of Property Act (IV of 1882) was continued, as not affected by that Act, until 1893; *Meherunnessa Bibi v. Rohilla Khatun*, (1890) Suit No. 89 of 1888, July 31st, 1890, *per* WILSON, J.—This is an unreported case, and was followed in the following unreported cases, *Sarodo Prosad Ghose v. Chunder Kant Mukerji*, (1891) Suit No. 340 of 1889, Dec. 9th, 1891, *per* TREVELLYAN, J.; *Nundo Lal Roy v. Rodrigues*, (1892) Suit No. 114 of 1890, March 17th, 1892, *per* TREVELLYAN, J.

“It was also followed in the case of *Gouri Sunker Pandey v. Abhoyeswari Debi*, (1893) Suit No. 41 of 1892, *per* SALE, J. The decree in this case, dated 29th May 1893, was a consent decree by which it was ordered that ‘the defendant do within three months pay to the plaintiff Rs. 20,905, and Rs. 1,500, with interest, and that these sums, with interest, if not paid within the time allowed for that purpose, shall immediately become due and realizable by execution.’ It was also ordered that ‘the defendant do pay to the plaintiff Rs. 1,46,717-15 by annual instalments, with interest’ as therein provided. And it was further ordered ‘that in default of payment of any of the annual instalments, with interest, the plaintiff shall be at liberty to execute the decree in respect only of the annual instalment falling due and remaining unpaid, with interest, and realize the same, with the costs of execution, irrespective of any proceedings for realization of the sums of Rs. 20,905 and Rs. 1,500.’ And it was further ordered that [443] ‘the properties set forth in a Schedule annexed to the decree (all being out of Calcutta) shall stand charged with the payment of all the sums payable under the decree.’

“The decree itself does not provide for the sale of the properties.

“Default having been made in payment of the two sums of Rs. 20,905, and Rs. 1,500, which were payable within three months, the plaintiff obtained an order, dated 22nd September 1893, directing that, unless payment be made of these two sums within six months, the properties charged under the decree, or a sufficient portion thereof, be sold.

“That order was reversed on appeal, on the ground of non-jurisdiction. The judgment of the Court [PETHERAM, C.J., and NORRIS and MACPHERSON, JJ.] dated 25th July 1894 is as follows:—‘We are of opinion that this appeal must be allowed. No portion of the property in question is within the territorial jurisdiction of this Court and this Court has, therefore, no power to sell it.’

“The plaintiff next obtained an order, dated 17th August 1894, for transmission of a copy of the decree to the Judge of the Assam Valley district for execution, some of the properties charged under the decree being within that district. A copy of the decree was accordingly transmitted to the Judge of the Assam Valley district, and was by him transferred to the subordinate Judge of Dhubri, to whom the plaintiff applied for execution. The defendant appeared and objected on the ground that the judgment-debtor was precluded from proceeding against the property charged under the decree, except by a fresh suit under section 67 of the Transfer of Property Act. The objection was disallowed, and the plaintiff obtained an order for execution. From this order an appeal was preferred to the High Court in its Appellate jurisdiction. It was contended, on behalf of the appellant, that the Transfer of Property Act was applicable, and that, under sections 99 and 100 of that Act, no order for

sale could be made until a suit was brought under section 67. *Contra*, it was contended, that effect should be given to the consent decree as containing an agreement on the part of the defendant for sale of the properties. The Court was of opinion that the provisions of the Transfer of property Act were applicable to the case. It was also of opinion that the decree could have no higher operation than an agreement between the parties; but stress was laid on the fact that the decree did not provide for the sale of the property. The result is thus stated—'As the case stands the plaintiff can realize the instalments by execution by sale and attachment of any property of the defendants, but if he wishes to sell and attach the property charged he must bring a suit. The appeal must be allowed.' *Aubhoyesury Dabee v. Gouri Sunkur Panday*, (1895) I. L. R., 22 Cal., 859.

"An application was then made for transmission of a copy of the decree to the Judge of the 24-Pergunnahs for execution in respect of properties [444] within that district charged under the decree, and the decision reversing the order of the Subordinate Judge of Dhubri was considered. That decision is referred to in the judgment as follows: 'That seems to me to be a ruling to the effect that no step in execution can be taken for the purpose of realizing any portion of the money due under the decree.—That being so, I have no option, but to refuse the present application.'—*SALIE, J.* (unreported, Nov. 3rd, 1896).

"This order, too, was reversed by the High Court in its appellate jurisdiction—*MACLEAN, C.J.*, and *MACPHERSON and TREVELYAN, JJ.*" (unreported, Dec. 21st, 1896). The following is quoted from the judgment of the Chief Justice:—'I refrain from expressing any opinion as to whether the plaintiff is a mortgagee within the meaning of section 99'—Then, referring to the decision reversing the order of the Subordinate Judge, Dhubri—'All that the Judges intended to decide was that, if the plaintiff wished to sell, he must institute a suit: they did not decide that, under the circumstances an order for attachment, as opposed to an order for sale, could not be made.'

"The rulings in this case are, in effect, that, under the circumstances, this Court, in its original jurisdiction, had no power to direct a sale of the properties charged under the decree, all being out of its territorial jurisdiction; that in respect of the two sums payable within three months the property charged might be attached in execution by the Court having jurisdiction, but could not be sold without a fresh suit to be brought under section 67 of the Transfer of Property Act.

"The following cases were cited in the course of these proceedings:—

"*Shurroop Chunder Gooho v. Ameerrunnissa Khatoun*, (1882) I. L. R., 8 Cal., 703; *Maseyk v. Steel*, (1887) I. L. R., 14 Cal., 661; *Kartick Nath Pandey v. Tilukdhari Lall*, (1888) I. L. R., 15 Cal., 667; *Prem Chand Dey v. Mokhoda Debi*, (1890) I. L. R., 17 Cal., 699; *Ashulosh Banerjee v. Lukhi Moni Debya*, (1891) I. L. R., 19 Cal., 139; *Vigneswara v. Bapayya*, (1892) I. L. R., 16 Mad., 436; *Jadub Lall Shru Chowdhry v. Madhub Lall Shaw Chowdhry*, (1893) I. L. R., 21 Cal., 34; and *Azimullah v. Najm-un-nissa*, (1894) I. L. R., 16 All., 415.

"It will be seen that these cases, except the first, are subsequent to the Transfer of Property Act, which came into effect on the 1st of July 1882.

[445] "The following are later cases:—

"*Chundra Nath Dey v. Burroda Shoondury Ghose*, (1895) I. L. R., 22 Cal., 813. The operative part of the decree of the District Judge of Mymensingh is as follows:—'The suit is decreed *ex parte*. The plaintiff to obtain the amount of his claim and costs of the suit with interest at 6 per cent. per annum until the date of realization, and the mortgaged property to remain liable for the satisfaction of the debt.' On appeal to the High Court it was held, on the objection of the judgment-debtor, 'that section 99 of the Transfer of Property Act was applicable to the case, and that the mortgaged property could not be sold, unless a suit under section 67 of the Act be brought, and the procedure prescribed by the Transfer of Property Act followed. The property, however, could be attached, as there is nothing in section 99 prohibiting such attachment.'

" *Mqtangini Dassee v. Chooney Money Dassee*, (1895) I. L. R., 22 Cal., 908. The head note is: 'Where a decree, after declaring the amount payable to the plaintiff in respect of future maintenance, and that it should be a charge on certain immoveable property which formed a specific item in the general estate of a testator, went on to direct that for the purpose of securing the payment of the future maintenance, a deed should be executed in favour of the plaintiff, charging such immoveable property, on her executing a release of all her rights and interest in the general estate—*Held*, that such a charge was properly enforced by a suit brought on the deed, and that it could not be given effect to by proceedings in execution.'

" These cases are referred to in *Chundra Moni Dassi v. Mutty Lal Mullick*, (1898) 2 O.W.N., 33. In that case it became unnecessary to decide the question whether a decree creating a charge may be enforced according to the practice established prior to the Transfer of Property Act, but that question was treated as still open. Part of the judgment is as follows: 'It seems to me impossible, on the materials at present before me, to decide whether there has been any default in paying the instalments, and, if so, to what extent. If default had been admitted, or not disputed, there would, according to the original practice of this Court, have been two methods open to the plaintiff for the purpose of enforcing payment. She might either have adopted the course referred to at page 386 of *Belchambers' Practice*, and applied for an order in the nature of a decree for an account and sale, or else have instituted a suit for the purpose of enforcing the charge. My attention has been drawn to certain cases in I.L.R., 22 Cal., the effect of which is to raise at least a question as to whether the practice referred to at page 386 of *Belchambers' Practice* can now be adopted. No doubt the cases to which I refer are distinguishable in some [446] important respects from the present case, and it may become necessary when the proper occasion arises to consider and determine the effect and bearing of these cases upon the procedure which undoubtedly has been adopted in this Court in respect of charges made by decrees on properties situate within the jurisdiction of the Original Side of this Court, and which has been followed since the passing of the Transfer of Property Act.'

" A decree for maintenance, may, if necessary, provide for the immediate sale of property and payment into Court of a sum sufficient, when invested in Government securities, to produce an income equal to the allowance payable periodically for maintenance. This course has been sometimes followed in administration suits. But there are instances where the decree has made the payment of maintenance a charge on immoveable property and has reserved liberty to apply. This, having regard to the rulings in the case of *Gouri Sunker Pandey v. Abhayeswari Devi*, is, it would seem, not sufficient. A decree, when it makes the payment of maintenance a charge on immoveable property should, when such property is 'within the territorial jurisdiction of the Court,' proceed to direct that, in default of payment the property charged, or a sufficient part thereof, be sold by the Registrar, or by a Receiver to be appointed of the property charged with, in either case, all necessary directions, and liberty should be reserved to the parties to apply.

" Assuming that a decree is made in this form with all necessary directions for the sale of the property charged for the purpose of providing for the regular payment of the allowance for maintenance, the question is whether the directions of the decree can be carried out or whether, having regard to sections 99 and 100 of the Transfer of Property Act, the only course open would be to proceed under section 67. Section 100 provides that 'where immoveable property of one person is by act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property,' &c. Is a charge created by a decree for securing the payment of an allowance for maintenance payable thereunder periodically, such a charge as is contemplated by section 100? Can it have been intended that a person to whom a monthly or quarterly or annual sum is payable for maintenance under a decree, and to whom no interest is payable, should, because the decree makes such payment a charge on immoveable property be estopped from proceeding under the

decree for the sale of such property and be required to bring a *fresh* suit? Such a person would be placed at a disadvantage as compared with a mortgagee who has advanced money for consideration, who may realize his claim by a *single* suit and who, though bound to allow the debtor six months' time to redeem, is fully compensated by having the right to charge interest until realization of his claim.

[447] "The question may also be considered from another point of view. A decree containing directions for the sale of property within the jurisdiction of the Court, would be binding on the parties who, therefore, could not object to its being carried out. It would have the effect of preventing the application of the provisions of the Transfer of Property Act as fully as a contract for the purpose entered into by the parties."

R. BELCHAMBERS.

17th December, 1897.

Thereupon, on 7th March 1898, an application was made before JENKINS, J., for a decree in terms of the Registrar's minute.

Mr. Mitra for the Plaintiff.

Mr. Chakravarti for the Defendant.

And the following decree was, on 4th May 1898, accordingly drawn up:—

Suit for a declaration that the plaintiff, as the widow of Herumbo Chunder Dass, deceased, is entitled to proper maintenance and suitable accommodation for residence out of the properties in the hands of the defendant belonging to the estate of Herumbo Chunder Dass, deceased, for suitable allowance for such maintenance and suitable accommodation for such residence; for a declaration that such allowance forms a charge on the said properties; for possession of certain *stridhan* ornaments and articles forcibly and wrongfully taken possession of by the defendant; or to receive the value thereof, &c.

This cause coming on, on the 25th day of November last, the 25th day of April last, and on this day for further directions on the report of the Registrar of this Court, dated the 30th day of March last, and filed on the 21st day of April last, before the Hon'ble LAWRENCE HUGH JENKINS, one of the Judges of this Court, in the presence of Counsel for all the parties, it is declared that the sum of Rs. 35 a month is a fit and proper sum to be allowed to the plaintiff for her maintenance during the term of her natural life. And it is further declared that the eastern portion of the family dwelling house, No. 102, Machooabazar Street, in the plaint in this suit mentioned with the alterations suggested by the said Registrar in his said report at a cost not exceeding Rs. 1,200 would be a suitable accommodation [448] for the residence of the plaintiff. And it is ordered and decreed that the defendant do out of the estate of Herumbo Chunder Dass, deceased, in the plaint in this suit named, pay to the plaintiff the sum of Rs. 1,345-12-0 for arrears of maintenance up to the 31st day of October last, and do out of the said estate monthly, and every month commencing from the first day of November 1897, pay to the plaintiff the sum of Rs. 35 a month for her maintenance, and do out of the said estate pay the costs of the alterations to be made to the eastern portion of the said family dwelling house within the limit aforesaid, and allow the plaintiff to occupy the said eastern portion of the said family dwelling house as her residence during the term of her natural life. And it is further ordered and decreed that the said monthly sum of Rs. 35, and the arrears of maintenance, and the costs of the alterations to be made to the said eastern portion of the said family dwelling house within the limit aforesaid, and the plaintiff's costs of this suit hereinafter mentioned, form a charge on the properties, belonging to the estate of the said Herumbo Chunder Dass, deceased, incumbered since the institution of this suit, and on the equity

of redemption of the properties belonging to the said estate incumbered before the institution of this suit, and also on the sale proceeds of the properties belonging to the said estate sold by the Receiver appointed in suit No. 271 of 1888 (hereinafter referred to as the said properties) subject to any incumbrances which affected the said property before the institution of this suit, and which now attach to the said sale proceeds. And it is further ordered and decreed that the Receiver appointed in the said suit No. 271 of 1888 be appointed Receiver of the said properties, but that he do not take possession of the same or realize the rents thereof, until the further order of this Court. And it is further ordered and decreed that the said Receiver do sell the said properties, or a sufficient portion thereof for the purposes of this decree if and when necessary, the necessity for carrying out the directions to be determined by the Court. And it is further ordered and decreed that in the event of the said monthly sum of Rs. 35 being in arrears for two consecutive months, or in default of payment of the said arrears of maintenance, or the costs of the alterations to [449] be made to the said eastern portion of the said family dwelling house within the limit aforesaid, or the plaintiff's costs of the suit, this plaintiff be at liberty to apply to this Court on notice to the other parties, that the said Receiver do take possession of the said properties, and sell the same or a sufficient portion thereof as hereby directed, and do out of the sale proceeds pay all arrears of maintenance payable to the plaintiff and the costs of the said alterations within the limit aforesaid, and the plaintiff's costs of this suit and invest the balance or a sufficient portion thereof in Government Promissory Notes to provide for the payment of the said monthly sum of Rs. 35, payable to the plaintiff, and hold the same and residue, if any, subject to the further order of this Court. And it is further ordered and decreed that it be referred to the Taxing Officer of the Court to certify the amount of Court-fees which would have been paid by the plaintiff, if she had not been permitted to sue as a pauper, and to tax the plaintiff her other costs of this suit on scale No. 2, and it is further ordered and decreed that the defendants do out of the said estate pay the amount to be certified as aforesaid to the Government Solicitor, and to the plaintiff, her other costs of this suit, to be taxed as aforesaid with interest thereon at the rate of six per cent. per annum from the date of taxation until realization. And the parties are to be at liberty to apply to this Court from time to time as may be necessary.

Attorney for the Plaintiff : Kumar S. K. Deb.

Attorneys for the Defendant : Messrs. *Remfry and Rose*.

C. E. G.

NOTES.

[See also (1909) 13 C.W.N., 787.]

[26 Cal. 449]

FULL BENCH.

The 3rd February, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., MR. JUSTICE MACPHERSON,
MR. JUSTICE GHOSE, MR. JUSTICE HILL,
AND MR. JUSTICE JENKINS.

Chundi Charan Mandal.....Decree-holder
versus

Banke Behary Lal Mandal.....Judgment-debtor.*

Civil Procedure Code (Act XIV of 1882), section 310A—Civil Procedure Code Amendment Act (V of 1894)—Power of a Court to set aside a sale if the deposit provided for in section 310A be not paid within thirty days.

[450] *Held* (by the FULL BENCH) :—Where the judgment-debtor has not within thirty days from the date of sale deposited in Court a sum equal to 5 per cent. of the purchase-money and the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder, but has deposited in Court within the prescribed period a sum calculated by some officer of the Court as the sum to be deposited in respect of such 5 per cent. and of the sum specified in such proclamation of sale, and there is nothing to show that there was any mistake of the Court by which the judgment-debtor was induced to deposit an insufficient amount, the sale ought not to be set aside.

Makbool Ahmed Chowdhry v. Bazle Sabhan Chowdhry, (1898) I. L. R., 25 Cal., 609, distinguished.

THIS appeal arose out of an application to set aside a sale. Within thirty days from the date of the sale, the judgment-debtor, under section 310A of the Code of Civil Procedure, deposited a sum less than the due amount required under the sale proclamation : the said amount was calculated to be due by the officer of the Court. But after the expiry of the limitation prescribed by section 310A, he deposited also the balance to the credit of the decree-holder. This amount the judgment-debtor contended, being the sum equal to 5 per cent. on the purchase-money he was not bound to deposit, inasmuch as the decree-holder was the purchaser, and as such he was not entitled to get that amount. On behalf of the decree-holder it was contended that the sale could not be set aside as the entire amount specified in the sale proclamation had not been deposited within the prescribed period of limitation. The Court of First Instance held that the payment of a sum equal to 5 per cent. on the purchase-money was a condition precedent to the reversal of a judicial sale, and the fact that in the present case the decree-holder himself was the purchaser would not take the case out of the operation of the section ; and as it appeared on the face of the proceeding that the judgment-debtor did not pay the amount specified on the proclamation within the statutory period of limitation, it rejected the application and confirmed the sale. On appeal the District Judge reversed the decision of the lower Court and set aside the sale. [451] The material portion of his judgment was as follows :—

"On the first point, by section 306 of the Code of Civil Procedure, the purchaser, whether decree-holder or other person, is required to pay down in cash $\frac{1}{2}$ of his bid, and there is a note to that effect in O'Kincaid's Code under this section, Title 'Decree-holder.' But

* Reference to the Full Bench in appeal from Appellate Order No. 152 of 1898.

section, 294 rather seems to lay down that a decree-holder selling off is not required to deposit any part of the purchase-money, and it is learnt from the Nazir that it is the practice. So it is somewhat in appellant's favour that he could not deposit 5 per cent. on purchase-money which was never paid.

"On the second point it is found that the amount stated in the sale proclamation was a sum which was calculated to the advertized date of sale with costs and interest to that date. But as a fact the sale did not take place till 12th November, some four or five days after; therefore it may have been necessary to make a further calculation. This Court has always held that it is inequitable to visit the laches of the Court itself or its officers on the parties and that is the view of the High Court in the unreported case No. 1467 of 1897, a copy of which is filed in the record.

"This Court has considered the rulings quoted by other side, and does not find they are against the appellant's contention. Hence it seems to this Court that under the last paragraph of section 310A, Civil Procedure Code, as a matter of equity and good conscience, the mistake was one of the Court itself, through its officer, and ought not to be visited on the appellant, and the order is, therefore, set aside, and the sale set aside but without costs, as it was appellant's mistake."

From this decision the decree-holder appealed to the High Court. On the appeal coming on for hearing the case was referred to a Full Bench by MACLEAN, C.J. and BANERJEE, J., on the 14th December 1898, with the following OPINION :—

Maclean, C.J.—There are two points raised on this appeal (1) Whether, if the decree-holder be the purchaser under a sale in execution, he is entitled to the 5 per cent. on the purchase money provided for in sub-section (a) of section 310A. (2) Whether if the deposit provided for by that section be not paid in within the thirty days as provided in the same section, the Court can set aside the sale.

On the first point I am of opinion that the decree-holder, if the purchaser, is entitled to the 5 per cent. on the purchase-money. Although he happens to be the decree-holder he is none the less the purchaser; and I can see no intention to exclude such a purchaser from the 5 per cent. benefit under the section. The 5 per cent. is undoubtedly given partly, I do not [452] say entirely, as some *solatium* to the purchaser for the loss of that which is, perhaps, a good bargain; and I fail to see why the decree-holder, if the purchaser, is not as much entitled to that *solatium* as an outside purchaser. If we were to accede to the respondent's contention we should have to read into the section after the word "purchaser" the words "if such purchaser be not the decree-holder." I can see no justification for such a construction.

As regards the second point the Lower Appellate Court finds as a matter of fact—the Judge says it was admitted—that the present respondent deposited some 48 rupees less than the amount required under the sale proclamation under section 310A. It has been contended before us that the deficit was only 11 rupees or so, and not 48, but in the view I take, whether it were the larger or the smaller sum is quite immaterial. The judgment-debtor has to deposit (1) a sum equal to 5 per cent. of the purchase-money; (2) the amount specified in the proclamation of sale. The calculation of the 5 per cent. on the purchase-money (in this case 1,000 rupees) was a matter of the simplest arithmetic; the amount specified in the proclamation of sale was patent. Admittedly the judgment-debtor did not make the deposit within the prescribed period (the 30 days); if he did not, has the Court any jurisdiction to set aside the sale? Section 310A affords a special indulgence to the judgment-debtor; it gives him, if I may say so, yet one more chance of saving his property. But he can only avail himself of that special indulgence if as a condition precedent

he make the deposit within the thirty days. If he do not do so, what power is there in the Court to extend the period and to deprive the purchaser of the rights he has acquired under his purchase? I can see none; nor have we been referred to any, either under any statute or as inherent in the Court itself. If he may extend the period for three days, why not for thirty, and so on? The Legislature has not thought fit to vest any discretion in the Court to extend the time, and if not, how can the Court arrogate to itself the power to do so?

If then the matter were *res integra* I should have felt no hesitation in saying that, unless the requisite deposit were made within the thirty days, the Court had no power to set aside the sale. But [453] it is said this view conflicts with certain decisions of this Court, and we are referred, in the first instance, to the case of *Ugrah Lall v. Radha Pershad Singh*, (1891) I. L. R., 18 Cal., 255. The first comment upon that case is that it is one under section 174 of the Bengal Tenancy Act, the language of which differs materially from section 310A of the Civil Procedure Code. In the former section the words are "the amount recoverable under the decree with costs," whilst in the latter the words are "the amount specified in the proclamation of sale." The former words are not, *quâ* the amount, nearly so precise as the latter, and rather suggest that some enquiry may be necessary to ascertain the actual amount; and apparently the case of *Ugrah Lall v. Radha Pershad Singh*, (1891) I. L. R., 18 Cal., 255, proceeded upon the footing that, as section 174 provides no machinery for ascertaining the amount but that in practice the amount was calculated in what is called "the office," (I presume that means by the Court,) the amount so calculated was to be taken as the amount payable under the section. That may or may not be so, but, at any rate, that case can be no authority for the present, in which the judgment-debtor has only to look at the proclamation of sale to ascertain the amount due to the decree-holder. In the case of *Ugrah Lall v. Radha Pershad Singh*, (1891) I. L. R., 18 Cal., 255, there would appear to have been an order of some sort made by the Munsif.

In the case of *Kabilaso Koer v. Raghu Nath Sukan Singh*, (1891) I. L. R., 18 Cal., 481, the Court would appear to think that before a sale can be set aside the provisions of section 174 must be strictly complied with. I am not prepared to say that a decision upon the construction of section 174 of the Bengal Tenancy Act can be regarded as a safe guide to enable us to ascertain the meaning of section 310A of the Civil Procedure Code. Great reliance, however, is placed upon the case of *Makbool Ahmed Chowdhry v. Bazle Sabhan Chowdhry*, (1898) I. L. R., 25 Cal., 609. In that case, apparently it was held that although the judgment-debtor had not deposited the 5 per cent. on the purchase-money, as he had deposited the amount calculated by the Court as the amount to be deposited, the sale ought to be set [454] aside. Speaking with the utmost respect for that decision, I am unfortunately unable to appreciate the principle upon which it is based. So far as the report shows, there is nothing to indicate that the decree-holder or the auction-purchaser had anything to do with the ascertainment of the amount by the Munsif or what power the Munsif or any of his officers had to fix the amount; and if the amount were fixed behind the back of the decree-holder and auction-purchaser, the result would be that the amount fixed, perhaps by some absolutely irresponsible person in the Munsif's Court, is to be treated as the amount to be deposited instead of the amount stated with every distinctness by the act of the Legislature. This seems to me to be legislating not construing what the Legislature has said.

Now what is the finding in the present case? The District Judge says "the appellant deposited the amount calculated to be due by the officer of the

Court." What officer? Who is the officer of the Court? The expression "the officer" would appear to indicate that there is some special officer whose duty it is to make these calculations. Where is then anything in the section which says the amount is to be calculated by any officer of any Court, or that any officer of any Court has any power to calculate the amount and decide what is the amount to be deposited? If a judgment-debtor instead of calculating the amount himself chooses to go to some irresponsible officer of the Court and that officer makes a wrong calculation, I fail to see why that circumstance should be regarded as a ground for extending the time for making the deposit under section 310A. I can appreciate that different considerations might arise if the Court in the presence of the parties had by an order fixed the amount, but that is not the present case. It is conceded that the judgment-debtor in this case did not pay in the 5 per cent. on the purchase-money and the amount specified in the proclamation of sale within the thirty days, and that being so, the Court, in my opinion, ought not to have set the sale aside. The appeal consequently must be decreed with costs.

As, however, this view clashes with that expressed in the case of *Makbool Ahmed Chowdhry v. Bazle Sabhan Chowdhry*, (1898) I. L. R., 25 Cal., 609, [455] the case must be referred to a Full Bench. The question for the decision of which this case is submitted to a Full Bench is, whether if a judgment-debtor do not within thirty days from the date of sale deposit in Court (a) a sum equal to 5 per cent. of the purchase-money, and (b) the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder, but has deposited in Court within the prescribed period a sum calculated by some officer of the Court as the sum to be deposited in respect of such 5 per cent. and of the amount specified in such proclamation of sale, the Court can pass an order setting aside the sale under section 310A of the Code of Civil Procedure.

Mr. J. T. Woodroffe, Babu Srinath Dass, and Babu Purno Chunder Shome, for the Appellant.

Sir Griffith Evans, Dr. Rash Behary Ghosh, and Babu Dwarka Nath Chuckerbutty, for the Respondent.

Mr. J. T. Woodroffe.—Section 310A of the Civil Procedure Code is different in its language from section 174 of the Bengal Tenancy Act; the former section speaks of "amount specified in the sale proclamation," whereas the latter speaks of "amount recoverable under the decree with costs." Now the question is, whether miscalculation by an officer of Court will entitle the judgment-debtor to pay in the money so calculated, under section 310A after thirty days, and to ask to set aside the sale. I submit not. Under section 310A, the judgment-debtor is bound to pay the amount specified in the sale proclamation; and unless he deposits that amount he is not entitled to get a sale set aside, even if there be a miscalculation by an officer of Court. The words in section 310A of the Code being more precise than in section 174 of the Bengal Tenancy Act that section must be strictly construed. An act must be construed according to the natural meaning of the language used, and not on the presumption that it was intended to leave the existing law unaltered. See *Narendra Nath Sircar v. Kamalbasini Das*, (1896) I. L. R., 23 Cal., 563; I. R., 23 I. A., 18, and also the cases of *Girish Chundra* [456] *Basu v. Apurba Krishna Dass*, (1894) I. L. R., 21 Cal., 940; and *Deb Narain Dutt v. Narendra Krishna*, (1889) I. L. R., 16 Cal., 267 (270).

The cases of *Ugrah Lall v. Radha Persad Singh*, (1891) I. L. R., 18 Cal., 255, *Abdool Latif Moonshi v. Jadub Chandra Mitter*, (1897) I. L. R., 25 Cal.,

216, have no application to the present case, as they are under section 174 of the Bengal Tenancy Act. The case of *Makbool Ahmed Chowdhry v. Bazle Sabhan Chowdhry*, (1898) I. L. R., 25 Cal., 609, has a direct bearing, although that was decided upon the principle laid down in section 174 of the Bengal Tenancy Act. Under section 310A of the Code the judgment-debtor is to look into the sale proclamation, and he is to deposit the amount therein specified. He is not to go to an officer of the Court for any calculation.

It makes no difference if the decree-holder is the purchaser. The judgment-debtor is bound to pay 5 per cent. on the purchase-money. The amount is the *solatium* or compensation for a possibly good bargain.

Sir *Griffith Evans* for the Respondent.—The judgment-debtor has substantially complied with the terms of the Statute. The question really is what is the underlying principle of section 310A of the Code of Civil Procedure, and what is the effect of an act of a ministerial officer of the Court. As to the effect of an act of a ministerial officer of the Court, see the case of *Abdoul Latif Moonshi v. Jadub Chandra Mitter*, (1897) I. L. R., 25 Cal., 216 (219). The practice has always been, whether right or wrong, to go to the execution clerk and ask of him the amount which the judgment-debtor is to pay. The judgment-creditor does not dispute the existence of this practice, and no evidence has been taken on this point. A party ought not to suffer for an act of Court. See the case of *Rodger v. Comptoir D'Escompte De Paris*, (1871) L. R., 3 P.C., 475. A man, if he does all that he can do, will be taken to have done all, if by mistake of the Court something is left [457] undone: see *Waterton v. Baker*, (1868) L.R., 3 Q.B., 173. The sale proclamation is not given to the judgment-debtor, so he has to go to an officer of the Court to make a calculation. One must construe an act intelligently and not as a grammarian. The object of section 310A is to give the judgment-debtor a chance to recover back his property. What does an act of Court mean? It ought not to be limited to the act of the presiding officer only. The case of *Makbool Ahmed Chowdhry v. Bazle Sabhan Chowdhry*, (1898) I. L. R., 25 Cal., 609, is in my favour, and the principle laid down in that case is correct.

Mr. *Woodroffe*, in reply.

The following **opinions** were delivered by the Full Bench (MACLEAN, C.J., and MACPHERSON, GHOSE, HILL and JENKINS, JJ.)

Maclean, C.J.—This appeal must succeed. I stated my reasons so fully when the matter was before me as a member of the referring Bench, that, on the present occasion, I only propose to add one or two very brief observations. I do not wish it to be understood, from the terms of my previous judgment, nor do I think my language is susceptible of that construction, that I intended to lay down, as an absolutely hard and fast rule that, if the 5 per cent. on the purchase-money and the amount specified in the proclamation of sale were not paid within the thirty days, the Court was powerless to set aside the sale. There may be circumstances in a particular case which would render such a rule quite inequitable. Nor am I prepared to say that, if the judgment-debtor has been misled by a mistake of the Court, the consequences of that mistake ought to fall upon him. I do not propose to lay down what constitutes a mistake of the Court. I confine myself to saying that there was certainly none in the present case. The question submitted must be answered in the negative.

We are now asked, at this late stage of the proceedings, to remand the case, in order that what actually took place when the judgment-debtor deposited the money, may be ascertained. We ought to be very careful in acceding to such a request, and [458] thus reopening the whole matter and re-starting the whole litigation.

The respondent never suggested this course either before the Subordinate Judge or before the District Judge or before the Division Bench. But, even if the respondent could prove what he suggests, that some information was given him as to the amount of the purchase-money, and of the sum mentioned in the sale proclamation by some officer of the Court, and that he relied on this information, it would not avail him. He must show, at the least, that it was the duty and within the province of the Court officer to give the information, and that it was incorrect. It is not suggested that any information was supplied in accordance with the rules which govern applications for information, and which are to be found in chapter IV of the General Rules and Circular Orders. It is only in compliance with these rules that information can, or ought to, be given.

I may perhaps add, that, as regards the case of *Makbool Ahmed Chowdhry v. Basle Sabhan Chowdhry*, (1898) I. L. R., 25 Cal., 609, it now transpires that the amount was fixed by an order of the Munsif himself, in the presence of and with the assent of the pleaders of both parties. That makes a very material difference.

As to the 5 per cent. on the purchase-money that point has not been argued, and I adhere to what I have previously said.

The appeal must be allowed with costs.

Macpherson, J.—I am of the same opinion. No evidence was taken in the case, but accepting as correct all the facts as stated in the respondent's petitions of the 13th and 17th December, respectively, the Court would not, in my opinion, be justified, on those facts, in setting aside the sale. Those facts certainly do not show that the appellant did all that he possibly could in order to comply with the requirements of section 310A, and that it was due to the mistake of the Court that an insufficient amount was deposited. It is not necessary to consider in the present case, whether the case of *Abdool Latif Moonshi v. Jadub Chandra Mitter*, (1897) I. L. R., 25 Cal., 216, to which I was a party, was correctly [459] decided. That was a case under section 174 of the Bengal Tenancy Act, and it will be time enough to consider whether that case was correctly decided when the question directly arises.

Ghose, J.—I agree in thinking, having regard to the facts of this case, that the question referred to the Full Bench must be answered in the negative. The principle upon which the case of *Makbool Ahmed Chowdhry v. Basle Sabhan Chowdhry*, (1898) I. L. R., 25 Cal., 609, was decided is this; that if the Court which has to deal with an application under section 310A, declares, though incorrectly, what is the amount that ought to be paid in by the judgment-debtor, and the judgment-debtor in accordance therewith deposits that amount, it would be manifestly unjust to hold that by reason of the shortness of the deposit, the judgment-debtor has lost the remedy given to him by that section, the mistake being a mistake of the Court. I still adhere to that principle. The facts of this case are, however, different. Here, the Munsif did not in any way declare what the amount was that should be paid; nor does it appear that the officer of the Court from whom the applicant is said to have received certain information in regard to the amount to be deposited, was the officer who was charged by the Court with the duty of supplying that information. And I think that in this case no facts have been proved, or found, upon which the Court should be justified in giving the applicant relief under section 310A.

Hill, J.—I also think that the questions referred to the Full Bench must be answered in the negative, and as I quite agree with what has fallen from

the learned Chief Justice now, as well as generally with the reasoning on which the order of reference proceeds, I do not think it necessary to add anything.

Jenkins, J.—I too agree as to the terms in which the questions referred to the Full Bench should be answered. In my opinion it is essential to the respondent's success that it should be established that he has been prejudiced by the act of the Court and that the mistake that has been made is attributable to that act. What constitutes an act of the Court must depend on the circumstances of each case. It is clear, I [460] think, that a mere casual act by an officer of the Court cannot be treated as the Court's act. For an act to be clothed with that character it appears to me, generally speaking, that it must be the act of the prescribed officer acting in accordance with the prescribed rules of the Court. The scope of possible proof put forward by Sir *Griffith Evans* on the part of the respondent, to my mind, falls far short of that. On that ground I think that no remand should be granted, while if we deal with the case exclusively on the materials before the Court, then we can in my opinion only come to the same conclusion as that which has been expressed by the Division Bench. As the point is raised on sub-section (a) of section 310A of the Code of Civil Procedure, it appears to me that a man is no less a purchaser, and the money paid by him is no less the purchase-money because he also chanced to be the decree-holder purchasing with the leave of the Court, and for this reason I am of opinion that the judgment-debtor was bound to deposit the 5 per cent. mentioned in section 310A, sub-section (a).

S. C. G.

Appeal allowed.

NOTES.

I. As regards the object of rule 89, Order 21, C.P.C., 1908, see also (1911) 34 All., 186; (1913) 24 M.L.J., 205.

II. The deposit must be of money, (1911) 13 C.L.J., 467 and unconditional, (1911) 16 C.W.N., 904; (1912) 15 Bom. L.R., 244; and full, (1911) 21 M.L.J., 631.

III. As regards the question when an appeal lies, this was followed in (1900) 6 C.W.N., 57; (1909) 13 C.W.N. 591; (1907) 30 Mad., 507; (1911) 15 C.L.J., 89; see also (1906) 5 C.L.J., 204 where the auction purchaser was a third person.

IV. In (1906) 11 C.W.N., 116 the High Court distinguishing this case, declined to interfere though the insufficient deposit was owing to a mistake in calculation by the ministerial officers of the Court. See also (1913) 22 I.C., 842 (Cal.); (1911) 15 C.L.J., 89.

V. In (1902) 29 Cal., 626, *MACLEAN, C.J.*, thus explained this passage in his judgment. "There may be circumstances in a particular case, which would render such a rule quite inequitable." He said, "I was alluding there to possible cases in which the decree-holder had by his conduct misled the judgment-debtor, and so prevented him paying in the money within the specified period and cases of that description, and I said there might be circumstances which would render the rule inequitable. There is no such element in the present case, and it is unnecessary to discuss how far my observation was well-founded, having regard to the language of sec. 310 A," 29 Cal., at 629.]

[26 Cal. 460]
APPELLATE CIVIL.

The 4th January, 1899.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Gobinda Nath Shaha Chowdhry and another.....Plaintiffs
versus
Surja Kanta Lahiri and others.....Defendants.*

Limitation Act (XV of 1877), Schedule (ii), Article 144—Putnidar and Darputnidar, dispossession of—Adverse possession—Relinquishment by the putnidar, effect of.

The land in dispute along with other lands were let out in *putni* and *darputni* by the predecessor in interest of the plaintiffs. During the continuance of the said leases the land in dispute was taken possession of and held adversely by the defendants or their predecessor. The *putni* and *darputni* were relinquished by the *putnidar* and *darputnidar* in favour of the plaintiffs on the 29th June 1891, and they, on the 28th June 1893, [461] brought a suit for recovery of possession of the disputed land from the defendants. The defence was that the suit was barred by limitation.

Held, that article 144, Schedule II. of the Limitation Act applied to the case, and that the suit was barred by limitation, inasmuch as it was not brought within twelve years from the date when the possession of the defendants became adverse to the plaintiffs.

Nuffer Chandra Pal Chowdhry v. Rajendra Lal Goswami, (1897) I.L.R., 25 Cal., 167 ; *Gunga Kumar Mitter v. Asutosh Goswami*, (1896) I.L.R., 23 Cal., 863 ; *Sharat Sundari Dabia v. Bobo Pershad Khan Chowdhry*, (1886) I.L.R., 13 Cal., 101 ; and *Chinto v. Janki* (1892) I.L.R., 18 Bom., 51, distinguished.

THIS appeal arose out of an action brought by the plaintiffs on the 28th June 1893 for recovery of possession of certain lands. The plaintiffs' allegation was that they were the purchasers of a moiety share of a pergunnah, certain *mouzahs* of which had previously been recorded as *putni* and *darputni taluqs* in the name of one William Sheriff. At a sale in execution of a decree for arrears of rent, the said *taluqs* were purchased by Ram Gopal, defendant No. 9, free from all incumbrances. After continuing in possession till 29th June 1891 he said Ram Gopal surrendered the *putni* and *darputni* to the plaintiffs by registered deeds of relinquishment. Thereupon the plaintiffs went to take possession of the lands in dispute, but were opposed by the principal defendants. The defence *inter alia* was that the plaintiffs' claim was barred by limitation, the *putnidars* and *darputnidars* not having been in possession of the said lands within twelve years before suit. The Court of First Instance dismissed the plaintiffs' suit. On appeal the District Judge upheld the decision of the first Court on the ground that the suit was barred by limitation, inasmuch as the possession of the defendants had extended over more than twelve years before the date of the institution of the suit, notwithstanding that the date on which the relinquishment took effect was within 12 years. Against this decision the plaintiff appealed to the High Court.

Babu Sreenath Das and Babu Kishory Lal Sarkar for the Appellants.

[462] Babu Mohiny Mohun Chuckerbutty for the Respondents.

* Appeal from Appellate Decree No. 1889 of 1896, against the decree of B. C. Mitter, Esq., District Judge of Faridpur, dated the 24th of July 1896, affirming the decree of Babu Chandra Kumar Roy, Officiating Subordinate Judge of that District, dated the 24th of January 1895.

The judgment of the High Court (*Banerjee and Rampini, JJ.*) was as follows :—

'This appeal arises' out of a suit brought by the plaintiff appellants to recover possession of a certain land.

The defence raised various points, of which it is necessary to notice only one, namely, limitation.

The first Court dismissed the suit, and the decree of the first Court has been affirmed by the Lower Appellate Court, which has based its judgment only upon the ground of limitation.

In second appeal it is contended for the plaintiffs that the Lower Appellate Court is wrong in law in holding that the case is barred by limitation. The facts of the case as found by the Lower Appellate Court are shortly these : The land in dispute, along with other lands, had been let out in *putni* and *darputni* by the plaintiffs' predecessor in title, but whilst the *putni* and *darputni* were in existence, the defendants or their predecessors took possession of the land in dispute adversely to the *putnidar* and *darputnidar*, and they have continued in possession.

Subsequently, that is on the 29th June 1881, the *putni* and *darputni* were relinquished by the *putnidar* and *darputnidar* in favour of the plaintiffs, and the plaintiffs brought the suit on the 28th June 1893 to recover *khas* possession of the land in dispute. Upon these facts the Lower Appellate Court has held that, as the possession of the defendant had extended over more than twelve years before the date of the institution of the suit, it is barred by limitation, notwithstanding that the date on which the relinquishment took effect was within twelve years before suit.

In second appeal it is contended that this view is wrong, and that the plaintiffs are entitled to reckon time from the date when the relinquishment took effect, that being the date on which the possession of the defendant became adverse to the plaintiff within the meaning of article 144 of the second schedule of the Limitation Act, which governs this case.

In support of this contention *Nuffer Chanāra Pal Chowdhry [463] v. Rajendra Lal Goswami*, (1897) I. L. R., 25 Cal., 167; *Gunga Kumar Mitter v. Asutosh Gossami*, (1896) I. L. R., 23 Cal., 863; *Sarat Sundari Dabia v. Bhobo Pershad Khan Chowdhuri*, (1886) I. L. R., 13 Cal., 101; and *Chinto v. Janki*, (1892) I. L. R., 18 Bom., 51, have been relied upon.

We are of opinion that the contention urged on behalf of the appellants is not sound, and that the cases cited are all distinguishable from the present. As the *putni* and *darputni* here came to an end not by reason of any sale for arrears of rent but by voluntary relinquishment by the *putnidar* and *darputnidar* in favour of the zemindar, the case cannot come under article 121 of the second schedule of the Limitation Act. The article of the Limitation Act under which the case properly comes is, no doubt, article 144, and the period of limitation is twelve years, running from the date when the possession of the defendants became adverse to the plaintiffs.

The question then is when did the possession of the defendants become adverse to the plaintiffs.

It is contended that it must be on the date when the relinquishment in favour of the plaintiffs took effect. The term "plaintiff," according to section 3 of the Limitation Act, includes any person from or through whom the plaintiff derives his right to sue; and the present plaintiffs derive their right to sue for *khas* possession through the *putnidars* and *darputnidars* who were entitled to such possession, and who have relinquished their rights in favour of the plaintiffs. That such relinquishment operates only as a transfer of the

tenure is clear, not only upon general principles, but also from the express terms of section 12 of Regulation VIII of 1819.

That being so, the time from which limitation runs must be the date when the possession of the defendants became adverse to the *putnidars* and *darputnidars*, who were dispossessed by them, and that date has been found by the Lower Appellate Court to be more than twelve years before the institution of the suit.

[464] It remains now to consider the cases cited. The first case, *Nuffer Chandra Pal Chowdhry v. Rajendra Lal Goswami*, (1897) I. L. R., 25 Cal., 167, was clearly one under article 121 of the second schedule of the Limitation Act, and can have no bearing on the present case. In the second case cited, viz., *Gunga Kumar Mitler v. Asutosh Goswami*, (1896) I. L. R., 23 Cal., 863, the landlord had become entitled to possession not by virtue of relinquishment by the tenants, but by reason of the sale of the under-tenure for arrears of rent; and so that case also is distinguishable from the present.

In the case of *Sharat Sundari Dabla v. Bhobo Pershad Khan Chowdhuri*, (1886) I. L. R., 13 Cal., 101, it was held that limitation did not run in favour of a trespasser, and as against the zemindar, so long as the zemindari was in the possession of an *ijaradar*, because the zemindar upon the expiry of the *ijara* became entitled to possession in his own right, and not through the *ijaradar*. The same thing cannot be said in this case.

It cannot be said that the zemindar became entitled to *khas* possession by reason of the *putni* having come to an end otherwise than by the voluntary act of the putuidar. The case of *Chinto v. Janki*, (1892) I.L.R., 18 Bom., 51, was one of a mortgagor suing for redemption. The plea of limitation was there urged by a person who had taken adverse possession as against the mortgagee whilst the mortgaged property was in the possession of the mortgagee; and it was held that such adverse possession could not affect the right of the mortgagor to redeem, he not claiming through the mortgagee.

In the present case, as we have said above, the plaintiffs became entitled to *khas* possession by the relinquishment of the *putnidars* and *darputnidars*, and so they must be held to be affected by the adverse possession that was taken against the *putnidars* and *darputnidars*, whose rights they had acquired through their voluntary relinquishment.

It was argued that if the view taken by the Lower Appellate Court be correct, it would prejudicially affect the rights of the [465] landlord, because he would be affected by adverse possession before he became entitled to possession himself.

The answer to this argument is this, that the zemindar is not bound to accept any relinquishment by the *putnidar*. That was held in the case of *Heera Lall Pal v. Nil Monee Pal*, (1873) 20 W. R., 383, and in *Judoo Nath Ghose v. Schoene Kilburn & Co.*, (1883) I. L. R., 9 Cal., 671.

Where a zemindar finds that the *putnidar* or other permanent tenant, after having allowed a trespasser to hold adverse possession of any land included in the permanent tenure for more than twelve years, offers to relinquish it, the zemindar can always refuse to accept the relinquishment; and if rent remains unpaid, he can bring the tenure to sale for arrears of rent, and the purchaser at such sale would be entitled to avoid any incumbrance created by the defaulting *putnidar*, and would not be bound by any adverse possession held against the latter.

For all these reasons we are of opinion that the Court of Appeal below was right in holding that the suit was barred by limitation; and the appeal must consequently be dismissed with costs.

This judgment admittedly governs the analogous appeals, which will accordingly be dismissed with costs.

S. C. G.

Appeal dismissed.

NOTES.

[See the Judgment of SUNDARA AYYAR, J., in *Ambalavana Chetty v. Singaravelu Odayar*, (1912) 15 I. C. 146 where the subject is fully dealt with. See also 29 All. 593.]

[26 Cal. 466]

APPEAL FROM ORIGINAL CIVIL.

The 15th, 16th, 19th and 20th December, 1898 and 17th February, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, MR. JUSTICE PRINSEP AND MR. JUSTICE AMBER ALI.

The East Indian Railway Company.....Defendants

versus

Kally Dass Mookerjee.....Plaintiff.*

Railway Company—Duty to carry passengers safely—Explosion in Carriage—

Negligence—Onus of proof—Ignorance or knowledge of law as a defence—

Its limitation—Damages, measure of—Costs.

[466] Held by the Appellate Court (affirming the decision of the Court below) :—In providing for the safety of their passengers it is the duty of a railway company to exercise such a degree of care, at the very least, as may reasonably be required from them under all the circumstances of the case ; and where an accident happens they must shew that it was not preventible by any care or skill.

If a railway-carriage be rendered dangerous to the passengers travelling therein by reason of the fact that there are fireworks in it, and if the carrying of the fireworks could have been prevented by the exercise of due care on the part of the railway company, they are liable for damages for negligence should an explosion of the fireworks occur.

Where loss of life and damage have resulted from the explosion of fireworks in a passenger carriage, the onus is on the railway company to show that they took due care to prevent the conveyance of fireworks in that manner, and not on the plaintiff to show that they did not.

Scott v. London Dock Co., (1865) 3 H. & C., 596 ; *Kearney v. London, Brighton and South Coast Railway Co.*, (1870) L. R., 5 Q. B., 411, and on appeal (1871) L. R., 6 Q. B., 759 ; *Byrne v. Boodle*, (1863) 2 H. & C., 722 ; *Cotton v. Wood*, (1860) 8 C. B. N. S., 568 ; *Foulkes v. Metropolitan Railway Co.*, (1880) L. R., 5 C. P. D., 157 ; *Welfare v. London and Brighton Railway Co.*, (1869) L. R., 4 Q. B., 693 and *Daniel v. Metropolitan Railway Co.*, (1868) L. R., C. P., 593, and on appeal (1871) L. R., 5 E. & I., Ap. 45, referred to.

Costs, in a case like the present, should be allowed as between attorney and client so as not to exhaust the damages or the larger portion thereof.

Narayan Jetha v. Municipal Commissioners of Bombay, (1891) I. L. R., 16 Bom., 254, *Sorabji Ratanji v. Great Indian Peninsula Railway Co.*, (1870) 7 Bom., (O. C.) 119 note and *Ratanbai v. Great Indian Peninsula Railway Co.*, (1870) 7 Bom. (O. C.) 120, note, (1871) 8 Bom. (O. C.) 130, followed.

Per O'KINEALY, J. (in the Court below) :—In the absence of evidence that the defendants had taken steps to prevent passengers from taking fireworks into the carriage, the Court cannot presume that the fireworks were taken clandestinely into the compartment, notwithstanding the fact that such carriage of fireworks is an offence, and that every one is presumed to know the law.

* Appeal from Original Decree No. 29 of 1898, from the decision of Mr. Justice P. O'KINEALY in suit No. 723 of 1896.

[462] The maxim that every man is presumed to know the law is limited to the determination of the civil or criminal liability of the person whose knowledge is in question. It cannot legitimately be made use of where (as in the present case) the parties are different and distinct from him.

THIS was an action for damages by the plaintiff as the father and administrator to the estate of his son who died from injuries sustained in an accident that occurred on the defendants' railway on the 27th April 1896. The plaintiff alleged that the defendants had contracted to carry the deceased safely by their railway but that they had acted so negligently and improperly that while the deceased was travelling in a third-class carriage belonging to the defendants, it took fire; and that the deceased, being severely burnt, fell through the floor of the said carriage, and ultimately died of the injuries received.

The plaintiff also alleged upon information and belief that the said fire was caused by the explosion of a number of fire-works which, through the negligence and improper conduct of the railway company's servants, and in violation of the rules of the defendants in that behalf, had been allowed to be carried by certain other persons in the said carriage. The plaintiff charged that the death of his said son was caused by the wrongful act or neglect of the defendants or their servants; and, as administrator to the estate of his said son, he claimed Rs. 8,000 damages, whilst, as damages for the loss to himself from the death of his said son, he claimed Rs. 7,000, alleging that the said son at the time of his death was of the age of twenty years only and was in Government employment at a monthly salary of Rs. 25.

In the lower Court.

Mr. A. Choudhury and Mr. K. S. Bonnerjee appeared for the Plaintiff.

Mr. Hyde and Mr. J. G. Woodroffe appeared for the Defendants.

The judgment appealed from was as follows:—

O'Kinealy, J. :—In this case the plaintiff is the father and the administrator of the estate of one Atindra Nath Mookerjee, who was fatally injured on the 27th of April 1896, while travelling as a passenger on the East Indian Railway between the [468] stations of Secundrabad and Dadri. Atindra Nath Mookerjee died on the 5th of May 1896 of the injuries sustained by him, and the plaintiff charges that his death was caused by the neglect of the defendants. The relief claimed is of a two-fold character. The sum of Rs. 7,000 is claimed as damages for the loss resulting to the plaintiff from the death of his son, and a further sum of Rs. 8,000 is claimed by the plaintiff as damages for loss to the estate of Atindra Nath Mookerjee, such loss also having been occasioned by the neglect of the defendants. As to this latter portion of the relief claimed by the plaintiff I may say at once that no evidence has been given to show that any pecuniary loss or damage was caused to the estate of Atindra Nath Mookerjee by the neglect complained of, and I therefore dismiss this portion of the claim.

The case for the plaintiff is that on the 25th of April 1896 Atindra Nath Mookerjee purchased from the defendants a 3rd class ticket from Bally in the District of Hooghly to Rawalpindi and proceeded on his journey; that on the 27th of April while on that journey the 3rd class carriage in which Atindra Nath Mookerjee was being carried caught fire owing to the negligence of the defendants and he was severely burnt in different parts of his body; that he was further injured by falling through the burning floor of the carriage, and in consequence of these injuries he died on the 5th of May 1896.

Specific charges of the negligence and improper conduct, which the plaintiff brings against the defendants are set forth in the 2nd and 3rd paragraphs of the plaint. They are, first, that the fire was caused by a number of fire-works,

namely, bombs, which through the negligence and improper conduct of the servants of the defendants and in violation of the rules in that behalf had been allowed to be carried in the carriage by certain persons other than Atindra Nath Mookerjee; *secondly*, that at the time the fire took place the doors of the carriage were locked owing to the negligence and improper conduct of the defendants, and that thereby Atindra Nath Mookerjee was prevented from escaping from the burning carriage; and *thirdly*, that owing to defective [469] arrangements in the connection cord and other appliances of the train to which the carriage was attached (such defective arrangements being the result of negligence and improper conduct on the part of the defendants) there was great delay in bringing the train to a stand and by reason thereof the escape of Atindra Nath Mookerjee from the burning carriage was prevented. Finally there is a general charge that the death of Atindra Nath Mookerjee was caused by the wrongful act, neglect or default of the defendant Company and their servants.

The defendants do not admit the plaintiff's right to institute this suit, or that they entered into any contract of carriage with Atindra Nath Mookerjee. They deny that they or their servants were guilty of any negligence, or unskilful or improper conduct regarding him. They deny that the doors on both sides of the carriage were locked at the time the fire took place, and they also deny that the arrangements in reference to the connection cord or any other appliances of the train were in any way defective. The second paragraph of the written statement is as follows:—"The defendants admit that on the 27th of April 1896 certain fire-works or bombs exploded in a 3rd class carriage forming part of the train known as the No. 5 up Bombay mail at mile No. 926½ on their Railway between Secunderabad and Dadri stations, and several passengers in the said train were injured by the said explosion, but they deny that the said explosion was due to any negligence or improper conduct on the part of themselves and their servants or that their servants allowed or permitted the fire-works and bombs to be carried by any person in the said train as alleged in the second paragraph of the plaint."

From the evidence given at the hearing it appears that Atindra Nath Mookerjee, who was the son of the plaintiff, was a clerk in Government service in the Arsenal at Rawalpindi. He was on leave of absence in the month of April 1896 during which time he lived with his father at Agarparah in the District of the 24-Pergunnahs. On the 24th of April 1896 he proceeded to join his appointment at Rawalpindi. On that day he went to [470] Bally from Agarparah and stayed the night in the house of Sarut Chunder Chatterjee, the husband of the plaintiff's sister. On the next day Atindra Nath Mookerjee left for Rawalpindi by the train leaving Bally at about 2 o'clock in the afternoon. He obtained a 3rd class ticket for the journey which was purchased for him by Sarut Chunder Chatterjee. This afternoon train is called the No. 5 passenger train, and it preserves that name all the way from Calcutta to Tundla near Agra where the Indian Midland Railway joins the East Indian Railway. At that place the No. 5 passenger train becomes the No. 5 up Bombay mail, which name it retains from Tundla on to Ghaziabad if not during the whole of the journey on to Kalka. At Tundla there are extensive changes made in the No. 5 up passenger train. The changes that were made in the train by which Atindra Nath Mookerjee was travelling appear to have been as follows:—The engine which had taken the train from Calcutta to Tundla was taken off and another engine known as No. 96 class F was attached to the train. Two carriages, one belonging to the Great Indian Peninsular Railway and another to the Indian Midland Railway,

were attached to the rear of the train ; a brake-van belonging to the Indian Midland Railway, which was found to be defective at Tundla, was taken off and another brake-van substituted and the train was furnished with a communication cord. One end of this cord was attached to a steam whistle on the engine and the other to a wheel in the guard's van at the rear of the train. When the train was finally made up at Tundla it consisted of the engine No. 96 with its tender, both of which were fitted with hand brakes, a brake-van also fitted with a hand brake, fourteen carriages of different classes belonging to the East Indian Railway Company, two carriages belonging to the other lines which I have mentioned above and the guard's van at the end of the train. Before this train left Tundla the communication cord was tested and found to be in good working order, and so far as I can gather from the evidence the train, when it left Tundla, was in a fit condition for the journey before it. On the 27th of April 1896 the train arrived at Aligarh about noon ; there it stopped 10 minutes, after which it proceeded on its journey to Secunderabad where it arrived shortly before [471] 2 o'clock in the afternoon. It then proceeded on towards Dadri, and it was on the way between these two stations when the fire broke out which caused the deaths of Atindra Nath Mookerjee and eleven other persons. At this time the train was running on a down grade of one in five hundred at a speed of 33 miles an hour.

Leaving aside for the moment the documents which have been put in evidence as throwing light upon the occurrence of the fire, three witnesses have been examined with reference to it on behalf of the defendants. These are William Henry Derry, a permanent way inspector in the employment of the defendants, who was travelling as a passenger in the train, William Gibson, the driver of the engine, and Carapiet John Hyrapiet, the guard of the train. There are also in evidence the statements of these witnesses made upon an officer's joint inquiry into the cause of the accident which was held at Ghaziabad on the 1st May 1896, and there is also the statement of Noor Ally, the brakesman of the forward brake-van who was also examined upon that inquiry. Derry seems to have been the first person who noticed the fire. He was in a second class composite carriage which was the fourth vehicle from the rear of the train. Two carriages belonging to the Indian Midland Railway and the Indian Peninsular Railway were the only carriages between him and the guard's van. He says that the first thing he noticed was a smell of oily burning jute ; that upon perceiving this he looked out of the carriage on both sides along the axle boxes thinking an axle box was running hot, but he saw nothing. About two minutes afterwards a volume of smoke passed the carriage in which he was sitting. He jumped up, and as he did so there was a loud explosion. He looked out and saw a ball of fire drop opposite the carriage in which he was on the right-hand side. He then goes on to say :—" I immediately opened the carriage door seeing there was something seriously wrong. With my face in the direction of the engine I stooped and caught the cord and pulled it towards me. I pulled the cord into the carriage with me as much as I could with the object of sounding the whistle. I pulled in eight or ten feet. I then released the cord as it was useless my hanging on to it, having done all I could. I [472] then looked to the guard's brake and saw him exhibit a red flag. I pulled in the cord that the slack might be on the brake-van side. I did not hear the whistle. When pulling in the cord I heard the noises of the passengers. When I saw the red flag I motioned to the guard to apply his brake and wind up the cord. He motioned back to me that he had done so. Seeing the confused state of the passengers I got out and walked to the rear

brake-van on the foot-board telling the passengers not to be alarmed as the train was coming to a stand. I noticed the speed slackening when I got out of the carriage to go back. I saw the ball of fire at mile 925, telegraph post 16, gate No. 36. I went along the foot-boards back to the rear part of the brake. As soon as the train slackened speed sufficiently to allow me to run faster than it was moving, both I and the guard jumped out and ran ahead so that by the time the train had come to a stand we were practically opposite the burning vehicles. Before the train stopped the passengers were tumbling or jumping from the train. They were either tumbling or jumping I cannot say which it was. I cannot say exactly where the first person fell out of the train. I can say where he was picked up, about 925, telegraph post 20. The train came to a standstill at 926, telegraph post 15, nearly a mile from where I saw the fire."

Hyapiet, the guard, says :—" A loud report sounding from the front part of the train first attracted my attention. . . . As soon as I heard the report, I looked out and saw smoke issuing from the centre part of the train. I at once applied my brake and then pulled the communication cord. Then I took my red signal flag and waved it towards the driver. I opened the lobby door and put out the flag on the right side. I observed the permanent way inspector Mr. Derry beckoning me to put on my brake. He was in the third or fourth carriage from the rear brake. I observed men jumping out of the train. When I saw the men jumping out, I knew there was a serious accident, something radically wrong. I also then noticed men on the foot-boards. In the meantime the train slackened speed and came to a stand. It was just a few posts past mile 926. Before the train came to a standstill I jumped from the brake-van, ran towards the front part of the train, and saw the postal van and [473] a third class carriage on fire. I immediately detached the third class carriage from the rear part of train and signalled to the driver to pull up the train. Before uncoupling the rear part I had seen Mr. Derry. He was standing by. I saw the driver coming from the engine. He said something to Derry and then went back to the engine. Then I told the brakesman to detach the two burning carriages from the front portion of the train. He did so, and I signalled to the driver to pull up ahead."

The account of the accident given by William Gibson, the driver, is as follows :—

"The whistle was opened wide. That was the first thing I noticed. I looked back without altering my position and saw the brakesman in the front brake showing the red signal. I immediately shut off steam and put the tender brake on, at the same time telling my second native fireman to put the engine brake on. When I had tightened up the tender brake I looked back upon that side of the train. I saw a number of people on the foot-boards of some carriages. I stepped to the left-hand side of the engine, reversed the lever, opened steam to the cylinders and steam to the steam-sanding gear. I then looked down on the left-hand side of the train and saw flames issuing from some of the carriages. As the engine slackened speed I jumped off and went back. Where I saw people standing on the foot-boards was towards the centre of the train. The brakesman was showing the red flag. I looked back on both sides of the train. I do not remember seeing the guard when I looked back. The place where I jumped off was on mile 926 near a culvert. I cannot tell exactly where by reference to the telegraph posts. After I got down, the train may have gone about ten yards. It was about 500 yards from the place where the whistle sounded to the place where the train stopped. I did not notice at the time what mile we were on when the whistle was sounded. I ascertained that

afterwards, when we got to Ghaziabad, I enquired and got information from some one else. When I jumped off the engine and went back, I met the permanent way inspector Mr. Derry. I told him to detach the burning vehicles and I would draw the train up. He said he knew what to do and told me to go back to the engine and he would give me the signal. I met him seven or eight [474] carriages from the engine. I went back to the engine and having received the signal from both Derry and the guard, and seeing that the passengers were clear off the vehicles, I drew the front part of the train for about fifty yards when I got the signal to stop. The burning vehicles were then detached from the front part of the train. I received signals and drew that portion of the train another fifty yards when I again received signals to stop."

According to the evidence of Mr. Derry, the explosion occurred on mile 925 at telegraph post No. 16, gate No. 36, and the train stopped with the burning vehicles at mile No. 926, telegraph post 15, nearly a mile from the place where he saw the ball of fire. According to the evidence of Gibson, the train was drawn up to a standstill within 500 yards of the place where the whistle sounded. Assuming that he means 500 yards from the place where his brakes came into full action, even then the train must have proceeded about a thousand yards after the explosion occurred before the driver's attention was attracted, and this delay has not been clearly explained. I am inclined to think that neither Derry nor the guard acted with the promptitude their evidence would seem to show, but it must be remembered that from the explosion to the stopping of the train was hardly 2½ minutes. Allowance must be made for the surprise of the moment, and a very slight delay in taking action would account for a good deal of the time during which the connecting cord remained unused and the whistle silent. This delay may have been partly due to the fact that the guard stopped to apply the brake to his own van before pulling the communication cord, or it may have been partly due to interference with the communication cord by Derry and the other passengers in the train, when the accident occurred. Indeed the connecting cord itself may have become defective owing to the explosion, for though the whistle was undoubtedly sounded, it is not clear by whom the cord was pulled at the time or from what part of the train that was done. I can find nothing to blame in the action of the train officials from the time the explosion took place till the train came to a standstill. I think they did the best they could under the circumstances.

[475] What happened after the train stopped and the burning carriages were detached was as follows: The front part of the train was taken by the driver Gibson to Dadri Station. He says it was ten or twelve minutes past two in the afternoon when the train was brought to a standstill; that about twenty minutes after that he left for Dadri and reached there at about quarter to three. From there he sent two telegrams to Ghaziabad for additional carriages to convey the wounded passengers and for medical assistance. Having done this, he proceeded back to Dadri with a bhistee and some porters, arriving there at about a quarter to four. In the meantime what happened at the scene of the accident was this: The guard and some of the European passengers went back on the line towards Secundrabad for the purpose of picking up the wounded, but finding it impossible to carry them back to the train the guard and Derry with the assistance of the European passengers and some coolies shunted the guard's van back to gate No. 36 which Derry fixes as the place at which the explosion occurred. What took place with reference to assisting the injured persons is told by the guard Hyrapiet and by Derry. Hyrapiet says:—"After the first portion of the train left for Dadri I went

with some military officers who were passengers in the train to search for the persons who had fallen out of the train. I found a man very badly burnt. He was lying near the fencing wires. This was about 150 yards from the brake-van and about 30 or 40 yards further from the burning carriages which were the 7th and 8th carriages from the rear of the train at the time of the accident." Hyrapiet then goes on to say:—"There was an officer with me, I think Captain Maclean, when I found out the first man. There was a Major Grant also there. This officer Maclean went with me when I went to search for the men. There were three coolies, but no other Europeans. I volunteered to carry the wounded man to the brake-van. The officer picked up the man and put him on my back and I carried him to the brake-van. I don't know the name of this wounded man. Captain Maclean accompanied me to the van. We got hold of a blanket, put the man into the blanket, and lifted him by holding the four corners of the blanket into the van. I was completely done up with the heat and the picking up of the man. I consulted the military [476] officers and decided that it was advisable to detach the van and push it along the line. I did this with the assistance of the coolies and the military officers. There was another man carried by a military officer in his arms. This other man was found over the fencing wires about 50 yards from the man I picked up. He too was carried to the brake-van. We hand-shunted the brake-van down the line and picked up the men who were lying on both sides of the line, and put them into the van. I picked up about 14 or 15 altogether. We shunted the brake-van down to gate No. 36; that was where I originally heard the report. I say that because there was a third class carriage door lying there. The report which I heard was the hursting of a third class carriage door. The doors and some of the splinters were lying there then. I cannot say if it was a door belonging to a third class carriage or to the combined postal and third class van. I cannot say if I found more than one door. There was a door and a lot of broken pieces. They were on one side of the line almost opposite the gate on the right facing Dadri; that would be on the east side of the line. There was a passenger completely charred and burnt almost shapeless just about a few yards from there. He was dead. I thought it best to leave the body there with a man in charge." Then he says:—"I forgot to say that I found four bamboo bombs which I locked up in my box and gave to the police. These were four pieces of bamboo about six or seven inches long, hollowed in the centre and the bamboos were burnt. They were slips of bamboo. From what I picked up I could say that the diameter of the bamboo was about 2½ inches. At that time I did not know what they were, but the military officer told me to look after them and lock them up in my box. I could not swear to the exact length of the pieces of bamboo. I should say it was between six and eight inches. I subsequently made them over to the police. These were picked up almost where the dead man was, a little past the gate almost close to where the carriage door was found." Then he says:—"An English-speaking Bengali clerk was picked up half way between the gate house and where the train stopped. I can't say if there were more Bengalis than one amongst those I picked up. I noticed a few [477] Marwaries were there. The Bengali lad was picked up clear of the rails. I cannot say exactly the particular spot. At that point the fencing would be about 18 or 20 yards from the rails." Having got all the wounded passengers into the van the guard tried to relieve the sufferings of the wounded, and with the aid of some coolies the van was shunted back to the rear portion of the train. By that time the driver had returned with the front portion of the train from Dadri, and oil was obtained from him for the purpose of putting upon the wounds of the injured persons.

Derry's account of the picking up of the wounded and dying is this : After he had sent the driver to Dadri he noticed that one of the passengers who had jumped out was being picked up by another passenger. He says :—" I went to his assistance. The guard was there too. The wounded man was brought into a second class carriage and I attended to him. One of the gentlemen passengers and myself then walked back to attend to the burnt people that were lying on the road. The brake-van was uncoupled and shunted back. This gentleman and myself went on ahead and the brake-van followed us. We walked back to gate No. 36 and gave water to the wounded and shade to those lying in the sun. My gangmen, line men, they were working close by, they came running up, they had blankets and we tied them to trees to give shade from the sun. I saw all the injured passengers ; amongst them I saw one young Bengali Babu. I cannot say what his name was. There was only the one Bengali injured. He was about 40 or 50 yards from the gate No. 36 on the Ghaziabad side. He was lying on the left-hand side in what we call the three foot way. That would be about 6 feet from the rail on the left-hand side of the line. He was conscious. I spoke to him, he spoke to me. I gave him some water and he said I had saved his life. I noticed all his body from above his neck down to his waist all was burnt. He was put into the brake-van along with the others." Before all the wounded were picked up, Derry went back and got oil from the driver which he sent back to the brake-van where the wounded were lying. He then attended to the line.

Atindra Nath Mookerjee himself made two statements with regard to the accident, one on the 28th of April, and the other [478] on the 30th. They were taken down by Inspector Fitzpatrick of the Government Railway Police, and these statements are to the effect that he was in the carriage where the explosion occurred ; that it was an explosion of fire-works which were being carried in the compartment in which he was, and the effect of the explosion was that the seats and planks underneath the carriage gave way and he was thrown down senseless. He says that he did not see the fire-works in the compartment, and was not aware of their presence until the explosion took place. There were some 12 or 14 passengers in the compartment with him. The two statements do not agree in respect to the place in which Atindra Nath Mookerjee was at the time of the accident, and when we consider his condition at the time they were made and the extreme suddenness of the accident, very little definite information can be expected from them. In the first statement he says that he was in a compartment in the front of the post-office van, in the second statement he says that the compartment in which he was travelling was behind the post office, and I am satisfied that the second statement is true. None of the witnesses who were examined at the trial can speak to the compartment where the explosion took place, but it is quite clear that when the train came to a standstill, the post-office van and the carriage to the rear of it were in flames. The front part of the post-office van, though filled with smoke, was not in a blaze at the time the train came to a standstill, nor was the rear of the 3rd class carriage immediately behind, although the front part was. We have the additional fact that there was a strong nearly head wind against the train, the effect of which would be to drive the fire to the rear instead of the front. Taking the whole evidence into consideration, I am of opinion that the explosion took place in the 3rd class compartment in the rear of the post-office van.

As to the cause of the explosion I have no doubt that it was caused by the fire-works which were carried by one or two of the passengers in the compartment. It was suggested for the plaintiff that the gas cylinder, which was

carried in the postal-van, was defective, and that it was the gas in the cylinder which exploded and caused the accident; but I believe that the explosion [479] of the gas cylinder took place after the train came to a standstill and not before.

It was contended for the plaintiff that the evidence showed that the communication cord was defective and had failed to sound the whistle when pulled, and that in any case steps had not been taken in proper time to bring the train to a standstill. Now as I have already said I believe that there was a considerable delay in attracting the driver's attention, but I do not believe the cord was defective before the explosion. It was as I have said tested and found in good order at Tundla, and there is nothing to show it did not continue in good order till the explosion occurred. That the whistle was sounded by the communication cord being pulled Mr. Gibson swears to and I believe him. He impressed me as being on the whole a careful and accurate witness. Who was pulling on the cord when the whistle was sounded is not clear. If the communication cord was not defective before the explosion, which was the cause of the accident, no defect which could be attributed to the explosion would, I think, be sufficient to support this part of the plaintiff's case; but even if I am wrong on that view it does not seem to me that the plaintiff's case would be advanced in the least. Assuming the explosion to have taken place at gate No. 36, I think it is clear that Atindra Nath Mookerjee either fell out of or tumbled out of the train within half the distance from that gate to where the train came to a standstill, so that even if the train had been brought to a stand within half the distance in which it was, the effect so far as Atindra Nath Mookerjee is concerned would have been the same. There is no evidence before me to show that his death was due in any respect to injuries caused by his falling out of the train. It was solely due, as I gather from the evidence of the doctor, to the injuries which he received from the burning, that is to say, it was due to the injuries which he received while in the carriage at and after the explosion occurred, and so far as I can see no quickness in stopping the train could have prevented those injuries.

It was also said that the brake power upon the train was insufficient. As regards this, the evidence satisfies me that the brake [480] power was ample for the train, and that even had the train been fitted with the steam brakes, as it was contended for the plaintiff it should have been, there would not be more than 5 or 6 seconds gain in stopping the train, and I do not think that that additional gain would have in any respect saved Atindra Nath Mookerjee from the injuries he received and which were the cause of his death. It is true that the Agent of the East India Railway seems to have considered it a matter of regret that the engine had not been fitted with steam brakes, and that was relied on before me as an admission that the brake power was insufficient, but I am inclined to place more reliance on the evidence of the practical men who were called at the trial than to the remarks on this subject contained in the report to the Directors. It was also said that the engine itself was of an obsolete type and was insufficient, but I do not think the plaintiff has made out a case for relief on this ground. Neither do I think that the plaintiff has made out a case on the ground that the doors on both sides of the train were locked at the time of the accident. That, I believe, was not the case. It is true the evidence shows the carriage doors were provided with catches at the bottom to prevent the doors from flying open and these catches would in the ordinary course of things be fastened, but I cannot hold that the use of these catches which were provided for the safety of the passengers is evidence of neglect or default on the part of the Railway Company, merely because they

may have been the cause of retarding the escape of the passengers from the burning train.

It was also contended by the plaintiff that great delay took place after the accident in helping the wounded and in providing the medical assistance, and it was suggested that this delay had contributed to the death of the plaintiff's son. I do not think the suggestion is well-founded. Besides, it forms no part of the case made by the plaintiff in his plaint, and I cannot, therefore, take it into consideration.

One important matter still remains, and that is as to the causes which led to the explosion. I gather from the evidence that the fire-works were taken on the train at Aligarh (which station was reached at noon on the 27th) by two passengers, father and [481] son, named Abud Ally and Golam Hussain. It appears that between Aligarh and the scene of the accident the passengers smoked in the compartment. That seems to be in accordance with the rules of the Company, and the evidence seems to point to this that the smoking was in some way the cause of the explosion. Golam Hussain appears to have been killed on the spot, and upon him was found a piece of paper. This piece of paper when taken from the body of Golam Hussain was given to the guard Hyrapiet and by him handed over to the Police. The Railway Police Inspector, who made the investigation into the cause of the accident, arrived at the place where it occurred in the morning of the 28th. He says in cross-examination that he found a ticket and an order from a zemindar of Sonepet ordering the fire-works. He ascertained, he does not say how, that they were what are called Sangolas, that is bombs tied up with rope, and catherine wheels. He then says: I don't remember if there was anything else.

Q.—Was a list prepared of what you ascertained were the fire-works carried at the time?

A.—I don't recollect. I say a list of fire-works was obtained. I think I saw that list.

Q.—When did you see it? How did you see it?

A.—I think it was found in the possession of the maker of the fire-works who was thrown out dead, and who still held this list and a bag and this order. I did not see the dead bodies. They were disposed of before I came.

And he goes on to say that he got his information from his Subordinate Police officers, Railway Police, and, he thinks, from Hyrapiet, the guard of the train. In answer to further questions on this point he said that catherine wheels vary from a foot in diameter to 6 inches, but he did not try to ascertain what the catherine wheels carried in the compartment were like, nor did he personally make any inquiries at Aligarh respecting them. He said inquiries were made under his orders but by whom he does not remember. Then he is asked:—

Q.—Did you make any inquiries as to how these fire-works were alleged to have been carried?

A.—Yes.

[482] Q.—How were they carried?

A.—They could not be noticed; they were concealed.

Q.—Did you inquire as to in what they were carried?

A.—The men were dead.

Question repeated.

A.—No. I could not find out whether they were in baskets or in cloths. As far as I can remember I could get no information as to this.

Q.—You said that they were being carried concealed. Do you say so because you could not ascertain from anybody if they had seen these fire-works?

A.—I say so because even those who were in the compartment did not see the fire-works, including Atindra Nath."

Further on he is again cross-examined on this point.

"Did you read the list of fire-works which you say was found ?

A.—I had it read if it was found. It was in vernacular.

(To the Court)—I can't read that vernacular in which it was written. I don't remember to have had it read to me.

Q.—Did you report that a lot of fire-works was being carried ?

A.—I may have done so.

Q.—Did you report that the order giving quantity and so forth had been found ?

A.—I may have done so.

Q.—What is your belief ?

A.—I can't remember at this distance of time what I wrote.

Q.—What is your belief as to the quantities sent ?

A.—The first idea was all the fire-works mentioned in the list found were being carried, but it was afterwards found that a part of them were carried by road and those in the train were samples. I said a lot, my idea was—(stopped) that means a large quantity."

In re-examination he says :—

"I said one of these men was the maker of the fire-works. It was from his shops the fire-works were going. The man we found on inquiry was ordered to supply them."

Then this is put to him.

"Q.—There were no traces of fire-works after the accident.

A.—The guard, I think, picked up the bits."

[483] I think that this witness and the guard Hyrapiet were inclined when they gave their evidence to minimise the quantity of fire-works which were carried in the passenger compartment on the 27th of April. In the report which Fitzpatrick made on the 28th of April he states that it is uncertain where and how the fire commenced ; that the injured persons who were then alive in hospital were too far gone in pain to give clear depositions as to where and how the fire originated. He then goes on to say :—"It is possible the post-office van was first set on fire by a naked light, carelessly thrown match, or a chilam. On the other hand the compartment in rear of the post-office van contained a lot of fire-works being carried from Aligarh to Sonpet against rule and regulation by two persons and whose names are Ahed Hussain, the son of Faizbux, and Golam Hussain, the son of Ahed Hussain, fire-work makers of Jalali, Aligarh. The order on Ahed Hussain for fire-works was given by one Kodar Ally Khan of Chikari, Sonpet, and the"—(the report is here torn but I take the word to be 'list' or 'order')—"giving quantity and so forth has been found, but both Ahed Hussain and his son are dead, so no prosecution against them can ensue. But whether the fire in the post-office set fire to the fire-works or *vice versa* remains to be proved by inquiry. This important point will be cleared up by the 30th when an officers' joint inquiry will be held."

Now it is clear from the evidence of this witness, and his report, that the first impression of those inquiring into the accident, was that there was a large quantity of fire-works being carried in the train that day, and that impression is supported by the extent of the damage caused by the explosion. The carriage panels were iron lined with wood, and the force of the explosion was sufficient to blow out the doors of the compartment to a distance of 10 feet from both sides of the line. The compartment was completely wrecked, and Hyrapiet in his evidence gives the state of the burning carriages at the time the train came to a standstill. He says in cross-examination :—"At the time when the train came to a stand no attempt was made to save the mail. We could not do anything. The fire had taken such a command over

the things that we could not do anything, but the [484] whole thing was not ablaze. You could approach the two carriages at the ends—the post-office at the front end and the 3rd class at the Secunḍrabad end.” And Derry in his evidence also says that the two carriages were in flames at the time when the train came to a stand.

Now it seems to me that to do such amount of damage in so short a time there must have been a considerable quantity of these fire-works in that compartment, and the hearsay evidence, for it seems to be nothing more, upon which Fitzpatrick relies now as his reason for supposing that a part of the goods mentioned in the list had been sent by road, and that only a portion had been carried in the train is not satisfactory. He suggests that they must have been concealed, because Atindra Nath Mookerjee says he did not know whether the fire-works were in the carriage until he heard the explosion. But there was probably nothing to turn the attention of Atindra Nath Mookerjee to the luggage carried by any other passenger into the compartment.

The evidence as to the remains of the fire-works which were found after the accident also tends in my opinion to show that the quantity of fire-works carried in the compartment was considerable. Hyrapiet, the guard, says that he picked up four bamboo bombs which he locked up in his box, “slips of bamboos which were 6 to 8 inches long, the diameter of the bamboo would be about 2½ inches.” He picked these up on the 27th and locked them up in his box. In his evidence before the joint inquiry given on the 1st of May 1896, when nothing had arisen to cause a desire to minimise the quantity, he stated this—“I picked up on the side of the line three bamboos with holes in the centre called bombs, about 14 inches long, which had exploded, and other bamboos used as torches for illuminating marriage processions, all burnt. Derry in his evidence says that he picked up two or three fire-work bamboos, about 8 inches long and 1 inch in diameter, wrapped round with a peculiar twine, which had exploded. He says he picked up two or three on that day and more were picked up the next morning. And in his statement before the officers’ joint inquiry he said he saw several exploded bombs picked up near the gate-house No. 36, [485] he also picked up some himself the next morning. Further it is extremely probable that besides the exploded bombs, which were picked up on the line on the 27th and the 28th, assuming that all those on or near the line were picked up [which is not clear, as no search seems to have been made for them], other bombs and fire-works may have exploded and been consumed within the carriage.

On the whole the evidence leads me to the conclusion that a considerable quantity of fire-works was in the carriage at the time of the explosion. An expert witness, who is a pyrotechnist, was called for the purpose of showing that a small quantity of bombs would be capable of doing the damage which was done. I do not think this expert’s evidence is very satisfactory. But even if a small quantity of bombs would be sufficient to do the damage that was done that does not necessarily give any reliable indication of the quantity of fire-works which was carried in addition to the bombs.

The question then is whether the defendants are responsible for the fire-works having been taken into and carried in the compartment of the passenger carriage as they were on that day, a carriage in which it was the practice for the passengers to smoke and therefore to have fire of some kind or another.

There can be no doubt that from the moment those fire-works were introduced into that carriage the lives of the passengers were in danger. The result of the explosion shows that from that moment the compartment became

practically a powder magazine. It, therefore, ceased to be from that moment a vehicle fit or proper to be used for the purpose of carrying passengers. The question is, are the defendants responsible for that, and to determine this question it is necessary to inquire, in the first instance, what is the duty of the Railway Company with respect to providing for the safety of their passengers.

In the case of *Christie v. Griggs*, (1809) 2 Camp., 79, the facts were these. The plaintiff was travelling to London as a passenger on a stage coach belonging to the defendant when it broke down and he was greatly bruised. The first Court imputed the accident to the [486] negligence of the driver, the second to the insufficiency of the carriage. The accident was caused by the axle-tree of the coach having snapped asunder, and Sir JAMES MANSFIELD, in directing the jury upon the question as to the sufficiency of the coach, stated that the defendant "did not warrant the safety of the passengers. His undertaking as to them went no further than this that, as far as human care and foresight could go, he would provide for their safe conveyance." In *Readhead v. Midland Railway Company*, (1867) L. R., 2 Q. B., 413, and on appeal (1869) L. R., 4 Q. B., 379, which was a similar case, the Court, while of opinion that a carrier does not warrant the safety of his passengers, laid down that the obligation to take due care should be attached to the contract between them; and they went on to say—"Due care," however, undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order." In the case of *Ford v. London and South-Western Railway Company*, (1862) 2 F. & F., 730, the plaintiff was injured by the tender of the train being thrown off the line, and one of the causes was alleged to be the defective tyre of one of the wheels of the tender. ERLE, C.J., in his direction told the jury: "The action is grounded on negligence. Negligence is not to be defined, because it involves some inquiry as to the degree of care required, and that is the degree which the jury think is reasonably to be required from the parties, considering all the circumstances. The Railway Company is bound to take reasonable care to use the best precautions in known practical use, for securing the safety of their passengers." In the case of *Burns v. Cork and Bandon Railway Company*, (1863) 13 Ir. Law Rep., 543, the Court laid down the principle that "it is the duty of a carrier to provide for his passengers a vehicle which shall be free from defects as far as human care and foresight can provide, and perfectly road-worthy." In the case of *Hyman v. Nye*, (1881) L.R., 6 Q.B.D., 685, the defendant was a jobmaster from [487] whom the plaintiff hired a landau for a drive from Brighton to Shoreham and back. After having driven some way, and whilst the carriage was going down hill and slowly over a newly-mended part of the road, a bolt in the under part of the carriage broke. The splinter-bar became displaced; the horses started off; the carriage was upset; the plaintiff was thrown out and injured, and he brought an action for compensation. No fault could be imputed to the horses or to the driver. The learned Judge at the trial told the jury in substance that the plaintiff was bound to prove that the injury which he had sustained was caused by the negligence of the defendant, and if in their opinion the defendant took all reasonable care to provide a fit and proper carriage (which opinion I may point out is to be arrived at on evidence given before them, because the jury can only deal with the facts which are proved at the trial) their verdict ought to be for him. Being thus directed, the jury found a verdict for the defendant; and in particular they found that the carriage was reasonably fit for the purpose for which it was hired,

and that the defect in the bolt could not have been discovered by the defendant by ordinary care and attention. The plaintiff obtained a rule calling upon the defendant to shew cause why there should not be a new trial on the ground of misdirection, and that the verdict was against the weight of evidence, and the rule was made absolute. Mr. Justice LINDLEY in his judgment, after referring to a number of authorities says: "A careful study of these authorities leads me to the conclusion that the learned Judge at the trial put the duty of the defendant too low. A person who lets out carriages is not, in my opinion, responsible for all defects discoverable or not; he is not an insurer against all defects; nor is he bound to take more care than coach proprietors or railway companies who provide carriages for the public to travel in; but in my opinion, he is bound to take as much care as they; and although not an insurer against all defects he is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whilst the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to shew that the break-down was [488] in the proper sense of the word an accident not preventible by any care or skill. If he can prove this, as the defendant did in *Christie v. Griggs*, (1809) 2 Camp., 79, and as the Railway Company did in *Readhead v. Midland Railway Co.*, (1867) L. R., 2 Q. B., 413; and on appeal, (1869) L. R., 4 Q. B., 379, he will not be liable; but no proof short of this will exonerate him. Nor does it appear to me to be at all unreasonable to exact such vigilance from a person who makes it his business to let out carriages for hire. As between him and the hirer the risk of defects in the carriage, so far as care and skill can avoid them, ought to be thrown on the owner of the carriage. The hirer trusts him to supply a fit and proper carriage; the lender has it in his power not only to see that it is in a proper state, and to keep it so, and thus protect himself from risk; but also to charge his customers enough to cover his expenses."

The cases which I have cited are cases in which the dangerous condition of the vehicle was owing to a defect in some part of the vehicle itself; but it seems to me that the principles laid down in those cases are applicable to the case before me and are those by which I must be governed. A vehicle may become insecure and dangerous as well from having dangerous substances placed therein as from a defective wheel or axle or bolt, and may cease to be road-worthy from the one cause as well as from the other, and if the causes owing to which in the case before me the carriage in which Atindra Nath Mookerjee was being carried by the defendants became insecure and dangerous and unfit for the conveyance of passengers, were causes which could have been prevented from becoming effective by care and skill on the part of the defendants, then that care and that skill the defendants were bound to exercise.

It was stated on behalf of the defendants that they could not prevent the introduction of the fire-works into the train, and the case was likened to a person entering a carriage with a box of matches or a piece of dynamite in his waist-coat pocket. But there is no evidence to show that the defendants had taken any steps to prevent passengers from taking fire-works with them into the passenger trains, and I cannot take the case before me [489] as analogous to the case put in argument, the very statement of which shows how the explosives were concealed. There is nothing before me to show how the fire-works were taken into the train or that they were in fact concealed. The expressions found in some of the reports that the fire-works were carried against

rule and regulation, or surreptitiously or clandestinely, are of no value as evidence in this case of the manner in which they were taken into the compartment, nor are the reasons given by Fitzpatrick for saying that the fire-works were concealed there. These expressions are at the most expressions to the effect that they were being carried without the knowledge of the Railway officials.

Even where it is shown that the explosives have been well concealed as in the illustration put in argument, I think it may fairly be said that, quite apart from the individual case, due care should have been taken by the defendants to impress upon their staff the necessity of being vigilant in preventing the carriage of fire-works, and also to bring home to their passengers that such an act would be severely punished, because the very fact of that having been done would, I have no doubt, tend to prevent even the secret carrying of explosives. It is not, however, necessary to pursue this hypothetical case. In the case before me I am asked to presume that the defendants took due care to prevent the carrying of these fire-works and that the person who carried them concealed them in such a way that they could not be discovered by the railway servants at Aligarh. I cannot presume these matters in favour of the defendants where the circumstances are such as to call upon them to show what care and caution they in fact did take.

I was told that every man must be presumed to know the law, that it must therefore be presumed that the man who took the fire-works into the train, especially as he was a maker of fire-works, knew he was committing a penal offence, that therefore it must be presumed he took every means to conceal his possession of these fire-works from the railway officials, and that in fact he was successful in doing so. I cannot rest the decision of a pure question of fact upon supposition of this character. No doubt every man must be supposed to know the law, and if [490] Golan Hussain were being sued or prosecuted for introducing these fire-works into the carriage, his plea of ignorance of the law would be no excuse for his conduct. But I think the maxim is limited to the determination of the civil or criminal liability of the person whose knowledge is in question and cannot be legitimately made use of in a case, such as the present, where the parties are entirely different and distinct from him. Even if he did know the law and knew he was committing a penal offence, there is no reason why I should assume further that he knew he must carefully conceal these fire-works from the railway officials. He may have acted on the belief (rightly or wrongly entertained) that the railway officials would not interfere with him, and that there was no necessity to conceal the fire-works.

That the introduction of a considerable quantity of fire-works into a railway carriage is not a thing which may not be prevented by the exercise of that due care which, according to the principles laid down in *Readhead v. Midland Railway Co.*, (1867) L. R., 2 Q. B., 413; and on appeal, (1869) L. R., 4 Q. B., 379, and *Hyman v. Nye*, (1881) L. R., 6 Q. B. D., 685, the defendants are bound to take, is shown by the course taken by the defendants themselves after the accident. In the seventh paragraph of Mr. Dring's report to the Agent to the East Indian Railway Company, dated the 6th of May 1896, respecting the accident and the finding of the officers' joint inquiry, he says this :—"A notice has since been issued to the staff to exercise great care in passing the luggage of passengers, and I have already received advice that in two instances passengers have been detected carrying fire-works; one case at Mogul Serai in which a Native Deputy Magistrate is said to be the offender, and a second case at Burhan." The fact that

within one week two cases of the carrying of fire-works were detected after the notice was issued to the staff to exercise great care, shows that the carrying of fire-works by passengers into the compartment in which they travel is a thing which may be prevented by the exercise of that high degree of care which the Railway Company are bound to exercise for the safety of their passengers ; and if that be so, I am of opinion that where loss of life and damage has [491] resulted from the explosion of fire-works in the compartment of a passenger carriage it should be shewn that due care was taken by the Railway Company to prevent the fire-works being carried in that manner.

The question at issue then resolves itself into this : Was there due care within the meaning of those words as defined in *Readhead v. Midland Railway Co.*, (1867) L. R., 2 Q. B., 413 ; and on appeal, (1869) L. R., 4 Q. B., 379, and *Hyman v. Nye*, (1881) L. R., 6 Q. B. D., 685, taken by the defendants for the purpose of preventing these two persons, Ahed Hussain and Golam Hussain, from taking these fire works into the compartment with them at Aligarh on the 27th of April 1896 ? Not a particle of evidence, upon this part of the case, has been given by the defendants. Their contention is that they are not bound to give any such evidence and they say that it lies upon the plaintiff to shew that they had not taken that due care and caution which they were bound to do to prevent the carrying of these explosives in the passengers' compartment. I do not think this contention is sound. If they had, previous to this accident, issued instructions to the staff to take care and prevent the carrying of fire-works, especially during the marriage season, or if as a matter of fact any precautions were in the habit of being taken in the Aligarh Station to prevent the carrying of fire-works in the passenger compartment, these are matters peculiarly within the knowledge of the defendants themselves, who have the sole control of the traffic and alone know the methods by which that traffic is regulated. It is, therefore, in my opinion the duty of the defendants to produce the evidence on these matters to show that they had exercised due care and caution, and that it is not for the plaintiff to show that they did not. In the case of *Christie v. Griggs*, (1809) 2 Camp., 79, the plaintiff having proved that the axle-tree snapped asunder at a place where there is a slight descent, from the kennel crossing the road, that he was in consequence precipitated from the top of the coach, and that the bruises he received confined him several weeks to his bed— there rested his case. Best, Sergeant, contended strenuously that the plaintiff was bound [492] to proceed further and give evidence either of the driver being unskilful, or of the coach being insufficient. But it was held by Sir JAMES MANSFIELD that the plaintiff had made a *prima facie* case by proving his going on the coach, the accident, and the damage he had suffered. That was the course taken in *Readhead v. Midland Railway Co.*, as I read the report in L. R., 2 Q. B., 413 ; and it is the course directed by that class of cases of which *Scott v. London Dock Company*, (1865) 3 H. & C., 596, is one of the best known examples. It appears that the train was a crowded train, but it had no more than its proper complement of passengers according to the guard, and it has not been suggested that there was any crowding or confusion at Aligarh Station under cover of which the fire-works might have been introduced into the carriage notwithstanding the vigilance of the railway officials. In fact, so far as the evidence before me goes, there is nothing to show that during the ten minutes' stay at Aligarh any passengers left the train, or that any entered the train except the two who carried the fire-works. There is no evidence before me to show that the defendants took any precaution whatever which might have resulted in preventing the introduction of these fire-works into the passenger compartment at Aligarh Station

on the 27th April. Mr. Dring, the Traffic Manager, who was called as a witness, and who wrote the report I have above referred to as to the precautions taken after the accident occurred, was not asked a single question on this subject. I must therefore come to the conclusion that the defendants did not exercise that high degree of care in providing for the safety of their passenger Atindra Nath Mookerjee which the law imposes upon them, and that therefore they are liable to the plaintiff in this suit for the damages which he has sustained by the loss of his son.

With regard to the amount of damages I take the rule to be laid down in *Narayan Jetha v. Municipal Commissioners of Bombay*, (1891) I.L.R., 16 Bom., 254. There the Court says:—"As regards damages, in cases of this nature, distinct evidence of the loss sustained or benefit expected is not necessary. The jury may look [493] at all the circumstances of the case and especially at the position of the parents and age of the child, and call in aid their own experience in arriving at their conclusions."

Now in this case the father has no settled income. He is about 48 years of age and suffering from paralysis. He was a schoolmaster, but owing to the disease from which he is suffering he had to give up his appointment. He also seems to have made some money by writing books, but at present he derives no income from that source, and his illness has involved him in debt. He has two other children living, but they are both infants, and it was to his eldest son Atindra Nath Mookerjee that he seems to have looked for his main support in future. That that son would be so to the best of his ability no one knowing the customs of this country can doubt. As for Atindra Nath himself, he entered Government service in 1894. He was in temporary employment till the beginning of 1896, when he was appointed permanently as a clerk in the Arsenal at Rawalpindi, on a salary of Rs. 25 a month. From this time onward one may, I think, consider that his future career was fairly assured. He appears to have lived at Rawalpindi in the house of his uncle who is employed in the Commissariat Department there, and to have taken sick leave for two months in February 1896. He was on his way to rejoin his appointment when he met with the accident which resulted in his death. In examination-in-chief the plaintiff said that his son used to send him Rs. 20 or Rs. 22 a month. In cross-examination he said "from 1894 he went on remitting me Rs. 10, 15, or 20 at a time, but after being permanent he sent me money once or twice. He sent me last Rs. 20 or Rs. 22. I cannot say when it was." Now I am satisfied that if Atindra Nath had lived he would have been a substantial support to the plaintiff, and looking at all the circumstances I think Rs. 1,500 would be a fair sum which the plaintiff should receive as damages in this case. I say which the plaintiff should receive because in dealing with the costs of this suit I think I am bound to see that he shall receive that sum. If I give the costs of this suit to the plaintiff merely as between party and party, his attorney and client costs of this protracted trial would, in all probability, exhaust the larger portion of it. In similar cases where larger damages [494] were given than I feel disposed to give in this case, WESTROPP, C.J., ordered the defendants to pay the costs of the suit as between attorney and client. See *Sorabji Ratanji v. G. I. P. Ry. Co.*, (1870) 7 Bom., (O. C.) 119, note, and *Ratanbai v. G. I. P. Railway Co.*, (1870) 7 Bom., (O. C.) 120, note; and on appeal, (1871) 8 Bom., (O. C.), 130. I shall follow those precedents in this case.

There will be a decree for the plaintiff for the sum of Rs. 1,500 with costs on Scale 2 as between attorney and client.

From this decision the defendant Company appealed.

The *Advocate-General* (Sir Charles Paul), Mr. Hill, and Mr. Hyde appeared for the Appellants.

Mr. Pugh and Mr. A. Chowdhry for the Respondents.

The *Advocate-General*.—Even on the findings of the learned Judge, the appellants are entitled to judgment; but they do not admit that the findings are properly arrived at.

Railway Companies are not insurers of their passengers; so that the facts alleged in the plaint do not constitute a breach of duty on the part of the appellants. Unless the plaintiff can put his case so high as to say that the defendants should search every passenger entering a carriage, he cannot succeed in this action. In order to make the defendants liable, there must be a neglect on their part to take some reasonable precaution; and the breach of duty alleged should be specifically stated. There must be also a *scienter* on the part of the defendants; but in both these respects the plaint is demurrable.

It is not for the defendants to disprove negligence on their part, it is for the plaintiff to prove it; and although a high degree of care is required of a Railway Company in the carriage of its passengers, that cannot mean an impracticable degree of caution. The fact that after accident some precaution was taken which was not taken before it is no evidence, by itself, of negligence before the accident—*Hart v. Lancashire & Yorkshire Railway Company*, (1869) 21 L. T. Exch., 261; and in order to make the [495] defendants liable, it must be shown what precaution they omitted which they ought to have taken.—*Daniel v. Metropolitan Railway Company*, (1871) L. R., 5 E. & I. Ap., 45. The plaintiff must prove the neglect of some duty by the defendants, or want of due care, or knowledge on their part that something dangerous was being carried.

It was not possible for the Company's servants to examine the luggage of every passenger. Section 58 of the Indian Railways Act, 1890, provides that every passenger shall, on request, deliver to the railway servants an account in writing containing such a description of the goods he is carrying as may be sufficient to determine what freight he may be charged for them. There is no power to search the luggage; and it is only in cases where there are grounds for suspicion, that a package may be opened. It was a criminal offence to take dangerous goods into a passenger compartment and in no case can the wrongful act of a third party make the Railway Company liable.

Mr. Hill on the same side:—The appellants did not contract to carry the deceased safely or securely, but only safely so far as reasonable care and foresight could avail. That does not mean the utmost possible foresight that a human being could exert. It means all that is reasonably and practically possible—See *Nugent v. Smith*, (1876) L. R., 1 C. P. D., 423 (437), and that was a case of the carriage of goods, which were completely under the carrier's control. The expression "utmost possible care" must be construed as the "utmost practicable care"—*Moss v. Smith*, (1850) 9 C. B., 94 (103).

As to the legal obligation on the appellants apart from contract:—The plaint alleges that they *allowed* fire-works to be carried; but the *scienter* is wanting. That being so, the legal obligation of the Company must be based on their knowledge or on reasonable grounds of suspicion. There is no guarantee to one passenger that another passenger carries no dangerous goods. Even if the law had cast that guarantee on the Company, it [496] would keep it within the bounds of justice, so as not to impose impracticable duties.—*Readhead v. Midland Railway Co.*, (1867) L. R., 2 Q. B., 413; and on appeal, (1869) L. R., 4 Q. B., 379. In order to constitute negligence, there must be a legal duty to

exercise control, and a breach of that duty. But in all cases reasonable conduct is the ultimate test. The degree of control is the paramount factor in determining what is or is not negligence. That factor is not merely determinant as to the proof, but it even changes the nature of the obligation. The reason why the liability of a carrier is so much stricter as regards goods than as regards passengers is because of his greater control over goods. The fallacy in the reasoning of the learned Judge in the Court below lies in the expression "allowed fire-works to be carried," which must be taken to mean that the carriage of fire-works was preventible by the exercise of reasonable and practicable precautions.

A Railway Company must assume that passengers are not infringing the law. A passenger is entitled to take into the compartment anything except articles forbidden by law; and the Company cannot interfere except to prevent, under section 59 of the Railways Act, a fraud on itself. No power to inspect luggage is given unless the Company has reason to suspect the presence of dangerous goods; and no reason is suggested as against the Company in this case. It cannot be alleged that the Company were bound to know the real state of things. For they could only know it by doing an act which they were not entitled to do, viz., opening the passenger's luggage.

Whether the occurrence of an accident is *per se* evidence of negligence depends on the degree of control exercisable, and on the knowledge not merely of the danger, but the knowledge—derived from experience—as to the probability of an accident occurring if due care be not taken: mere knowledge of the danger is not enough—*Scott v. London Dock Co.*, (1865) 3 H. & C., 596. Unless both these elements co-exist, the plaintiff must fail. It is not enough to show that the accident may have occurred through the negligence of the defendants' servants; the plaintiff must also show [497] something that the defendants might have done but omitted to do—*Smith v. Great Eastern Railway Co.*, (1866) L. R., 2 C. P., 4 (10).

If this case had been tried by a jury, the question for them would have been whether negligence could be predicated, and if so whether it ought to be—*Metropolitan Railway Company v. Jackson*, (1877) L. R., 3 App. Cas., 193 (197). If the facts proved are equally consistent with negligence or the absence of negligence, the Judge must withdraw the case from the jury—*Cotton v. Wood*, (1860) 8 C. B. (N.S.) 568; *Briggs v. Oliver*, (1866) 4 H. & C., 403. In order to render the defendants liable, the plaintiff must show facts more consistent with negligence than with the absence of it—*Toomey v. London, Brighton and South Coast Railway Co.* (1857) 3 C. B. (N. S.), 146. The plaintiff must prove that the death of the deceased was attributable to some negligent act or omission of the defendants—*Wakelin v. London and South Western Railway Co.*, (1886) L. R., 12 App. Cas., 41.

Again: the plaintiff must prove that the accident was one which the defendants ought to have foreseen—*Cornman v. The Eastern Counties Railway Co.*, (1859) 4 H. & N., 781. No previous accident of this kind has been proved: therefore there was nothing to show that the defendants could reasonably have foreseen this accident. The onus of proving knowledge on the part of the defendants is also on the plaintiff—*Welfare v. London, and Brighton Railway Co.*, (1869) L. R., 4 Q. B., 693, where the knowledge in question was the knowledge of the condition of the defendants' own premises.

If, however, the Court should think that the accident itself is evidence of negligence, then the plaintiff did away with his rights, because it follows that he must have known that the fire-works were taken into the carriage. All the reports admitted in evidence in the Court below are not evidence at all, and were inadmissible even though not objected to by the defendants' Counsel.

All that they show is that a certain [498] person made certain statements to a public official in the course of his duty; he was not a servant of the Company, but a Government servant; and therefore his admissions (if any) do not bind the defendants. But if the reports are to be taken as admissions, they must be taken as a whole; and if so, they shew that the fire-works were carried *surreptitiously* by a passenger. Carrying fire-works is a criminal offence; and we are entitled to assume that the person who took them knew the law, because he was in a trade governed by special regulations. The probabilities, therefore, are that he would be extremely careful to carry them concealed. So that, even if there be a *prima facie* presumption in this case against the defendants, that presumption is rebutted by the evidence and by the probabilities of the case. Everybody has a right to suppose that a crime will not be committed and to act on that belief—*Baxendale v. Bennett*, (1878) L. R., 3 Q. B. D., 525 (530); and even apart from any question of crime, it is surely reasonable for every man to assume that his neighbour will not do an illegal act, and to act on that assumption.

Further, there is no statutory obligation on the Railway Company to put up notices warning passengers of the penalties for carrying dangerous goods; and, at the time of this accident, the Company were not working under rules framed under the Railway Act of 1890, but under the Act of 1879, as there had not been time to supply copies in the vernacular of the regulations for which the Company, without being obliged to do so, had applied to the Government.

In *Cliff v. Midland Railway Co.*, (1870) L. R., 5 Q. B., 258, the accident was preventible, for there the defendants had powers the exercise of which would have prevented the possibility of accident; and those powers were exercised after complaints had been made, and after a fatal accident had occurred. The jury found negligence; but the defendants moved for and obtained a new trial.

It makes no difference whether the legal obligation on the passenger is by law or by contract. In this case there was an obligation on the passenger not to take fire-works into the [499] compartment; and the defendants were entitled to rely on his performing that obligation—*Daniel v. Metropolitan Railway Co.*, (1871) L. R., 5 E. & I., Ap. 45 (60). A passenger cannot impose on the Company any obligation not laid upon them by law; nor can the wrongdoing of one passenger impose any greater obligation on them—*Degg v. Midland Railway Co.*, (1857) 1 H. & N., 773 (781).

If the inspection of luggage is not reasonably possible, the Company are not to be expected to examine all the luggage—*Richardson v. Great Eastern Railway Co.*, (1876) L. R., 1 C. P. D., 342 (344). And in India the duty of examination would be infinitely more difficult than in England, by reason of the numerous religious and caste prejudices. Notice of the presence of dangerous goods is not to be imputed to the Company—see *Bevan on Negligence*, 2nd edition, p. 1059, and the cases there collected.

In *Baldwin v. London, Chatham and Dover Railway Co.*, (1882) L. R., 9 Q. B. D., 582, the defendants were held liable because they admitted a breach of duty in misdelivering the goods; otherwise, it was the duty of the plaintiff to inform them that the goods were such as to require special care.

Mr. Pugh for the Respondent:—The issue substantially is whether there was or was not such negligence as contributed to this accident. In the carriage of passengers, Railway Companies are bound to use the utmost care, and to do everything that human foresight can suggest to secure the safety of persons

using their lines—Story on Bailments, 8th edition, section 601. There is both a common law and a statutory duty cast on them. Their duty as to explosives would be incumbent on them apart from any statute; and how can it be said that they acted consistently with their duty when they allowed gunpowder to be carried in a compartment where they allowed smoking?

Section 47 of the Indian Railways Act, 1890, empowers the Company to make rules, and that power is given for the very purpose of meeting cases of this kind; but the defendants have [500] not shown that they took any steps to fulfil their duties in this behalf. Indeed, the section says that they *shall* make rules; but from the passing of the Act until 1895 they made no rules whatever. Their suspicion is enough for the exercise of the power of inspecting luggage; and a package of this kind cannot be looked upon as the ordinary luggage of a passenger.

True, want of knowledge of law will not excuse any man charged with a crime; but that is a very different thing from saying that every man is presumed to know the law—*Martindale v. Falkner*, (1846) 2 C. B., 706 (719); 15 L. J., Q. B., 91 (94), approved in *The Queen v. Mayor and Corporation of Tewkesbury*, (1868) L. R., 3 Q. B., 629 (635). And even if people are to be taken to know the law they cannot be expected to know the bye-laws. But the defendants ask the Court to presume still further that, if anything is done contrary to the law or to their bye-laws, it is done in a secret manner.

The evidence shows that the defendants took no precautions whatsoever at Aligarh with regard to the examination of passengers' luggage. When they did issue notices on the subject, the result was that two prosecutions followed. They suggest that no precautions were possible, so that they clearly acknowledge that none were taken.

Different considerations apply to cases where a duty is imposed—whether by common law, or by statute or contract—and cases where there is no duty—see the authorities collected and considered in Pollock on Contracts (5th edition), p. 416 *et seq.* The doctrine as to *scienter* has no application to the present case. The luggage of passengers was under the control of the defendants, so were the carriage into which it was taken, and the stations on the line; therefore the presumption of negligence arises. Even where the Company's trains run on another line, they are bound to make provision for the safety of a passenger who starts on their line—*Foulkes v. Metropolitan District Railway Co.*, (1880) L. R., 5 C. P. D., 157. The case of *Wakelin v. London and South-[501] Western Railway Co.*, (1886) L. R., 12 App. Cas., 41, is distinguishable, because there was no breach of any duty, inasmuch as the premises on which the accident occurred were not under their control at the time.

Mr. Chowdhry on the same side:—The defendants' own evidence proves them guilty of negligence. All that the plaintiff had to prove was that the carriage took fire, that there were fire-works, and that the line and the train belonged to the defendants; and there is no question about any of these facts.

The reports made by the railway officials would be evidence against the defendants; they are reports made by the railway servants to their superior officers, and in them there was no suggestion of the surreptitious carriage of the fire-works until the Agent made his report after receiving all the other reports.

The unusual nature of the occurrence is an element in determining on whom the onus should fall, and it is unreasonable to throw the onus on the plaintiff. Not only was no evidence produced to contradict the railway inspector's report, but the Company even based their subsequent report on it, and, therefore, it

ought to be taken as evidence against them, especially as they did not object to its going in.

Section 54 of the Indian Railways Act, 1890, imposes a statutory obligation to exhibit the conditions for the carriage of goods; no evidence has been given that such a notice was exhibited.

The exception in section 72 of the Act applies only to the carriage of goods; therefore the common law as regards the carriage of passengers would be applicable to the Company.

Mr. *Hill* in reply:—The passage cited from *Story on Bailments*, section 601, lays down the law as it exists in the United States; but it is not English law and goes very much beyond the point at which English law stops, so far as the acts of a third person are concerned. A Railway Company is not liable for the acts of even its own servants, if those acts are not done in the course and scope of the servants' duty—*Cobb v. Great Western Railway Co.*, (1894) L. R., App. Cas. 419.

C. A. V.

[502] The following judgments were delivered by the Court (MACLEAN C.J., and PRINSEP and AMEER ALI, JJ.):—

Maclean, C. J.—This is an appeal by the East Indian Railway Company from a decision of Mr. Justice P. O'KINEALY, dated the 8th of June 1898, by which he awarded a sum of Rs. 1,500 by way of damages to the plaintiff with the costs of the suit.

The plaintiff is the father and administrator of the estate of one Atindra Nath Mookerjee, who was injured, on the 27th April 1896, while travelling as a passenger on the appellants' line between the stations of Secundrabad and Dadri. Atindra Nath Mookerjee was so badly injured that he died on the 5th of May following. In the Court below, the plaintiff charged the defendants with negligence, on the ground that the communication cord was defective, that proper steps had not been taken in time to bring the train to a standstill, that the brake power of the train was insufficient, and, in that sense, defective, and that the carriage doors were improperly locked. All these issues, however, have been found in favour of the appellant Company; they have not been urged before us by the respondent, and it is unnecessary further to allude to them.

The evidence establishes that Atindra Nath Mookerjee, on the 25th of April 1896, took a third class ticket from Bally to Rawalpindi; that on the 27th April, while on his journey, the carriage in which he was travelling caught fire, that he was badly burnt, and injured by falling through the floor of the carriage, and subsequently died of those injuries.

There can be no reasonable doubt, upon the evidence, that the fire resulted from an explosion of fire-works carried by some fellow-passengers of the injured man in the compartment in question, and the plaintiff's case is that it was through the negligence and want of due care on the part of the servants of the appellant Company, and in violation of their rules, that the fire-works found their way into the carriage. This is denied by the appellant Company.

There has been much discussion, in the course of the argument, as to the actual quantity of fire-works in the carriage when the explosion took place, though it is common ground, that [503] any way, a certain quantity of fire-works or bombs did explode in the carriage, and that several passengers in the train were severely injured by that explosion. Both the passengers who were carrying the fire-works were killed, and any direct evidence as to the quantity is not forthcoming, though much light would, probably, have been thrown upon this particular point, if that which has been styled the "list" of

fire-works, or "the order from the Zemindar of Sonepet," and which, with their railway tickets, was found upon the body of one of the men who were conveying the fire-works, had been produced. At one time it was in the hands of the guard, Hyrapiet, a servant of the Company, and was by him apparently handed over to the Police; but it has since disappeared. This is, at least, very unfortunate. Fitzpatrick, the inspector of the Railway Police at Tundla, speaks of the quantity of fire-works as a large quantity, and though that statement must be regarded as a matter of inference rather than of direct and positive knowledge on his part, upon the whole of the materials before us his conclusion strikes me as well-founded, and I am satisfied, that, when the explosion took place, there was a large quantity of fire works in the carriage.

It is contended for the Company that, if the quantity had been large, the fire-works must have been observed by the passengers in the carriage, and reliance is placed upon the two statements of Atindra Nath Mookerjee, to the effect that he did not see any fire-works. This is a matter of surmise and probability only, and is met by the counter suggestion that, whether the fire-works were carried in a basket or in bundles they would probably be placed under the seat, and a passenger, perhaps at the other end of the carriage, might not have observed them. But having regard to the condition of Atindra Nath Mookerjee when he made those statements, too much reliance cannot safely be placed upon them. The question of the actual quantity of fire-works is only material upon that of whether or not they were likely to escape observation, for whether the quantity were large or small, the fire clearly arose from their explosion.

It is proved then that Atindra Nath Mookerjee had paid for his ticket and was a third-class passenger by the defendants' [504] train, that he was travelling as such passenger in the train, that when so travelling a fire resulting from the explosion of a considerable quantity of fire-works carried in the carriage, in which he was travelling broke out in that carriage, that he was severely injured, and that he died of those injuries; and the plaintiff contends, upon that state of facts, that he has made out a *prima facie* case of negligence against the appellant Company, and that, having made out such *prima facie* case, the onus is cast upon the defendants of showing that they had taken every reasonable care and precaution to prevent such dangerous goods being carried in a passenger's compartment of their train, a compartment in which, admittedly, smoking is permissible. In other words the plaintiff's contention is that the facts proved or admitted by the Company raise a presumption of negligence, which the Company are bound to rebut.

We have been referred by the appellants to a very large number of cases ranging over a somewhat diversified field of inquiry, many of which appear to me to refer to questions of negligence of a class widely different from that under consideration, and in that view I do not think it would be very profitable to discuss them. The authorities establish that, in providing for the safety of their passengers, it is the duty of a Railway Company to show, at the very least, such a degree of care, as may reasonably be required from them, considering all the circumstances of the case. The care has sometimes been spoken of as "a high degree of care," and it has been said that the Company must show that the accident was one not preventible by any care or skill.

The present case appears to me to range itself under that class of cases where such a *prima facie* case has been established as to necessitate an answer on the part of the defendants, to satisfy the Court that they have taken all reasonable care and precaution in the matter. A fire in a train is not an ordinary circumstance; a fire in a train resulting from an explosion of a large quantity

of fire-works is an extraordinary occurrence, one which raises, at least, a presumption of possible negligence on the part of the Company.

[505] Upon this class of case, which I may designate as the *res ipsa loquitur* class, there are many authorities, and the one very generally referred to, by reason of the principle formulated by Chief Justice ERLE, is that of *Scott v. London Dock Co.*, (1865) 3 H. & C., 596. Of these cases the strongest in favour of the plaintiff is that of *Kearney v. London, Brighton and South Coast Railway Co.*, (1871) L. R., 6 Q. B., 759, whilst the appellants rely upon (amongst other cases) *Welfare v. London and Brighton Railway Co.*, (1869) L. R., 4 Q. B., 693, and equally upon *Daniel v. Metropolitan Railway Co.*, (1871) L. R., 5 E. & L., Ap. 45, to which I will refer more particularly in a moment. The latest case in these Courts on this head is that of *Choutmull Doogur v. Rivers Steam Navigation Co.*, (1897) I.L.R., 24 Cal., 786, which has recently been affirmed by the Judicial Committee of the Privy Council, (1898) *Ante.*, p. 398.

That, however, was a case of damage to goods not of injury to a passenger.

The appellants, however, contend that this class of case has no application to the present, inasmuch as the fire-works were not under their control, but under the control of one of their passengers.

This leads us to consider to what extent the Company has control over luggage carried by their passengers.

The men who were taking the fire-works—there is nothing to show whether they were being carried in baskets or in bundles or how they were being carried—took their tickets and, inferentially, entered the train at Aligarh Station, and there is no evidence to show that any care or precaution whatever was taken at that station to prevent passengers, who might be suspected of carrying dangerous goods, from taking them into a passenger compartment. The Company urge that they have no power to search a passenger's luggage, and that if they have to search every parcel **[506]** carried by every passenger it would become impracticable to work the passenger traffic of their line.

It is a strange thing to say that a substantial or indeed any quantity of fire-works can be properly described as passenger's luggage, but be that as it may, it would be difficult to say that fire-works are not dangerous goods within the meaning of section 59 of the Railways Act (IX of 1890), and under that section no passenger is entitled to take such goods with him, and any railway servant may refuse to receive such goods for carriage; and if any railway servant has reason to believe that such goods are contained in a package, with respect to which no notice of their nature has been given to the station master or other railway servant in charge of the place, such servant may cause the package to be opened for the purpose of ascertaining its contents. There is, therefore, under certain conditions, a power of search in the officers of the Company. There is not a particle of evidence adduced by the appellant Company to show that they took any precaution at Aligarh to prevent the men from taking the fire-works into the carriage. It is not suggested that there was any crowd at Aligarh Station; the train stopped there for ten minutes; and from the evidence of the guard the men would have to pass through a gate where their tickets were checked. For aught we know these fire-works may have been carried in an open basket, and the servant of the Company—the man at the barrier—may have allowed the men to pass through with the goods so exposed. If that were so, and there is no evidence to show whether it was so or not, it is admitted that the Company would be liable. This was the Hindu marriage season—a time at which, notoriously, fire-works were in demand for marriage festivities, and a time consequently when the Company

might not unreasonably be expected to have been specially on the alert.' The circumstances under which the men were enabled to pass the barrier were facts peculiarly within the knowledge of the Company. They might have called the man at the gate who, if it were the fact, would have been able to say that there was nothing in the appearance of the baskets or bundles carried by the men calculated to lead him to suspect that they were carrying such dangerous goods; or they might have called others [507] of their servants at Aligarh to show that reasonable precautions against the carriage by passengers in the compartment of such goods were taken. But they call no one to show this. On the contrary, they contend that it is for the plaintiff to call these witnesses and make out his case of negligence.

When a similar argument was advanced in the case of *Byrne v. Boodle*, (1863) 2 H. & C., 722 (728), it was characterised by the late Chief Baron POLLOCK as "preposterous." It must be remembered that the railway station at Aligarh, the arrangements at the station, the line, the train and the carriages, are each and all under the control of the defendants, and I cannot bring my mind to think that, when the plaintiff had proved what he did, it was not incumbent on the Company to show that they exercised every reasonable care and precaution to prevent the fire-works being taken into the carriage. I am not prepared to accept the contention of the Company that they have no control over the luggage carried by their passengers.

With respect to the case of *Daniel v. Metropolitan Railway Co.*, there the accident arose under circumstances, and from a cause, quite outside the control of the Company, and it was consequently held that the latter were not liable. The reasoning of the various judgments in that case shows that that was the real *ratio decidendi*; but it would be materially extending the principle of that case if it were held to apply to the present.

It is however not so much upon the decision itself in that case that the appellants rely, as upon the observations of the late Mr. Justice WILLES, when the case was in the Court of Common Pleas, (1838) L. R., 3 C. P., 593. That learned and distinguished Judge says: "It is necessary for the plaintiff to establish by evidence circumstances from which it may be fairly inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to." To my mind the plaintiff in this case has brought himself within this definition; he has established such circumstances as fairly warrant such an inference as is referred to. It is a fair [508] inference from the circumstances that there is reasonable probability that the accident resulted from the want of some precaution which might have been taken by the defendants at Aligarh Station, and which, if taken, might have resulted in preventing these fire-works being carried by a passenger into a passenger compartment. The defendants might have shown, what, if any, precautions were taken, but they have not condescended to do so.

For these reasons the judgment of the Court below must be affirmed and the appeal dismissed, and having regard to the length of time which the argument has occupied—I am not suggesting that it was too long—and upon grounds similar to those given by Mr. Justice O'KINEALY, with costs as between attorney and client.

Prinsep, J.—I am of the same opinion.

Ameer Ali, J.—Before dealing with the main and substantive question in this case, I desire to make a passing observation on the appellants' contention that the plaint does not disclose, with sufficient precision, the character of the

negligence charged against the defendant Company. On this point it is enough to observe that if the allegation in the plaint was considered by the defendants as not reasonably explicit, it was open to them to require the plaintiff to supply the defect. No step, however, appears to have been taken, and the parties went to trial on the single issue of fact, viz., whether the defendants were or were not guilty of negligence so as to make them liable on the action.

Now, it may be regarded as settled law that in the case of carriers of passengers under statutory powers, there exists an express duty, independently of any implied contract, to carry them safely. This duty imposes on the carrier the obligation of exercising the utmost care and caution consistent with human foresight and diligence. I need only refer to the following cases among others in support of the proposition which I have enunciated—*Collett v. London and North-Western Railway Co.*, (1851) 16 Q. B., 984; *Marshall v. York, Newcastle and Berwick Railway Co.*, (1857) 11 C. B., 655; *Austin v. Great Western Railway Co.*, (1867) L.R., 2 Q. B., 442.

[509] In *Foulkes v. Metropolitan District Railway Co.*, (1880) L. R., 5 C. P. D., 157, to which I shall have presently to refer in detail, THESIGER, L.J., pointed out in the clearest terms that the benefit which a carrying company derived, directly or indirectly, from the carriage of passengers imposed upon it the corresponding obligation of taking due and reasonable care for their safety. A violation of the duty thus imposed on a carrying company, an omission on their part to take such due and reasonable care to insure the safety of their passengers whom they invite to travel by their carriages, is considered as negligence. Proceeding on this principle the learned Judge in the Court below has held in this case that the defendants had omitted in fact to take the care which was incumbent on them to prevent the introduction into the carriage in which the plaintiff's son was travelling of the dangerous articles, the explosion of which caused the accident. And it is with this finding that we are now concerned. It has been urged on behalf of the appellants that the learned Judge in the Court below has wrongly thrown the onus on the defendants whereas it lay upon the plaintiff to prove negligence, that he has imposed an obligation on them not warranted by law, and that in considering the question of omission on their part he has overlooked the fact that it is the amount of control possessed by the Company over the act or acts complained of that determines their liability.

These, in substance, represent the principal objections urged against the lower Court's judgment. If I understand the matter aright there is no fixed rule as to onus; each case must depend on its own special facts; in some instances the situation of the parties and the nature of the accident, or the circumstances leading to it, may give rise to a legal presumption of negligence against the defendants; in others it may be necessary for the plaintiff to establish affirmatively actual negligence before the Company can be made liable.—*Byrne v. Boadle*, (1863) 2 H. & C., 722; *Cotton v. Wood*, (1860) 8 C. B. (N.S.), 568; *Scott v. London Dock Co.*, (1865) 3 H. & C., 596; and **[510]** *Kearney v. London and Brighton Railway Co.*, (1870) L. R., 5 Q. B., 411, furnish examples of the first class of cases. In *Scott v. London Dock Co.*, (1865) 3 H. & C., 596, the majority of the Judges held that where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. In *Kearney v. London, Brighton and South Coast Railway Co.*, (1870) L. R., 5 Q. B., 411, the plaintiff was injured by the fall of a brick, while

passing under a Railway bridge extending over the highway. The bridge rested on perpendicular brick walls, having pilasters, and from the top of one of these pilasters the brick fell, shortly after the passing of a train. It was held that these facts raised a presumption of negligence against the defendants. In this case, COCKBURN, C.J., after stating the principle applicable to the case, said as follows :—

"The Company who have constructed this bridge were bound to construct it in a proper manner (there was no evidence, however, that it was not so constructed) and to use all reasonable care and diligence in keeping it in such a state of repair that no damage from its defective condition should occur to those who passed under it, the public having a right to pass under it. Now, we have the fact that a brick falls out of this structure and injures the plaintiff. The proximate cause appears to have been the looseness of the brick, and the vibration of a train passing over the bridge acting upon the defective condition of the brick. It is clear, therefore, that the structure in reference to this brick was out of repair. It is clear that it was incumbent on the defendants to use reasonable care and diligence, and I think the brick being too loose affords *prima facie* a presumption that they had not used reasonable care and diligence. It is true that it is possible that, from changes in the temperature, a brick might get into the condition in which this brickwork appears to have been from causes operating [511] so speedily as to prevent the possibility of any diligence and care applied to such a purpose, intervening in due time, so as to prevent an accident. But inasmuch as our experience of these things is that bricks do not fall out when brickwork is kept in a proper state of repair, I think, where an accident of this sort happens, the presumption is that it is not the frost of a single night or of many nights, that would cause such a change in the state of this brickwork as that a brick would fall out in this way, and it must be presumed that there was not that inspection and that care on the part of the defendants, which it was their duty to apply." The case was carried to the Exchequer Chamber where the judgment of the majority below was unanimously affirmed, (1871) L. R., 6 Q. B., 759.

Before I refer to the decisions relied upon by the appellants, I desire to call attention to the facts of the present case. The plaintiff's son was proceeding to Rawalpindi in the Panjab, by the defendants' line, with a ticket purchased by or for him at Bally. At Aligarh two passengers entered his compartment with some bombs and catherine-wheels. Between Secundrabad and Dadri further up the line the fire-works exploded with such fearful effect that the doors of the compartment were blown out, the carriage was set on fire, eleven out of the fourteen passengers in the compartment were so seriously injured that they died within a short time, and considerable damage was done to the rolling stock of the Company. The facts are abundantly clear upon the official reports of the Company's servants to their superior officers which have been put in evidence on behalf of the plaintiff with the consent of the defendants' Counsel. They would probably be evidence as to the actual facts stated in them under section 35 of the Evidence Act. It was contended that as in some of these letters phrases like "surreptitiously carried" or "clandestinely carried" occurred, they ought to be taken as evidence against the plaintiff, to disestablish the case of negligence. No fact is given which would justify the officer using the expression in saying that the bombs were carried clandestinely. So far as we can judge it was a mere hypothesis or opinion absolutely of no [512] evidential value. Besides, it is noteworthy that the expression does not occur in the earlier reports or letters, but only in the later ones when presumably the

officers of the Company had awakened to a sense of the gravity of the situation and of the liability involved in the dispute. These facts which are more fully set forth in the lucid and exhaustive judgment of the learned Judge in the Court below, raise in my mind a strong presumption of gross carelessness on the part of the Company's servants, and cast upon the defendants the onus of showing that there was no neglect of reasonable precautions on their side, and that the explosives were really carried in a manner that avoided detection. These matters were within the cognizance of the defendants, but no attempt was made to discharge that onus. On the contrary it has been strenuously argued either that no precaution was possible, or that they do not know what precaution could be taken, which comes to the same thing.

Ex post facto evidence has no bearing on the question whether due or reasonable care was or was not taken, but when a contention of the character just referred to is vigorously pressed by a learned Counsel, the fact that subsequent to the accident steps have been taken which have in a great measure obviated the risk, becomes highly relevant. It is in evidence upon the reports that a special watch placed by the Company has succeeded in stopping in several instances the carriage of fire-works and in the conviction of offenders. In this connection I may observe that the suggestion of Counsel that these fire-works were, in order to avoid detection, carried tied up in a bundle, is not only not founded on any data but is also improbable. It appears from the depositions of the witness, that the bombs had bamboos eight to ten inches long stuck into them; we know what catherine-wheels are like. To suppose that these things would be carried tied up in a bundle, which would simply spoil the things, is absurd. However that may be, it is enough to say that the defendants have given no evidence as to how they were carried, or that they were in fact carried so concealed as to escape the notice of the Company's servants.

[513] Much stress was laid on *Daniel v. Metropolitan Railway Co.*, (1871) L. R., 5 E. & L., Ap. 45, and *Welfare v. London and Brighton Railway Co.*, (1869) L. R., 4 Q. B., 693, as furnishing the guiding principle in cases relating to the liability of Railway Companies. In *Daniel v. Metropolitan Railway Co.*, (1871) L. R., 5 E. & L., Ap. 45, it appears that the Corporation of London was authorised to execute certain works over the line of the Metropolitan Railway Company. These works consisted partly in placing heavy iron girders upon the walls running along the line of railway, and were, therefore, works in the execution of which some danger was involved. The Railway Company had no control over these works, which were executed by contractors, engaged by the Corporation. By the negligence of the contractors one of the girders fell on a passing train and injured the plaintiff. It was held that it was not the duty of the Railway Company to assume that the contractors would be negligent or to take precautions against their possible negligence, and that the occurrence of the accident did not raise any presumption of negligence on the part of the Company.

In *Welfare v. London and Brighton Railway Company*, (1869) L. R., 4 Q. B., 693, the plaintiff who was standing under a portico looking at a time table was injured by the fall of a timber and a roll of zinc from the roof which was undergoing repair. There was nothing to show that the defendants knew or had the means of knowing that the roof needed repairing, or that there was any obligation on their part to take steps to know the condition of the roof. It was held therefore that the plaintiff had failed to make out a case of negligence against the Company. The facts of these two cases differentiate them altogether from the case before us. In *Wakelin v. London and South-Western Railway Co.*, (1886) L. R., 12 App. Cas., 41,

negligence was established against the Company, but inasmuch as the plaintiff failed to show the connection between the negligence, and the cause of her husband's death, her action was dismissed. Lord WATSON stated his view in that case in the following words: "It appears to me that in all such cases the liability of the defendant Company must rest upon these facts, in the first place [514] that there was some negligent act or omission on the part of the Company or their servants, which materially contributed to the injury or death complained of, and in the second place, that there was no contributory negligence on the part of the injured or deceased person. But it does not, in my opinion, necessarily follow that the whole burden of proof is cast upon the plaintiff. That it lies upon the plaintiff to prove the first of these propositions does not admit of dispute. Mere allegation or proof that the Company were guilty of negligence is altogether irrelevant; they might be guilty of many negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection whatever with the injury for which redress is sought, and, therefore, the plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury." And Lord FITZGERALD said as follows: "There was evidence also intended to establish negligence on the part of the defendants in the absence of due and proper precautions for the safety of the public using that footpath. It seems to me that there was evidence of negligence, but it did not go so far as to establish that such negligence led to the death of Wakelin."

In the present case there can be no question that the negligence of the defendants, assuming that there was any, was the *causa causans* of the accident. It was urged on the authority of *Daniel v. Metropolitan Railway Co.*, (1871) L. R., 5 E. & I., App., 45, that, as the defendants have no control over the passengers or over what they introduce into the carriages as their personal luggage, the Company could not be liable for negligence. I have already pointed out that in *Daniel v. Metropolitan Railway Co.*, (1871) L. R., 5 E. & I., App., 45, the Railway Company had no authority over the contractors. Is it correct to say that the defendants had no control over their passengers? Does not the whole argument proceed on a pure assumption of fact? *Foulkes v. Metropolitan District Railway Co.*, (1880) L. R., 5 C. P. D., 157, has more analogy to the present case. There the plaintiff, as it appeared in the Court of Appeal, had taken a return ticket at the railway station at Richmond, which belonged to the South-Western Company, for Hammersmith belonging [515] to the District Railway Company. The latter had running powers on the South-Western Company's line: and the plaintiff on his return journey from Hammersmith to Richmond in a carriage of the defendant Company was injured whilst alighting from the train. In the action brought by him it was contended on behalf of the District Railway Company that the contract with the plaintiff having been made by the South-Western Railway that Company were liable and not the defendants: and, *secondly*, that as the accident arose from the improper construction of the platform at Richmond, which was under the sole control of the South-Western, the District Railway Company were not liable. Both these points are thus dealt with by BAGGALLAY, L. J.: "The train by which the plaintiff travelled was in every sense their own; the locomotive and carriages belonged to them, the drivers, guards and other servants in charge of it were in their employment, and in their pay, the line over which it ran was in part their own, and over the other part they had running powers, and in respect of that portion of the line over which they had, and were exercising, running powers, they had the same duties and were under the

same obligations relatively to their passengers, and to the public generally, as they had and were under in respect of the portion of the line which was their own. The plaintiff was admittedly properly travelling by their line; he had, in the sense in which the word is ordinarily used, been invited to travel by it." And he went on to add: "I should not have adverted to this subject [the question relating to the platform] had it not been suggested in argument that the accident was occasioned to the plaintiff, not by reason of any improper construction of the carriage in which the plaintiff travelled, but by reason of the improper construction of the platform, and that the construction and maintenance of the platform was under the sole control of the South-Western Company; but admitting the fact to be so, as it possibly is, it was the duty of the defendants either to adapt the foot-board or step of their carriage to the platform it would have to approach or to arrange for an alteration being made in the platform itself. To carry their passengers in carriages which were in any respect or for any purpose dangerous was, in my opinion, a misfeasance rather than a nonfeasance."

[516] Now, what was the position of the Company in the present case? The carriage in which the plaintiff's son was travelling was theirs, it was entirely in the charge and under the control of their servants; the platform at Aligarh was under their control, the gate or barrier through which the passengers had to pass to get on to the platform was held, it would appear from the evidence, by one of their servants; the law had vested them with the fullest powers to make rules against the introduction of combustibles and explosives into the trains. And if, in spite of these powers and facilities, they omit or fail to take sufficient precautions, as in the absence of any rebutting evidence we must assume they did, their liability cannot be questioned. The learned Judge in the Court below has not, in my opinion, cast a higher obligation than the law imposes, the duty of taking due and reasonable care for the safety of passengers whom they invite to travel by their line.

For these reasons I agree in dismissing the appeal.

Appeal dismissed.

Attorneys for the Appellants: Messrs. *Morgan & Co.*

Attorney for the Respondent: *Babu A. K. Mitter.*

H. W.

NOTES.

[This decision was reversed by the Privy Council, upon appeal, in *The East Indian Railway Company v. Kalidas Mukerji*, (1901) 28 Cal., 401.]

APPELLATE CIVIL.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Kadambini Debi.....Plaintiff

versus

Kali Kumar Haldar.....Defendant.*

Easement—Light and air—Partition of a joint-family house—Effect of Partition by a consent decree where the decree does not reserve any right to the use of light and air—Implied grant of easement upon severance of tenement.

On partition of a family dwelling house by a consent decree, the plaintiff claimed a right to the passage of light and air necessary for the enjoyment of his share of the building in the way in which it was enjoyed at the time [517] of the partition, though no such right was expressly reserved in the decree. The defence was that the principle of an implied grant of easement upon severance of the tenement should not be applied to the case, but that the rights of the parties should be determined solely with reference to the decree made in the partition suit.

Held, that the principles of justice, equity and good conscience should be applied to the case, and that the plaintiff was entitled to the right claimed, even in the absence of any express provision in the decree reserving such right.

Quere: Whether the principle of an implied grant of easement in severance of tenements would apply in a case where the partition was effected by a decree of the Court in a contested suit and not by consent of parties.

THE facts of the case were shortly these: One Mani Lal Banerjee and the plaintiff were in joint possession of a plot of land with a building thereon. Mani Lal brought a suit for partition of the said plot of land, which ended in a consent decree, and a partition was effected. Mani Lal got the northern portion, and the plaintiff got the southern portion of the building. On the southern portion there was a one-storied building with some doors and windows opening to the north. Mani Lal's share was purchased by the defendant. Prior to the purchase by the defendant, Mani Lal began erecting a new building on the northern portion of the block. The defendant after his purchase took up the work of the building where Mani Lal had left it and completed the construction of the southern wall as a new building, and a verandah was being put up projecting towards the plaintiff's house, which the plaintiff alleged would probably be an obstruction to the free access of light and air through the doors and windows of her house. Under these circumstances she brought a suit for a declaration of her right to the passage of light and air through the doors and windows of her house, for removal of the verandah, and for a perpetual injunction restraining the defendant from extending a certain roof close to the said doors and windows.

The defence (*inter alia*) was that the plaintiff was not entitled to the right claimed, no such right having been reserved in her favour in the partition decree.

The Munsif found in favour of the plaintiff and granted the [518] injunction prayed for. On appeal the Lower Appellate Court reversed the decree of the

* Appeal from Appellate Decree No. 1103 of 1897, against the decree of Babu Rajendra Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 21st of May 1897, reversing the decree of Babu Sasi Kumar Ghose, Munsif of Alipur, dated the 7th of December 1896.

Munsif and dismissed the plaintiff's suit on the ground that the rights of the parties must be determined with reference to the decree in the partition suit, and as that decree did not reserve any right to the passage of light and air, such as the plaintiff claimed, she was not entitled to it.

From this decision the plaintiff appealed to the High Court.

Mr. J. T. Woodroffe, Babu Basunta Kumar Bose, and Babu Horendra Nath Mookerjee, for the Appellant.

Sir Griffith Evans¹, and Babu Jogesh Chundra De, for the Respondent.

Mr. Woodroffe for the Appellant.—The effect of the consent decree was that the plaintiff was entitled to enjoy the building with the easements which were attached to the same at the time of the partition: See the cases of *Ratanji Hormasji v. Fdalji Hormasji*, (1871) 8 Bom., H. C. O. C., 181; *Amutool Hussool v. Joomuck Singh*, (1875) 24 W. R., 345; *Charu Surnokar v. Dokouri Chunder Thakoor*, (1882) I. L. R., 8 Cal., 956; and *Bolye Chunder Sen v. Lalmoni Das*, (1887) I. L. R., 14 Cal., 797. The plaintiff would be entitled to the easement claimed, as it was apparent and continuous, and necessary for enjoying the share as it was enjoyed when the partition took effect: see *Purshotam Sakharam v. Durgoji Tukaram*, (1890) I. L. R., 14 Bom. 452. The following cases were also cited in the course of the argument:—*Whaley v. Dawson*, (1805) 2 Sch. & Lef., 367, 372; *Wheelton v. Burrows*, (1879) I. R., 12 Ch. D., 31, *Allen v. Taylor*, (1880) L. R., 16 Ch. D., 355; *Phillips v. Low*, (1892) 1 L. R., Ch. D., 47; *Barnes v. Loach*, (1879) L. R., 4 Q. B. D., 494; *Compton v. Richards*, (1814) 1 Price, 27; *Swansborough v. Coventry*, (1832) 9 Bing., 305 (309); and *Pearson v. Spencer*, (1863) 3 B. & S., 761.

[519] Sir Griffith Evans for the Respondent.—In this case the plaintiff could not go behind the decree, and she is not entitled to the right claimed, inasmuch as the decree did not provide for such right—*Gopal Chunder Roy v. Brojendra Coomar Roy*, (1879) 5 C. L. R., 338, and *Thomas v. Owen*, (1887) L. R., 20 Q. B. D., 225.

Mr. Woodroffe in reply.

The judgment of the High Court (Banerjee and Rampini, JJ.) was as follows:—

This appeal arises out of a suit brought by the plaintiff appellant for a declaration of her right to the passage of light and air through certain doors and windows, for the removal of certain obstructions to the same, and for a perpetual injunction restraining the defendant from extending a certain roof close to some of those doors and windows referred to in the plaint.

The defence was that the plaintiff was not entitled to the right claimed, there being no such right reserved in her favour in the decree for partition by which the building, to which the right to the passage of light and air is said to appertain, was allotted to the plaintiff's share.

* The first Court found for the plaintiff to this extent, namely, that the plaintiff was entitled to an injunction restraining the defendant from extending the roof, or hanging verandah, and it gave the plaintiff a decree accordingly.

On appeal the Lower Appellate Court has reversed the first Court's decree and dismissed the plaintiff's suit, holding that the rights of the parties must be determined with reference to the decree in the partition suit, and as that decree does not reserve any right to light and air, such as the plaintiff claims in her favour, she is not entitled to a decree.

In second appeal it is contended for the plaintiff that the Lower Appellate Court is wrong in holding upon the facts found that the plaintiff is not entitled to the right claimed.

It is argued for the plaintiff that the effect of the partition decree, which was a decree by consent, was to entitle the plaintiff [520] to enjoy the building in question with those apparent and continuous *quasi*-easements which were attached to the same and which were necessary for the enjoyment of the building in the way in which it was enjoyed at the time of the partition.

In support of this contention several cases have been cited, of which it is necessary only to refer to the following, namely, *Ratanji Hormasji v. Fidalji Hormusji*, (1871) 8 Bom. H. C., O. C., 181; *Amuttol Russool v. Jhoomuck Singh*, (1875) 24 W. R., 345; *Charu Surnokar v. Dokouri Chunder Thakoor*, (1882) I. L. R., 8 Cal., 956; and *Bolye Chunder Sen v. Lalmoni Dasi*, (1887) I. L. R., 14 Cal., 797.

On the other hand it is contended for the respondent that the rule of English law which implies a grant of an easement upon severance of tenements is one that does not apply to this country, that even if such a rule could apply to a case of severance by the act of parties it can have no application to a case like this, where severance is effected by a decree of Court, and that, in a case like the present, the rights of the parties should be determined solely with reference to the decree made in the partition suit.

No doubt the rights of the parties must be primarily determined with reference to the terms of the decree in the partition suit. If the decree had contained any express provision one way or another bearing on the present point, such provision would have to be given effect to quite irrespective of any rule of law with regard to an implied grant of an easement upon severance of tenements. But there is no express provision in the decree bearing upon the present question.

One thing, however, is clear from the terms of the decree in the partition suit, that the decree was made by consent of parties; that what was divided was not merely the land, but the land with the building standing on it; and that a certain portion of the land with the buildings, as indicated in the plaint referred to in the decree, is allotted to the plaintiff and a certain other portion to the defendant.

[521] That being so, the question is whether the appellant who had allotted to her a portion of the house, that is the land with the building standing thereon, had that portion allotted to her with these apparent and continuous *quasi*-easements, which are necessary for the enjoyment of the building as a building, or whether she got simply the land allotted to her with the building then standing thereon, which might any day by the action of her co-sharer be converted into an uninhabitable building.

There being no enactment of the Legislature applicable to a case like this, the question we have stated will have to be answered with reference to the principles of justice, equity and good conscience; and the Courts in this country have considered the rule of English law known as the doctrine of implied grant of easements upon severance of tenements, as being in accordance with justice, equity and good conscience. This will appear from the cases to which we have referred above.

It was urged that the question, whether the rule applied to a case in which severance is effected by a decree of Court, was raised in the case of *Bolye Chunder Sen v. Lalmoni Dasi*, (1897) I. L. R., 14 Cal., 797, but was considered by the learned Judges who tried that case to be one of considerable difficulty

and was left undetermined; and that the rule of implied grant of easements ought not to apply to such cases because that rule is based either upon the principle that no man can derogate from his own grant or upon a presumption as to the intention of the parties by whom severance is effected; and neither of these two can apply to a case where severance is made by a decree of Court.

No doubt there is considerable force in this argument, but it is unnecessary to decide the broad question in this particular case, the partition here being effected, not by the Court as in a contested suit, but by consent of parties, the Court merely recording that consent.

That being so, we are not precluded from applying to this case the principle of presumed grant of easements upon severance of tenements.

It was further contended that we should not apply to a [522] case where parties come to a partition the rules applicable to a case where the owner of an entire tenement alienates a portion, or simultaneously alienates different portions of the whole to different persons; and that in a case where a partition is effected by parties the dominant consideration in their minds is that each should acquire a portion which he could enjoy without interference by his co-sharer. But there is another and a more important matter to consider, and that is this: In dividing property, the value of each divided portion ordinarily is assessed with reference to its existing condition, and in the present case there is nothing to show that any other consideration guided the parties.

On a full consideration of these matters we think that it would accord best with the rules of justice, equity and good conscience to hold that the plaintiff by the partition in question got the portion allotted to her, with the passages for light and air which are found by the first Court to be necessary for the enjoyment of that portion in the way in which it used to be enjoyed, and that the absence of any express provision in the decree does not stand in the way of the plaintiff's claiming the right to those passages for light and air.

It was urged that if the decree of the Court of Appeal below is set aside, the case ought to go back. We have considered the grounds of appeal urged before the Lower Appellate Court by the defendant, and we do not think that any question of fact was raised in the appeal for the decision of which a remand would be necessary.

The questions raised were all in substance questions of law which have been disposed of by the observations made above.

The result then is that the decree of the Lower Appellate Court will be set aside, and that of the first Court restored with costs in this and the Lower Appellate Court.

S. C. G.

Appeal allowed.

NOTES.

[See also (1898) 3 C.W.N., 407; 16 I.C., 893; 24 M.L.J., 552; 16 C.L.J., 417.]

[523] PRIVY COUNCIL.

The 17th November and 10th December, 1898.

PRESENT :

LORDS ASHBOURNE, HOBHOUSE, MACNAGHTEN, AND MORRIS,
AND SIR R. COUCH.

Muhammad Mehndi Ali Khan.....Representative of Plaintiff

versus

Muhammad Yasin Khan and others.....Defendants.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Oudh Land Revenue Act (XVII of 1876), sections 121, 123—Transfer of shares of under-proprietors in arrears of rent—Right to interest on rent from transferee—Oudh Rent Act (XXII of 1886), section 141.

Under the Oudh Land Revenue Act, 1876, sections 121, 123, the shares of defaulting under-proprietors were transferred to three of them who offered to pay. The present suit was brought by the superior proprietor, the talukhdar, in whose estate the mehal was comprised, against the whole body of under-proprietors, for arrears of rent accrued, while the term of the above transfer was running.

Held, that the provision in section 123 of the Oudh Land Revenue Act, 1876 to the effect that such transfer shall not affect the joint liability of the co-sharers of the mehal, had not the effect of charging the co-sharers other than the three transferees with any liability for rent accrued during the term of the transfer.

Interest was also claimed, but as to this it was *held*, that under-proprietors were not tenants within the meaning of the Oudh Rent Act, 1886, section 141, providing for payment of interest on rents due from tenants

APPEAL from a decree (1st November 1894) of the Judicial Commissioner's Court, affirming a decree (14th October 1890) of the Deputy Commissioner of Sultanpur.

This suit was brought on the 4th June 1890 under the provisions of clause 2, section 108, of the Oudh Rent Act, XXII of 1886, in the Court of the Deputy Commissioner, by the father of the present appellant, the talukhdar of Hasampur, as superior proprietor of mehal Sewar, within the talukh, against the under proprietors of that mehal for the recovery of Rs. 10,761, arrears of rent, with interest thereon, for the years 1294, 1297, Fasli, alleged to be due from the defendants as a joint body, numbering forty-four.

[524] Under sections 121 and 123 of Act XVII of 1876, the Oudh Land Revenue Act, the shares of all but three of the under-proprietors had been transferred to those three named Hubdar Khan, father of Yasin, the first respondent, to Gujadhari Singh, the second, and to Roghubar Singh, the third, for a term of ten years. That was effected on the 10th September 1881.

The question raised and decided on this appeal related to the liability of the original co-sharers of the mehal to be charged with rent due to the superior proprietor, that liability being now alleged on the default of the above three to pay rent accrued due on the whole mehal since the transfer.

The facts are stated in their Lordships' judgment.

For the defence it was answered that only the three, to whom the ten years' transfer had been made, were liable for the rent claimed; all the others

being out of possession and having no management of the property. It was also contended, on the issue of their liability, that upon this question there had been already an adjudication by a former Deputy Commissioner on a claim for rent, which was decreed against the three transferees only down to 1291 Fasli. That had been decided between the parties, or those whom the present litigants represented, on the 10th March 1884.

The Court of First Instance decided this suit in favour of the under-proprietors, deprived for the above stated period, holding them not liable in consequence of the transfer. But, on concluding his judgment, the Deputy Commissioner observed that it was premature to decide whether the saleable interest of the three defendants, by whom he decreed the rent to be payable, as the result of their having possession of the whole mehal, was limited to their own rights as three under-proprietors, or extended to the rights of the other under-proprietors as well.

The judgment of the Judicial Commissioner and of the Additional Judicial Commissioner, forming the Court, was that the question of the liability of the respondents, other than the three transferees, was a matter already adjudged in the former decision above referred to (section 13 of the Civil Procedure Code).

On the plaintiff's appeal,—

[525] Mr. *C. W. Arathoon*, for the appellant, argued that there was error in the judgments of the Courts below. The transfer had been made with liability continuing on the village; and the question should have been held to be whether the Deputy Commissioner had not made a transfer of only the temporary possession of the village, with the right, title, and interest remaining in the village community of under-proprietors. There was no dispute as to the proceeding that had been taken under the Rent Act, XIX of 1868, and the Land Revenue Act, XVII of 1876. The question had not been fully contested in 1884; and the Appellate Court should have disposed of the question arising on the merits, and on the construction of section 123. The argument was that the transfer for ten years had not operated to deprive the landlord of his right over the sub-settlement tenure, mehal Sewar, as his security, and as a tenure upon which he held a lien for the rent due to him. Independently of the express reservation of liability in section 123, the joint liability of the co-sharers in the mehal rested upon general principle, and could only be taken away by some definite enactment. The question had been really raised whether the saleable interest of the under-proprietors was limited, after a general default by the village community, to the interests of three judgment-debtors to whom the tenure had been transferred for ten years; in other words, whether the charge for the rent on the village extended to the interests of the other under-proprietors, or did not so extend. It was submitted that it should have been decided that the under-proprietary title of the respondents as a body was liable to attachment and sale in satisfaction of the claim of the superior proprietor for rent in arrear. It was a further question whether interest was not payable on the arrears of rent for which decrees had been made. Reference was made to the Oudh Rent Act, XXII of 1886, section 141.

The respondents did not appear.

Afterwards, on the 10th December, their Lordships' judgment was delivered by

Lord Hobhouse.—The plaintiff in this suit is the talukhdar of Hasampur. The first three defendants were at the institution [526] of the suit transferees of the mehal Sewar, part of the talukh, for the remainder of a term

of 10 years. The other 44 defendants were entitled to sub-proprietary rights within the same mehal, subject to the transfer. The plaintiff is entitled to rent in respect of the entire méhal amounting to about Rs. 2,670 per annum. His suit is brought for arrears of rent which accrued while the term was running. The transferees have no defence to the suit. The other 44 defendants assert that they are not liable, and so it has been held first by the Deputy Commissioner and afterwards by the Court of the Judicial Commissioner. No one has appeared to oppose the talukhdar's appeal to Her Majesty in Council.

The transfer was effected in the year 1881 by the Deputy Commissioner acting under powers given by the Oudh Rent Act of 1868, section 125, and the Oudh Land Revenue Act of 1876, section 121. It seems that for some years the under-proprietors had failed to pay rent, that the Deputy Commissioner had entered into management under the Rent Act without any beneficial result, and after a while had recourse to the powers given by the Revenue Act to transfer the shares of the defaulters to the three defendants, who were also defaulting shareholders, but were backed up by a mahajun, who found the requisite funds. From the date of the transfer the other co-shareis were no longer in legal possession, except that a certain quantity of nyjote or sir land was reserved to some of them at rents stated in the Deputy Commissioner's order.

Each of the parties has contended that the point in issue has been previously decided in his favour and cannot be re-opened. In 1884 the plaintiff brought a similar suit in which the defendants other than the transferees denied their liability, and the then Deputy Commissioner Mr. Harrington gave the plaintiff a decree against the three transferees only. In 1885 the plaintiff again brought a similar suit, which being for a smaller amount was brought in the Court of an inferior range of jurisdiction, that of the Extra Assistant Commissioner, which would not be competent to entertain the present suit. The learned Judge decided in favour of the talukhdar on the ground which will be mentioned presently.

[527] The Deputy Commissioner in this suit held that he ought to decide it on its own merits, and he held that, however the decree might work out in execution against the transferees, which it was premature to decide, the plaintiff could not have a decree against anybody else. The Judicial Commissioners took the view that the judgment of 1884, being made by a Court competent to decide the present case, is binding now, whereas that of 1885, being made by a Court not so competent, is not. Therefore they do not decide the suit on its merits. Without at all intimating that the Judicial Commissioners have erred, their Lordships doubt whether the judgment of 1884, which is the only evidence before them of that suit, sufficiently discloses what was really contested and decided there, so that they can confidently hold the present issue to be *res judicata*. In that judgment it appears that the plaintiff admitted the plea of the defendants consequently upon the admission of the three transferees that they were liable. It may possibly have been that the plaintiff was satisfied with the security of the transferees for the smaller amount then in dispute, and did not choose to contest the disputed point. It is safer to pass by this point without expressing any opinion upon it.

As to the merits Mr. Arathoon has not succeeded in impressing their Lordships with any substantial doubts. It is a startling thing to be told that under-proprietors, whose beneficial interest has been transferred by an official act to persons who thereby become possessors of the whole mehal, still remain liable to pay rent to the talukhdar. To produce that result the appellant

relier on section 123 of the Land Revenue Act, which provides that the procedure of transfer shall not affect the joint liability of the co-sharers of the mehal. That provision was the basis of the judgment 1885, in which the learned Judge observed with much truth that "apparently the principle would seem to be entailing hardship on the excluded proprietors, for these are not in possession of their shares; on the other hand the transferees are in possession and they alone should be held liable for the talukhdar's demand." Fortunately the language of the Act is not calculated to work such a glaring injustice. Such liability as the co-sharers incur, whether to the Government or [528] to the talukhdar, is to remain joint as before; but there is no provision for charging them with any liability at all when they have been deprived of the property in respect of which liability arises. In fact they have ceased for the time to be co-sharers, and during that time they have no liability, joint or other, directly to the talukhdar.

Then Mr *Arathoon* relies on the fact that sir land is reserved for a number, by no means all, of the defendants. The answer is that no claim in respect of that land has been raised in this suit. Probably no such claim exists, but it is sufficient to say now that, if there is any, it must rest on quite different grounds to the claim for rent issuing out of the whole talukh, and must raise quite different issues which have never been tried.

A minor point in the appeal relates to the talukhdar's claim for interest upon arrears of rent due from the three transferees. It is stated by the Deputy Commissioner that interest on arrears of revenue is not chargeable against talukhdars, and he holds that arrears of rent due from sub-proprietors should be subject to the same incident. The Rent Act of 1886, section 141, provides for interest on rents due from tenants, but Mr. *Arathoon* does not contend that these sub-proprietors are tenants, and he cannot adduce any other law by which such arrears are made to carry interest.

The appeal fails on all grounds. Their Lordships will humbly advise Her Majesty to dismiss it.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

C. B.

NOTES.

[See also (1904) 26 All., 299 P.C.]

[529] APPELLATE CIVIL.

The 16th February, 1899.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE STEVENS.

Bujha Roy.....Judgment-debtor

versus

Ram Kumar Pershad.....Auction-purchaser.⁴

Appeal—Order amending sale-certificate—Order granting application for review of order—Civil Procedure Code (Act XIV of 1882), section 244—

Question relating to execution of decree.

No appeal lies from an order granting an application for the amendment of a sale-certificate.

Bhimal Das v. Ganesha Koer, (1897) 1 C. W. N., 658, approved.

THE facts of this case, so far as they are necessary for the purposes of this report, are as follows :—

The auction-purchaser, who was also the decree-holder, made an application on the 26th of October 1895, in the Court of the First Subordinate Judge at Arrah, for delivery of possession of two plots of land purchased ; but the application was rejected by the Subordinate Judge on the 7th of December 1895, on the ground that the boundaries of the plots of land, as given in the application, did not tally with those given in the sale-certificate. Thereupon the auction-purchaser presented a petition, purporting to be an application for a review of the order of the 7th of December 1895, and praying for a rectification of the sale-certificate as to boundaries. This application was treated by the Subordinate Judge as one for review under section 623 of the Civil Procedure Code ; and on the 13th of June 1896, the Court granted the review and set aside the order complained of. Eventually, after going into evidence, the Subordinate Judge passed an order on the 2nd September 1897, amending the sale-certificate in the manner applied for, as regards plot No. 2 only.

[530] The judgment-debtor appealed to the High Court against the order of the lower Court, dated the 2nd of September 1897, and also took objection to the order, dated the 13th of June 1896.

Babu *Saligram Singh* and Babu *Mahabir Sahay*, for the Appellant.

Mr. *C. Gregory*, and Babu *Makhan Lal*, for the Respondent.

On behalf of the respondent a preliminary objection was taken that the appeal did not lie.

The judgment of the High Court (**Ghose and Stevens, JJ.**) was as follows :—

This is an appeal against an order of the Subordinate Judge of Shahabad, dated the 2nd September 1897, directing that a sale-certificate granted to the auction-purchaser—the decree-holder at whose instance a certain property was sold—be amended, as prayed for by the said auction-purchaser.

It appears that the auction-purchaser had previously made an application for delivery of possession in accordance with the boundaries which he set forth as the correct boundaries of the lands which had been sold ; but his

⁴ Appeal from Original Order No. 408 of 1897, against the order of Babu Hare Krishna Chatterji, Subordinate Judge of Shahabad, dated the 2nd of September 1897.

prayer was refused on the 7th December 1895, upon the ground that the boundaries as set forth by him did not agree with those in the certificate of sale. An application was subsequently made on the 27th February 1896, for amendment of the sale-certificate. It was treated as an application for review under section 623 of the Code; and a review was granted on the 13th June 1896. An investigation was then ordered, the result of which was that on the 2nd September 1897, an order was made, directing the amendment of the sale-certificate in the manner applied for by the auction-purchaser as far as one of the plots, viz., No. 2, was concerned. In this appeal, the propriety of the order of the 2nd of September 1897, as also that of the order dated the 13th June 1896, granting the review, have been questioned. The respondent, however, has raised a preliminary objection upon the ground that no appeal lies to this Court against the order complained against. We think that this objection must prevail. The Code does not provide for an appeal [531] against such an order. The only section of the Code which the appellant relies upon is section 244, it being contended that the question raised was one relating to the execution, discharge or satisfaction of the decree. We are unable to accept this contention as correct; for the decree itself has already been executed, and no question now arises in relation to the execution thereof, the only question being whether the certificate given to the auction-purchaser gives a right description of the property sold. In this view, we are supported by the case of *Bhumal Das v. Ganeshia Koer*, (1897) 1 C. W. N., 658, decided by TREVELYAN and STEVENS, JJ. We hold that this appeal is incompetent, and must therefore be dismissed.

We have, however, been asked to deal with this appeal as an application under section 622 of the Code, but we do not think we ought to do so in the present proceedings.

We make no order as to costs in this appeal.

M. N. R.

Appeal dismissed.

NOTES.

[This was followed in (1901) 23 All., 476; (1900) 7 C.L.J., 436; see also (1904) 6 C.L.J., 749.

A Court has an inherent jurisdiction to amend a sale certificate which incorrectly describes the property actually sold:—(1913) 19 C.L.J., 209.]

[26 Cal. 531]

The 27th January, 1899.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE STEVENS.

Ganu Singh.....Plaintiff
versus

Jangi Lal and others.....Defendants.¹

Attachment—Attachment before judgment, Effect of—Alienation during attachment—Civil Procedure Code (Act XIV of 1882), sections 483 484, 485, 486, 487, 488, 489, 490, 276.

Any private alienation of a property attached before judgment, during the continuance of the attachment, is void as against all claims enforceable under the attachment.

* Appeal from Appellate Decree, No. 1168 of 1897, against the decree of A. Mackie, Esq., District Judge of Tirhoot, dated the 15th of May 1897, affirming the decree of Moulvie Ali Ahmed, Munsif of Mozufferpore, dated the 28th of July, 1896.

The effect of an attachment of a property under the Civil Procedure Code, whether made before or after decree, is the same provided that in the former case a decree is made for the plaintiff at whose instance the attachment takes place.

Raj Chunder Roy v. Isser Chunder Roy, (1865) Bourke, O. C., 139, referred to.

[532] THE facts of the case, so far as they are necessary for the purposes of this report, are as follows :—

The defendants (1st party) Jangi Lal, Bhagwati Pershad, and Inderdan Pershad, brought a suit on a bond against the defendants (2nd party), Harihar Singh, Posa Singh, and Ramdial Singh, in the Court of the Additional Munsif at Mozufferpore, and before judgment had 4 annas share of a certain *putti* belonging to the defendants (2nd party) attached on the 30th October 1886. While the said attachment was subsisting, the plaintiff Ganu Singh, it is alleged, purchased from the defendants (2nd party), 4 gundas and odd share of the property attached, by a *kobala*, dated the 9th June 1894. During execution proceedings instituted by Jangi and others, who had succeeded in their suit, Ganu Singh objected and his objection was disallowed with regard to the said 4 gundas and odd share. Thereupon Ganu Singh brought a suit for the said share, and the Munsif dismissed the suit, the decision of the Munsiff being confirmed on appeal to the Judge of Tirhoot.

The plaintiff appealed to the High Court.

Babu *Umakali Mukerjee* and Babu *Lakshmi Narayan Singh* for the Appellant.

Babu *Sarada Charan Mitter* and Babu *Shorasi Charan Mitter*, for the Respondents.

The judgment of the High Court (**Ghose and Stevens, JJ.**) was as follows:—

This appeal arises out of a suit in which the plaintiff, who is the appellant before us, asked for a declaration of his title in respect to a 4 gundas odd share in a certain property as acquired by him under a bill of sale executed by the defendant, second party, Harihar Singh, on the 9th June 1894. The respondents before us, Babu Jangi Lal and others, who are the creditors of Harihar Singh, on the institution of a suit against that individual for recovery of a certain amount of money, obtained an attachment before judgment of the 4 gundas and odd share of the property.

The Courts below have dismissed the suit upon the ground [533] that the sale of the plaintiff on the 9th June 1894, while the attachment before judgment was subsisting, was bad in law, and that therefore the plaintiff is not entitled to judgment.

It has, however, been argued before us by the learned Vakil on behalf of the plaintiff that the Courts below, before giving effect to the attachment before judgment, ought to have determined whether that attachment had been made in accordance with the provisions of the Civil Procedure Code. It has also been argued that *that* attachment did not prevent the judgment-debtor Harihar Singh from alienating his property to the plaintiff.

As regards the first point raised before us, it seems to be quite clear, looking at the judgments of both the Courts below, that there really was no dispute between the parties, that there was an attachment, and that the attachment was duly made. That being so, we are of opinion that we should not interfere with the judgments of the Courts below upon this ground.

As to the other question, namely what may be the effect of the attachment before judgment, it seems to us, upon a consideration of sections 483 to 490 of the Code of Civil Procedure, read with the sections which deal with attachment after judgment, in course of the execution of a decree, that the effect of

an attachment, whether it be before or after decree, is the same, provided that in the former case a decree is made for the plaintiff, at whose instance the attachment takes place. It will be observed that the main object of an attachment before judgment is to enable the plaintiff to realize the amount of the decree, supposing a decree is eventually made, from the defendant's property. Section 483 provides that "if at any stage of any suit the plaintiff satisfies the Court by affidavit or otherwise that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of the whole or any part of his property," and so on, "the plaintiff may apply to the Court to call upon the defendant to furnish security to satisfy any decree that may be passed against him, and, on his failing to give such security, to direct that any portion of his property within the jurisdiction of the [534] Court shall be attached until further order of the Court." Section 484 empowers the Court to call upon the defendant, either to furnish security to produce and place at the disposal of the Court when required, the property sought to be attached, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security. Section 485 lays down that in the event of the defendant failing to show cause or to furnish the required security, "the Court may order that the property specified in the application, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, shall be attached." Section 486 provides that "the attachment shall be made in the manner herein provided for the attachment of property in execution of a decree for money." Section 487 says: "If any claim be preferred to the property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for money." Then we have section 488, in which it is laid down that, "when an order of attachment before judgment is passed, the Court which passed the order shall remove the attachment whenever the defendant furnishes the security required together with security for the costs of the attachment, or when the suit is dismissed," clearly indicating that in the event of the suit not being dismissed but decreed, the attachment shall subsist. Section 489 then provides that "attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree." It would seem that, save and except in these two classes of cases, the intention of the Legislature is that an attachment before judgment should be fully operative. Then we have section 490 providing that "when property is under attachment by virtue of the provisions of this chapter, and a decree is given in favour of the plaintiff, it shall not be necessary to re-attach the property in execution of such decree."

This section confirms the view which we have just expressed. No doubt, as has been pointed out by the learned Vakil for [535] the appellant, there is no distinct provision in Chapter XXXIV of the Code, which deals with arrest and attachment before judgment, similar to that which is to be found in section 276 of the Code, viz., that when an attachment is made in execution of a decree, alienation of the property so attached during the continuation of the attachment shall be void as against all claims enforceable under the attachment. But looking at the various sections to which we have just referred as a whole, there can be very little or no doubt that the Legislature intended that the same effect should be given to an attachment before judgment as is expressly provided in section 276 in respect to an attachment in execution of a decree.

In this view we think we are supported by the decision in the case of *Raj Chunder Roy v. Isser Chunder Roy*, (1865) Bourke, O. C., 139, where Mr. Justice NORMAN, referring to the provisions of the old Code in regard to attachment before judgment, expressed the opinion that the process in attachment before judgment is in all respects the same as in cases of attachment after judgment, and that the effect, namely, of binding the property so as to prevent private alienation, is the same in both cases. No doubt, as has been pointed out by the learned Vakil for the appellant, the precise question that the learned Judge had to decide in that case was different from that with which we have to deal here; but the reasoning upon which that decision was arrived at, is the reasoning which we think we may well adopt in this case. If we were to adopt the opposite view, an attachment before judgment would be entirely futile and of no efficacy whatever.

In this view of the matter, we are of opinion that the Courts below have come to a right conclusion. The result is that the appeal must be dismissed with costs.

M. N. R.

Appeal dismissed.

[536] *The 21st February, 1899.*

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Nagendra Nath Basu and another... ..Plaintiffs
versus
Satadal Basini Basu.....Defendant.*

Land Registration Act (Bengal Act VII of 1876), section 78—Suit for rent, without registration of name, whether maintainable by the legal representatives—Succession Certificate Act (Act VII of 1889), section 4, cl. (2)—Debt, Meaning of.

A suit for rent, accruing due partly during the lifetime of a registered proprietor, and partly after his death, was brought by his representatives; the defence was that the suit was not maintainable inasmuch as the plaintiffs were not registered proprietors, and had no certificate under the Succession Certificate Act.

Held, that section 78 of the Land Registration Act is not a bar to the realization of rent accruing due during the lifetime of the registered proprietor, but a suit for rent accruing due after the death of the registered proprietor is not maintainable, by his representatives, without having their names registered under the Land Registration Act.

* Appeal from Appellate Decree No. 586 of 1897, against the decree of Babu Bulloram Mullick, Subordinate Judge of 24-Pergunnahs, dated the 12th of February 1897, reversing the decree of Babu Nriya Gopal Sarkar, Munsif of Diamond Harbour, dated the 28th of August 1896.

Held, also, that rent is not a "debt" within the meaning of section 4 of the Succession Certificate Act, and therefore no certificate of succession is necessary.

THIS appeal arose out of an action brought by the plaintiffs for recovery of arrears of rent which had accrued between April and the 4th December 1893. The father of the plaintiffs, who was a registered proprietor of the property in respect of which rent was claimed, died on the 19th September 1893, and his heirs sold the property on the 4th December in that year. The defence (*inter alia*) was that the suit was not maintainable, inasmuch as the plaintiffs had not registered their names under the provisions of the Land Registration Act. The Court of First Instance overruled the objection raised by the defendant, and decreed the plaintiffs' suit. On appeal, the Subordinate Judge set aside the decision of the first Court. From this decision the plaintiffs appealed to the High Court.

[537] Dr. *Ashutosh Mookerjee* for the Appellants.

Babu Tara Kishore Chowdhry for the Respondent.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.):—

Maclean, C.J.—This case in my opinion does not fall within section 78 of Bengal Act VII of 1876.

The facts are these: The father of the present plaintiffs was the registered proprietor of the property in question. He died on the 19th September 1893, and his heirs sold the property on the 4th December in that year. This suit is for the recovery of the rents which accrued between April and the 4th December 1893. As regards the rent accruing between the 19th September 1893 when the father, the registered proprietor, died, and the 4th December 1893, when his heirs sold the property, it cannot be recovered, for the plaintiffs must be regarded as suing as proprietors, and they were not registered as such, and consequently as regards that part of the claim they are successfully met by section 78 of Bengal Act VII of 1876. But as regards the rent accruing between April and the particular date fixed for payment, which I understand was some day in July, they are entitled in my judgment to maintain the action to recover that amount as representatives of their late father. They are not suing as proprietors; they are suing as his heirs, and anything they may recover will belong to his estate. Otherwise, if a registered proprietor did not get in his rents, then sold the property to a purchaser who registered and the previous proprietor then died, his representatives could not recover the arrears of rent. This cannot be. The answer, as I have said; is that they are suing, not as themselves proprietors, but as the legal representatives of the late registered proprietor, and section 78 does not apply to such a case.

A case somewhat similar in principle to the present was recently decided by a Division Bench of this Court, of which I happened to be a member—*Belchambers v. Hussan Ali*, (1898) 2 C. W. N., 493.

[538] It has been suggested that the plaintiffs cannot sue as representatives, inasmuch as they have no certificate in accordance with the provisions of section 4 of the Succession Certificate Act VII of 1894. That is successfully met by sub-section 2 of the section, which says that the word "debt" includes any debt except rent. The debt in this case is for rent.

Upon these grounds the appeal must be allowed to the extent I have indicated, and the appellant must have proportionate costs in this Court and in the Court below.

Banerjee, J.—I am of the same opinion. I think as regards that portion of the claim which is for rent that accrued due during the lifetime of

the plaintiffs' father, that is the rent for the first quarter of the Bengali year 1300, that it is not in any way barred by the provisions of section 78 of Bengal Act VII of 1876, because that portion of the rent the plaintiffs are entitled to claim not merely as proprietors, but also as the legal representatives of the deceased proprietor who was registered under Bengal Act VII of 1876, and in whose lifetime it fell due. Section 78 bars the claim for rent only when the claim is made by the plaintiff as proprietor or manager of an estate or revenue-free property, in respect of which he is required by the Act to cause his name to be registered, and, as I have just stated above, the plaintiffs are entitled to make the claim, not as proprietors for the time when the rent accrued, but as legal representatives of the proprietor to whom the rent became due.

Then, it was urged by the learned Vakil for the respondent that, if the plaintiffs claimed the rent as being money due to the estate of their deceased father, they must in the first place produce a succession certificate under section 4 of Act VII of 1889, and in the second place, the claim would in that case be of the Small Cause Court class, and this second appeal would be barred by section 586 of the Code of Civil Procedure.

As to the first contention, as has been pointed out by the learned Chief Justice, it is met by sub-section 2 of section 4 of Act VII of 1889. As to the second objection, that, I think, is met by article 8 of the second schedule of Act IX of 1887, [539] the claim made by the plaintiffs being one for rent. In taking this view, I do not overlook the principle of law that a party cannot, by any wilful unwarrantable addition to or modification of his claim, oust the jurisdiction of the Court in which the suit ought properly to have been brought. I do not think, having regard to the facts of this case, that it is one that comes within the application of that principle.

In regard to the rest of the claim, I have nothing to add to what has been said by the learned Chief Justice.

S. C. G.

Appeal allowed.

NOTES.

[This was followed in (1899) 27 Cal., 535.]

[26 Cal. 539]

The 28th February, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K. C. I. E., CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Hira Lal Ghose, Minor, by his Mother and next
friend Rai Kamini Dassi.....Auction-purchaser

versus

Chundra Kanto Ghose and others.....Judgment-debtors.*

*Second appeal—Code of Civil Procedure (Act XIV of 1882), sections 2, 311
and 588—Decree—Fraud—Question relating to the execution of the decree
between parties to the suit—Auction-purchaser a third party.*

An application was made by the judgment-debtor against the decree-holder and the auction-purchaser, who was a third party, to have a sale set aside, on the ground of irregularity in publishing or conducting the sale, as also on the ground of fraud. The Court of First Instance rejected the application and refused to set aside the sale. On appeal to the Subordinate Judge he reversed the decision of the first Court. On a second appeal to the High Court by the auction-purchaser an objection was taken that no second appeal lay at his instance.

Held, that, inasmuch as the application was under section 244 of the Civil Procedure Code, a second appeal would lie. The question of a right to a second appeal does not turn upon who may happen to be the appellant, but upon whether or not the case is one within section 244 of the Code.

THIS appeal arose out of an application to set aside a sale. The allegation of the petitioners (two of the judgment-debtors) was that the sale took place about twelve years ago, and that they did not know of the sale until the auction-purchaser [540] instituted a regular suit against the judgment-debtor and others to obtain *khas* possession of the property, and summonses were served upon them. The Court of First Instance, having held that there was no evidence that the auction-purchaser fraudulently concealed the fact of the sale from the petitioners, refused to set aside the sale on the ground that the application was barred by limitation. On appeal the Subordinate Judge reversed the decision of the first Court, holding that the application was not time-barred, but he did not decide the question whether there was any fraud in the case or not. Against this decision the auction-purchaser appealed to the High Court.

Dr. Asutosh Mookerjee, and Babu Depin Behary Ghose, for the Appellant.

Babu Nilmadhub Bose, and Babu Sib Chandra Palit, for the Respondent.

The judgments of the High Court (MACLEAN, C.J., and BANERJEE, J.) were as follow :—

Maclean, C. J.—A preliminary objection is taken that no second appeal lies in this case. The appeal arises out of an application by the judgment-debtor against the decree-holder and auction-purchaser, to have the sale, at which the latter purchased the applicant's property, set aside on the ground,

*Appeal from Order No. 373 of 1898, against the order of Babu Kailash Chunder Mazumdar, Subordinate Judge of Koolneah, dated the 5th of September 1898, reversing the order of Babu Ganendronath Mookerjee, Munsif of Bagerhat, in the district of Jessore, dated the 4th of June 1898.

not only of the irregularity mentioned in section 311 of the Code of Civil Procedure, but also of fraud. The application is undoubtedly entitled under section 244 of the Code ; and it is conceded that if the case fall within the provisions of that section, a second appeal will lie, but it is contended for the respondent that the appellant here being the auction-purchaser and so not a party to the suit, the case is not within the section, and that no second appeal lies. It is said that a second appeal will not lie when the appellant is neither the judgment-debtor nor the decree-holder. I do not think that this distinction is well founded.

A Division Bench of this Court has recently decided in the case of *Nemai Chand Kanji v. Deno Nath Kanji*, (1898) 2 C. W. N., 691, that a [541] second appeal will lie, at the instance of the judgment-debtor, and that decision was followed by another Division Bench of this Court in the case of *Bhubon Mohun Pal v. Nunda Lal Dey*, (1899) *Ante*, p. 324. In both those cases, the appellant to the High Court was the judgment-debtor.

I ought in passing to say that the case of *Kinoo Khan v. Kawbiz Mullah*, (1897) 1 C. W. N., cc., was uncontested. We have sent for our judgment in that case, and it is clear that for some reason or other the case was not contested. It must not consequently be regarded as any authority.

To appreciate whether a case is, or is not, within section 244, we must consider what the application was, and whether at the time it was made, it was an application under the section. It was an application by the judgment-debtor against the decree-holder and the auction-purchaser, whose purchase had been confirmed, to have the sale set aside. The question was one between the parties to the suit in which the decree was passed, viz., the judgment-debtor and the decree-holder, relating to the execution of the decree, and was, undoubtedly, an application under that section. The circumstance that the auction-purchaser was a party to the application does not make it any the less a case under the section [see the case of *Prosunno Kumar Sanyal v. Kali Das Sanyal*, (1892) 1. L. R., 19 Cal., 683 : L. R., 19 I. A., 166]. If that be so a second appeal would have lain at the instance of the judgment-debtor or the decree-holder. Why not at the instance of the auction-purchaser, who is the person most directly interested ?

A narrow construction ought not to be placed on this section : see the case I have just cited. If the contention of the respondent were to prevail, we should have to face the anomaly that both the judgment-debtor and the decree-holder would have a right of second appeal, but that the auction-purchaser, whose sale has been confirmed, and who is really more materially interested in the matter than the decree-holder, [542] would have no such right ; whilst if the case were properly within the section, he could not have brought a separate suit in which, if he could have brought it, he would have had an appeal to this Court.

The question of a right to a second appeal does not turn upon who may happen to be the appellant, but upon whether or not the case is one within section 244. If, as has been held, both the judgment-debtor and the decree-holder have such a right, it is difficult to appreciate upon what ground it should be denied to the auction-purchaser, who is equally a party to the proceedings, though not a party to the suit. The judgment-debtor brought the auction-purchaser before the Court, and now says that, having so brought him there, he is not to have the same rights *quâ* appeal as either the judgment-debtor or decree-holder, whilst, at the same time, he is to be taken as bound by the order and barred from bringing a separate suit. That does not seem to me to be right.

Looking at the principle of the authorities to which I have referred, the contention of the respondent must, in my opinion, fail.

Upon the merits the appellant is right. The Subordinate Judge has decided that the respondent was not barred by the Statute of Limitation, and then has proceeded to say off-hand that the sale must be set aside, without considering the evidence upon that question. The question of limitation must be taken as concluded; but the case must go back to the lower Court for a decision upon the evidence whether the sale ought or ought not to be set aside. The costs will abide the result.

Banerjee, J.—I am of the same opinion. The appeal arises out of an application for setting aside a sale in execution of a decree on the ground of fraud, and also on the ground of material irregularity in publishing and conducting the sale which has caused substantial injury to the judgment-debtors. The first Court rejected the application on the ground that it was barred by limitation. On appeal by the judgment-debtors, the Lower Appellate Court has reversed the order of the first Court and set aside the sale, holding that the application was saved from being barred by [543] limitation by virtue of the provisions of section 18 of the Limitation Act, as the decree-holder and the auction-purchaser had kept the judgment-debtors from the knowledge of their right to make this application by means of fraud. Against this order of the Lower Appellate Court the auction-purchaser has preferred this appeal on the ground that the Lower Appellate Court is wrong in setting aside the sale without coming to any finding either that the sale was brought about by fraud, or that it was vitiated by irregularity leading to substantial injury.

At the hearing of the appeal, a preliminary objection is taken by the learned Vakil for the respondent that no second appeal lies, as the case cannot come under section 244 of the Code of Civil Procedure, the question raised not being one between the parties to the suit, but being raised by the auction-purchaser, who was no party to the suit, and in support of this objection the case of *Kinoo Khan v. Kawbiz Mullah*, (1897) 1 C. W. N., cc., is cited.

In answer to the objection it is urged by the learned Vakil for the appellant that the question whether a second appeal lies or not will have to be determined, not by considering who the appellant is, but by considering what the nature of the question is that was raised in the Court below and has been determined by the order appealed against. The question involved in the preliminary objection is not quite free from difficulty. After a careful consideration of the arguments on both sides, I am of opinion that, having regard to the circumstances of this case, the preliminary objection ought to be overruled.

With reference to the case cited by the learned Vakil for the respondents, I do not think it necessary for me to say anything in addition to what has been said in the judgment of the learned Chief Justice. The judgment of this Court in that case proceeded upon the footing of there being really no contest as to the applicability of the preliminary objection to the case.

Turning now to the reasons urged in support of the objection, I am of opinion that the real question for determination is whether what is appealed against is a decree within the meaning of section 2 of the Code of Civil Procedure. If it is a decree [544] within the definition given in that section, this second appeal lies. That definition includes an order determining any question mentioned or referred to in section 244, but not specified in section 588. Now the question that has been determined in this case by the Lower Appellate Court is that the sale of the judgment-debtor's property is liable to be set aside, it is not clearly stated on what grounds, but evidently, it would

seem, on the ground of fraud. That being so, the order appealed against has determined a question which is either mentioned or referred to in section 244, and which is not specified in section 588. For the question whether the sale should be set aside or should be allowed to stand, is a question that arose as between the judgment-debtors and the decree-holder, and was a question relating to the execution of the decree, and it is not specified in section 588, because clause 16 of section 588, which is the only portion of the section that can have any bearing upon the present case, contemplates only the setting aside of a sale on the ground of material irregularity in the conduct of the sale leading to substantial injury as provided in section 312 of the Code of Civil Procedure, and does not apply to an application for setting aside a sale on the ground of fraud.

It was argued by the learned Vakil for the respondents that, although that may be so, still as the decree-holder is satisfied with the order of the Court below passed in favour of the judgment-debtors, and as the only person who questions the correctness of that order is the auction-purchaser, who is a third party, the case does not come under section 244 of the Code of Civil Procedure.

But the question in the Court below was one between the parties to the suit, and though one of the parties interested in the determination of that question was the auction-purchaser, a third party, that circumstance could not take the case out of the scope of section 244. This must be taken to be settled by the decision of the Privy Council in the case of *Prosunno Kumar Sanyal v. Kali Das Sanyal*, (1892) 1. L. R., 19 Cal., 688 : L. R., 19 I. A., 166. The fact of the decree-holder not appealing, but being apparently satisfied with the order of the Lower Appellate Court, does not make any difference because [845] what we have to consider is whether the order appealed against is one that determines any question mentioned or referred to in section 244, and not specified in section 588; and that condition is satisfied, though after the making of the order it might have been accepted by both parties to the suit and the order may be contested only by the auction-purchaser.

Perhaps there may arise cases in which there may be no contest between the parties to the suit from the beginning, and in such cases it would be difficult to say that an appeal would lie at the instance of the auction-purchaser; but that would be so, not because the auction-purchaser was the appellant, but because the question from the beginning was not one arising between the parties to the suit within the meaning of section 244 of the Code. That, however, is not the case here. The view I take is in accordance with the decision of this Court in the cases of *Nemai Chand Kanji v. Dino Nath Kanji*, (1898) 2 C.W.N., 691; and *Bhuban Mohan Pal v. Nunda Lal Dey*, (1899) *Ante*, p. 324.

On the merits of the appeal, it is clear that the appellant's contention ought to succeed. For all that the learned officiating Subordinate Judge has found is that as in consequence of the fraudulent conduct of the decree-holder and the auction-purchaser, the petitioners were kept from the knowledge of their right to have the sale set aside, the application is not barred by limitation. That may be quite true, and by reason of the fraudulent conduct of the decree-holder and the auction-purchaser, the applicant may be entitled to the extension of time provided for in section 18 of the Limitation Act; and yet the sale may not be vitiated either by fraud or by any material irregularity which has led to substantial injury. The case must, therefore, go back to the Lower Appellate Court for the determination of the question whether the sale is so vitiated or not.

S. C. G.

Appeal allowed ; case remanded.

NOTES.

[See the Notes to 26 Cal., 324 *supra*. See also (1908) 32 Bom., 572 ; (1911) 13 C.L.J., 535 : 15 C.W.N., 685.]

[546] The 2nd February, 1899.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Sheo Nandan Roy.....Plaintiff

versus

Ajodh Roy and others.....Defendants.

Bengal Tenancy Act (VIII of 1885), section 116—Zerai land—Raiyat brought on zerai land by lessee, Right of on expiry of lease—Trespasser—Right of occupancy—Liability to Ejectment.

Section 116 of the Bengal Tenancy Act applies even in a case where a person is brought on the malik's *zerai* land as a *raiya*t by a lessee for a term of years ; therefore such a person cannot acquire any right of occupancy or non-occupancy on the said land, and he, being a trespasser only on the expiry of the lease of the lessee, is liable to ejectment.

Henderson v. Squire, (1869) L. R., 4 Q. B., 170 ; *Oomatara Debia v. Peena Bibes*, (1865) 2 W. R., 155 ; and *Hurish Chunder Roy Chowdhry v. Sree Kalee Mookerjee*, (1874) 22 W. R., 274, referred to.

Binad Lal Pakrashi v. Kalu Pramanik, (1893) I. L. R., 20 Cal., 708, distinguished.

THIS appeal arose out of an action brought by the plaintiff to recover *khas* possession of certain lands. The allegation of the plaintiff was that the disputed lands were part and parcel of 27 bighas 6 chittaks of *zerai* land, of which one Mahomed Ishak was the admitted proprietor, who granted a *thika* lease of the said lands to one Ajodh Roy, which extended up to 1300 F. S. ; that on the expiry of Ajodh Roy's lease in 1301 F. S. the said lands were settled with him ; and that on his attempt to take possession he was resisted by the defendants.

The defence was that out of the lands in dispute 3 bighas were the *raiya*t holding of the defendant Ajodh Roy and the remaining 6 bighas were the *raiya*t holding of the defendant Deva Roy, and that they had acquired a right of occupancy in them.

The Munsif held that the lands were the *zerai* lands of the proprietor ; that Ajodh Roy, the former lessee, on the expiry of his [547] lease had no title to the 3 bighas of land claimed by him, and that the remaining 6 bighas the defendant Deva Roy had a right to hold, inasmuch as he was holding the lands as a *raiya*t under the former lessee, and accordingly he gave a decree for *khas* possession in respect of the 3 bighas claimed by Ajodh Roy, but dismissed the suit in respect of the 6 bighas claimed by Deva Roy.

On appeal by the plaintiff the Subordinate Judge affirmed the decision of the Munsif, holding that section 116 of the Bengal Tenancy Act did not apply to the case, as the plaintiff had failed to show that the disputed 6 bighas of

* Appeal from Appellate Decree No. 2 of 1897, against the decree of Babu Behary Lal Mullick, Subordinate Judge of Sarun, dated the 12th of September 1896, affirming the decree of Babu Umesh Chunder Sen, Munsif of Chupra, dated the 9th of March 1896.

land had been held by the defendant Deva Roy under a lease for a term of years or from year to year.

From this decision the plaintiff appealed to the High Court.

Babu *Lakshmi Narayan Singh* for the Appellant.

Babu *Amarendra Nath Chatterjee*, and Dr. *Asutosh Mookerjee*, for the Respondents.

The judgment of the High Court (**Banerjee and Rampini, JJ.**) was as follows:—

This appeal arises out of a suit brought by the plaintiff, who is the lessee of the proprietor, to recover *khas* possession of certain lands, the area of which is stated in the plaint to be 9 bighas 10 cottahs, on the allegation that those lands are part of the *zerait* or private lands of the proprietor, and that the defendants have no right to remain on them.

The defence was a denial of the fact that the lands were *zerait*, and the defendants claimed an occupancy right in them.

The first Court found that the lands were the *zerait* lands of the proprietor: that out of the entire area claimed, which is stated as being 9 bighas only, a quantity of 3 bighas had been held by the defendant Ajodh Roy, the former lessee, without any title upon the expiry of his lease; and that the remaining 6 bighas had been held by the defendant Deva Roy as a *raiayat* under the former lessee; and it gave the plaintiff a decree for *khas* possession in respect of the 3 bighas claimed [548] by the defendant Ajodh Roy, but dismissed the suit in respect of the 6 bighas claimed by Deva Roy.

On appeal by the plaintiff, the Lower Appellate Court has affirmed the decree of the first Court, holding that section 116 of the Bengal Tenancy Act did not apply to this case, as the plaintiff had failed to show that the 6 bighas of land in question, which was found by the first Court to be the *zerait* land of the proprietor, had been held by the defendant Deva Roy under a lease for a term of years or under a lease from year to year.

There was a cross-appeal by the defendant Deva Roy, in which it was urged that the first Court ought to have held that he was a *raiayat* with a right of occupancy. The cross-appeal was dismissed on the ground that it was unnecessary to determine in this case to what class of *raiayats* the defendant Deva Roy belonged.

Against this decision of the Lower Appellate Court the plaintiff has preferred this second appeal, and it is urged on his behalf, *first*, that section 116 of the Bengal Tenancy Act applies to this case; *secondly*, that, if it does apply, the defendant Deva Roy had no right to remain on the lands after the expiry of the lease of the former *thikadar* under whom he held; and, *thirdly*, that the Lower Appellate Court was wrong in not coming to any decision as regards the 10 cottahs of land in excess of the 3 bighas and 6 bighas in relation to which alone the rights of the parties had been determined by its judgment.

The judgment of the Lower Appellate Court proceeds on the assumption that the lands were the proprietor's *zerait* lands. The learned Vakil for the appellant contends that the Lower Appellate Court has in effect affirmed the first Court's finding that the lands were the proprietor's *zerait* lands. On the other hand, the learned Vakil for the respondents contends that there has been no affirmance of the finding of the first Court by the Lower Appellate Court on this point; and that if the appellant's contention on the point of law as to the meaning of section 116 of the Bengal Tenancy Act be given effect to,

it will be necessary to remand the case to the Lower Appellate Court for [549] a finding on the point whether the lands were the proprietor's *zerait* lands or not.

We are of opinion that the Lower Appellate Court has not come to any finding of its own upon the question whether the land in dispute was the proprietor's *zerait* land, it having been unnecessary, in the view that it took of the law, to arrive at any finding on the point; and that if the view of the law taken by the Lower Appellate Court is not affirmed, the respondents are entitled to a remand, as it was competent to them to ask the Lower Appellate Court to affirm the decree of dismissal made by the first Court upon the ground that the land was not the proprietor's *zerait* land, they having in the first Court denied that the land was *zerait* and the parties having gone to trial upon an issue on that point. This being premised, let us see how far the opinion of the Lower Appellate Court that section 116 of the Bengal Tenancy Act is inapplicable to this case is correct.

It was found by the first Court that the lands were *zerait*, and for the purpose of the present question we must proceed upon the assumption that they are so. It is also found that the defendant Deva Roy came upon the land while it was held by the other defendant Ajodh Roy as a *thikadar* under the proprietor under a lease for a term of years; and the question is whether these two circumstances are not sufficient to bring the case within section 116 of the Bengal Tenancy Act. We are of opinion that this question ought to be answered in the affirmative. The section says: "Nothing in Chapter V shall confer a right of occupancy in, and nothing in Chapter VI shall apply to, a proprietor's private lands known in Bengal as *khamar*, *nij* or *nijote*, and in Behar as *zerait*, *nij*, *sir* or *kamat*, when any such land is held under a lease for a term of years or under a lease from year to year." Here the lands, upon the assumption upon which we are now proceeding, were *zerait* lands, and they were held by the defendant Ajodh Roy under a lease for a term of years at the time when the defendant Deva Roy, who claims the benefit of Chapter V and to whom has been accorded the benefit of Chapter VI by the Court below, came upon the lands. Therefore, in our opinion, the lands in dispute must be held to be excluded from the [550] operation of Chapter V, so far as it confers a right of occupancy, and also from the operation of Chapter VI of the Bengal Tenancy Act.

It was argued by the learned Vakil for the respondents that the true meaning of the section is this, that it excludes the operation of Chapters V and VI in respect of *zerait* lands only when such lands are held directly under the proprietor by the person who claims the benefit of either of those two chapters, under a lease for a term of years or under a lease from year to year; and that when such lands are held by the person claiming an occupancy or a non-occupancy right (and the latter is a very substantial right, regard being had to section 44 of the Act) not directly under the proprietor, but under a lessee, that is a tenure-holder under the proprietor, the acquisition of an occupancy or a non-occupancy right, as the case may be, cannot be prevented; in other words, that the section applies only to cases where the proprietor retains his *zerait* lands as such directly under him, without interposing any tenure-holder between him and the actual *rayyat*, and takes the precaution of letting in *rayyats* either under leases for terms of years or under leases from year to year. The language of the section is not very clear, and the question raised before us is not altogether free from doubt; but after weighing the conflicting considerations that arise, we are of opinion that the construction which the learned Vakil for the appellant seeks to put upon it is the true construction, and our reason is shortly this: As we understand the section, its object is evidently to exclude the proprietor's

private lands from the operation of Chapters V and VI of the Bengal Tenancy Act, provided that the proprietor has taken a certain precaution which is indicated by the concluding words of the section, "where any such land is held under a lease for a term of years or under a lease from year to year." The question then arises—held by whom? The learned Vakil for the appellant answers "held by anyone whether a *thikadar* or a *raiyat* to whom the proprietor has let it out." And this answer is quite in accordance with the language of the section, the Legislature not having said "where such land is held by a *raiyat*." On the other hand, the learned Vakil for the respondents contends that the section applies only where the land is held by a *raiyat* who alone [551] can claim the benefit of Chapters V and VI under a lease for a term of years or under a lease from year to year. But this construction is in the first place open to the objection that it interpolates the words, "by a *raiyat*" after the words "is held," and in the second place there is this further difficulty in the way of our accepting it, that it would prevent the protection contemplated by the section from being operative, although the landlord may take the precaution of leasing the land to the person to whom he lets it for a term of years or from year to year. Take the case of a proprietor, for instance, who has lands that are admittedly his private lands, which are partially let out to *raiya*ts under leases for short periods, and suppose that he leases the whole of his *zerai* lands to a farmer for a term of years slightly longer than the longest term for which any of the *raiya*ts holds the same. Upon the expiry of the lease to the farmer the landlord will be precluded from obtaining *kh*as possession from any of the *raiya*ts, because the *raiya*ts will then have held the land after the expiry of their leases under the farmer, and after the interposition of the farmer or tenure-holder had, according to the respondents' contention, destroyed the *zerai* character of the lands. We do not think that such a result could have been intended. If the proprietor lets out his private lands either under a lease for a term of years or under a lease from year to year, in our opinion he does all that is necessary to be done by him under section 116 of the Bengal Tenancy Act to entitle him to the protection of that section so as to have his *zerai* lands secured against being burdened with any occupancy or non-occupancy rights in favour of *raiya*ts contemplated in Chapters V and VI; and this having been done with reference to the lands in dispute, section 116 of the Bengal Tenancy Act applies to this case.

Then arises the question, the subject of the second contention on behalf of the appellant, namely, whether upon that view of the case the defendant Deva Roy, on the expiry of the former *thikadar*'s lease, ceased to have any right in the lands. He having been brought on the land by his landlord, who was a lessee under the proprietor for a limited term of years, *prima facie* his right would come to an end upon the expiry of his landlord's lease. This view is in accordance with general principles [552]—see the case of *Henderson v. Squire*, (1869) L. R., 4 Q. B., 170, and also the cases of *Oomatara Debia v. Peena Bibee*, (1865) 2 W. R., 155, and *Hurish Chunder Roy Chowdhry v. Sr*ee *Kalee Mukerjee*, (1874) 22 W. R., 274.

It was argued upon the authority of *Binad Lal Pakrashi v. Kalu Pramanik*, (1893) I.L.R., 20 Cal., 708, that the mere fact of the title of the person who inducts a *raiyat* upon any land ceasing or being non-existent, would not be sufficient to show that the *raiyat*'s title ceased or did not exist. We are of opinion that *that* case can have no application to a case like the present. The ground for the decision in that case was, as stated in the judgment of the learned Chief Justice, that the only right of the person who has obtained possession of the zamindari is to the rent payable for the land and not to

obtain *khas* possession of the land itself unless he can do so under the provisions of the Bengal Tenancy Act; and that ground is not applicable to *zerait* lands protected by section 116, the primary character of such lands being that the proprietor is entitled to be in *khas* possession of them, and no *raiya* can acquire any occupancy or non-occupancy right in them.

In this view of the case, and for the reasons we have stated at the outset, it becomes necessary to remand the case to the Lower Appellate Court for disposal after determination of the question whether the lands are really the proprietor's *zerait* lands; and we think it is also necessary to remand it for the determination of the question raised in the third contention on behalf of the appellant, namely, what are the rights of the parties in respect of the ten cottahs of land in regard to which the Courts below have come to no finding.

The costs will abide the result.

S. C. G.

Appeal allowed; case remanded.

NOTES.

[See also (1906) 34 Cal., 57; 11 C.W.N., 225; 5 C.L.J., 181; (1914) 20 C.L.J., 448.]

[553] *The 26th January, 1899.*

PRESENT :

MR. JUSTICE HILL AND MR. JUSTICE RAMPINI.

Dilbar Sardar and another.....Defendants

versus

Hosein Ali Bepari.....Plaintiff.*

Co-sharers—Joint possession, Suit for—Effect of purchase of a right of occupancy, not transferable by custom, by a co-sharer landlord without the consent of the other co-sharer—Abandonment—Right to partition.

In a suit to recover joint possession of an occupancy holding in respect of his share by a co-sharer landlord, on the ground that the defendant acquired no title by the purchase of the said holding, as it was not transferable by custom, and that there was an abandonment of the holding by the former tenant, the defence (*inter alia*) was that the plaintiff was not entitled to joint possession, and that he could not get any relief except by bringing a suit for partition inasmuch as they (the plaintiff and the defendants) were joint proprietors.

Held, that the plaintiff was entitled to the relief claimed, and that the claim for joint possession without partition was maintainable.

Watson & Co. v. Ramchund Dutt, (1890) I.L. R., 18 Cal., 10; L. R., 17 I. A., 110; and *Lachmeswar Singh v. Manowar Hossein*, (1891) I. L. R., 19 Cal., 253; L. R., 19 I. A., 48, distinguished.

THE facts of this case are shortly these: The lands in dispute appertained to two *taluks*, of which the plaintiff was the owner of a fourteen annas share

* Appeal from Appellate Decree No. 1592 of 1897, against the decree of Babu Juggod-durlav Mazumdar, Subordinate Judge of Dacca, dated the 14th of July 1897, affirming the decree of Babu Rajani Nath Ghose, Munsif of Naraingunge, dated the 30th of September 1896.

and the remaining two annas belonged to the defendants Nos. 1 and 2. The plaintiff's allegation was that defendants Nos. 3 and 4 had rights of occupancy in the disputed lands; that defendant No. 1 purchased the occupancy holding of defendant No. 3 in execution of a decree for money against him, whilst the defendants Nos. 1 and 2 purchased the occupancy holding of defendant No. 4 by a private sale; that by the said purchases the defendants Nos. 1 and 2 did not acquire any right to the disputed lands, inasmuch as the right of occupancy was not transferable by custom or by local usage; that the defendants had no right to retain possession of the said lands to the extent of the plaintiff's share [554] without his consent; that defendants Nos. 3 and 4, since the sale, had abandoned the holding, and left the place, and that the plaintiff was entitled to recover possession of the disputed lands to the extent of his share, with mesne profits.

There were two suits, and the defendants Nos. 1 and 2, in each of these suits, pleaded (*inter alia*) that the plaintiff's claim was bad for misjoinder of causes of action; that it was barred by limitation; that inasmuch as they were co-sharers, the plaintiff's claim for *khas* possession without partition was not maintainable; and that there was not such a forfeiture of the right of occupancy as would entitle the plaintiff to get a decree for *khas* possession.

The Munsif overruled the objections of the defendants, decreed the suits, and ordered that the plaintiff should recover possession of the fourteen annas share of the disputed land in each of the suits in *ijmali* with the defendants Nos. 1 and 2. On appeal the Subordinate Judge confirmed the decision of the first Court.

Against this decision the defendants appealed to the High Court.

Babu Harendra Narayan Mitter, for the Appellants.

Dr. Rash Behary Ghosh, and Babu Jogesh Chunder De, for the Respondent.

The judgment of the High Court (Hill and Rampini, JJ.) was as follows:—

The appellants in this Court are, it appears, co-proprietors with the plaintiff in a certain *taluk*, the former holding a two-anna and the latter a fourteen-anna share thereof.

It also appears that the appellants obtained a money decree against one of the tenants holding under the *talukdars* as a body, and in execution of that decree they brought the holding to sale, purchased it themselves, and obtained possession. The holding in question was an occupancy holding; and it has been found, as a matter of fact, that in that particular locality occupancy holdings are not transferable without the consent of the landlord.

The plaintiff brought the present suit for the purpose of regaining joint possession along with the appellants of the lands comprised in the holding in question.

[555] Both the Courts below have decreed in his favour, and have restored the plaintiff to joint possession of the land.

In this Court it is contended that the form of the suit was misconceived, and that the plaintiff, if entitled to any relief whatever, is entitled only to a partition of the estate. No authority has been cited for this proposition, but reliance has been placed upon a remark made in the judgment which was delivered in the case of *Paikdharai Rai v. Manners*, (1895) I. L. R., 23 Cal., 179 (185), which possibly, so far as it goes, may tend to sustain the contention. That, however, is merely an *obiter dictum*; and there is no doubt that the view of this Court has been, so far as we are aware, for a long series of years to the

contrary effect. Reliance has also been placed upon the well-known cases of *Watson and Co. v. Ramchund Dutt*, (1890) I. L. R., 18 Cal., 10: L. R., 17 I. A., 110, and *Lachmeswar Singh v. Manowar Hossein*, (1891) I. L. R., 19 Cal., 253: L. R., 19 I. A., 48. These cases are, however, in our opinion, clearly distinguishable from the present. Upon the findings of fact arrived at by the Courts below, the present case might thus be stated: A two-anna sharer in the *taluk* has, without the consent of his co-sharers, expelled (for it comes to that) one of the common tenants of the *talukdars*, and has possessed himself to the exclusion of his co-sharers of the lands held by him. But this is not a case such as is contemplated by either of the decisions cited. For there are in this case no considerations whatever of an equitable kind, so far as we can perceive, to sustain the claim brought forward by the appellants to retain possession of the land from which they have expelled the tenants to the exclusion of their co-sharers.

As to the question of abandonment, it has been held by the Courts below (and we think correctly) that, as a matter of fact, there has been an abandonment on the part of the occupancy tenant: that that abandonment has been acquiesced in by the landlords, and consequently, there having been consent to the termination of the tenancy on the part of both the tenants and the landlord, the tenancy must be taken to have determined.

[556] Then the question of mesne profits was raised. Apparently the Courts below have given the plaintiff a decree for mesne profits, not on the footing of the rent previously received from the tenant who was in occupation of the land, but on the footing of the profits which might have been realized from the land, if properly used and cultivated. It is contended here, however, that all that the plaintiff is entitled to is mesne profits at the rate paid previously by the occupancy tenant by way of rent. We see no reason, however, for dissenting from the view of the lower Courts on this question. The defendants have possessed themselves wrongfully of these lands to the exclusion of the co-sharer, and we therefore think, so far as that question is concerned, they are liable for mesne profits, and we think they ought to pay them, not merely at the rate of rent paid by the tenant for the holding, but upon the ordinary footing of the profits which might have been derived in the course of cultivation from the land.

These being our views, we dismiss the appeal with costs.

S. C. G.

Appeal dismissed.

NOTES.

[See the Full Bench decision in *Dayamayi v. Ananda Mohan Roy*, (1914) 42 Cal., 172, as regards the effect of an alienation of an occupancy holding, apart from custom or local usage.]

[26 Cal. 556]

The 2nd May, 1899.

PRESENT :

MR. JUSTICE HILL AND MR. JUSTICE RAMPINI.

Narohary Jana.....Appellant

versus

Hari Charan Pramanick and others.....Respondents.*

Second Appeal—Bengal Tenancy Act (VIII of 1885), sections 105, 108—Order of Special Judge as to standard of measurement of lands.

An order of the Special Judge as to the length of the standard of measurement to be used in measuring certain lands is not a decision in a case under section 106 of the Bengal Tenancy Act, and therefore no second appeal lies from such an order to the High Court.

Mathura Mohun Lahiri v. Uma Sundari Debi, (1897) I. L. R., 25 Cal., 34, and *Dengu Kazi v. Nobin Kissori Chowdhurani*, (1897) I. L. R., 24 Cal., 462, distinguished.

[557] THIS was an appeal, preferred by the landlord, against an order of the Special Judge of Midnapore, holding that no appeal lay to him from the order of the Settlement Officer, who had held that the standard of measurement to be used in measuring the lands of a village, named Joyram Chuck, was a pole of 7 feet 9 inches. The appellant, who was the landlord of the village, contended that the standard of measurement was a pole of 7 feet 5½ inches. When the appeal was preferred to the Special Judge, the Settlement Officer had done nothing but settle the length of the measure; he had not measured the lands, nor ascertained the area of the tenant's holdings, nor either recorded or settled rents. On appeal the Special Judge held that the question of the standard of measurement could not affect any of the records which form the record of rights, and that no appeal lay to him from the decision of the Settlement Officer, which was not a decision under chapter X of the Bengal Tenancy Act (VIII of 1885), and dismissed the appeal. From this decision the landlord appealed to the High Court.

Babu Jagat Chandra Banerjee, on behalf of the respondents, raised the objection that no appeal lay to the High Court from the order of the Special Judge, as his decision did not come under section 106 of the Act.

Babu Hara Chandra Chakravarti for the Appellant.—A second appeal does lie to this Court. The cases of *Mathura Mohun Lahiri v. Uma Sundari Debi*, (1897) I. L. R., 25 Cal., 34, and *Dengu Kazi v. Nobin Kissori Chowdhurani*, (1897) I. L. R., 24 Cal., 462, are entirely in favour of a second appeal.

The decision of the High Court (Hill and Rampini, JJ) was as follows :—

This is a second appeal against an order of the Special Judge of Midnapore, dated the 9th August 1897, holding that no appeal lies to him from an order of a Settlement Officer, finding that the standard of measurement to be used in measuring the lands of a village, named Joyram Chuck, is a pole of 7 feet 9 inches. The appellant, who is the landlord of the village, contended that the standard of measurement is a pole of 7 feet 5½ inches.

[558] It appears to us (1) that no second appeal lies to us, and (2) that the decision of the Special Judge is right and that no appeal lay to him.

* Appeal from Appellate Decree No. 2029 of 1897, against the decree of H. R. H. Coxe, Esq., District Judge of Midnapur, dated the 9th of August 1897, affirming the decree of Babu Monmotho Nath Chatterjee, Settlement Officer of that District, dated the 18th of January 1897.

We think no second appeal lies to us because the decision of the Special Judge is not a decision in a case under section 106 of the former chapter X of the Bengal Tenancy Act, which was in force when the order of the Special Judge was passed. The dispute between the parties was not a dispute as to the correctness of an entry in the record of rights for the following reasons : (1) there is no entry in any record of rights as to the standard of measurement ; (2) no record of rights has been made or is at present being made ; and (3) there is at present nothing to show that the question of length of the standard of measurement will even indirectly affect any entry in the record of rights.

The learned pleader who appears for the appellant, however, relies on the cases of *Mathura Mohan Lahiri v. Uma Sundari Debi*, (1897) I. L. R., 25 Cal., 34, and *Dengu Kazi v. Nobin Kissorsi Chowdhurani*, (1897) I. L. R., 24 Cal., 462, under the former of which he contends a second appeal does lie to this Court from a decision of a Settlement Officer about the standard of measurement, and the second of which shows that a dispute may be raised at any time about an entry or even a proposed entry in the record of rights. But the facts of the case of *Mathura Mohan Lahiri v. Uma Sundari Debi*, (1897) I. L. R., 25 Cal., 34, are very different from those of the present one. In that case there had been a measurement, the landlords had applied for a settlement of rents, and the parties disputed, not only in respect of the standard of measurement, but as to whether the tenants were in possession of excess lands, and whether they held their lands on a consolidated rent or not. There was an appeal to the Special Judge on all these points.

The facts of the present case are quite different. The Settlement Officer at the time when his decision now under appeal was passed had, as far as we can see, done nothing but settle the length of the measure he was about to use in the measurement [559] of the lands of the village. He had not measured the lands, ascertained the area of the tenants' holdings or either recorded or settled rents. There was then no record of rights and no entry or even proposed entry in a record of rights, and hence we consider neither of the cases cited by the pleader has any application to the present case.

Then the Special Judge has pointed out that the question of the standard of measurement cannot affect any of the records which form the record of rights. These are the *khewat* and *khatian*—see the Government rules under the Tenancy Act, chapter VI, rule 8. The former is a record of proprietary interests. The latter is a record of tenants' rights, the entries in which only can form the subject of dispute between the parties to this case. But the area of the tenants' holdings in the *khatian* is entered in *acres* (see cols. 5, 6, 7 and 8). This is in accordance with section 92 of the Act and rule 64 of the Board's Settlement Manual. The question of the local standard of measurement cannot affect the entries in these columns. The only columns the entries in which may possibly be affected by the question of the local standard of measurement are columns 9 and 10. In column 9 is recorded the existing rent. If this is a lump rental, the question of the standard of measurement cannot affect it. If it is a fluctuating rental at so many rupees per bigha, it may affect it. But it remains to be seen what entry will be made in this column. Column 10 is the column in which is entered the rent settled by the Settlement Officer, if he finds it necessary to settle any rent. He will not have to do so, unless the *raiyyats* are found in possession of excess lands. Hence, there is at present no certainty nor indeed any reasonable ground for supposing that any entry in the record of rights will be affected by the question of the local standard of measurement. The contention of the parties at present is neither an "objection" under section 105, nor a "dispute" under section 106.

Thus, the order of the Settlement Officer, being an order neither under section 105, section 106 nor section 107, is not a decision under chapter X of the Act ; for there is no other section in the chapter under which a Settlement Officer can decide [560] anything. That being so, no appeal lay from his order to the Special Judge under section 108 (2), and the Special Judge's order not being a decision under section 106, no second appeal lies to us under section 108 (3).

We accordingly dismiss this appeal with costs.

Appeal dismissed.

[26 Cal. 560]
CRIMINAL REFERENCE.

The 2nd March, 1899.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Queen-Empress
versus
Mati Lal Lahiri.*

Penal Code (Act XLV of 1860), sections 409, 477A—Criminal Procedure Code (Act V of 1898), sections 222 (2), 234—Criminal breach of trust by public servant—Acquittal—Framing new charge—General falsification of accounts for a period extending over two years.

The alteration in the law by section 222 (2) of the Criminal Procedure Code (Act V of 1898) does not apply to a charge under section 477A of the Penal Code. It applies only to criminal breach of trust or dishonest misappropriation of money.

THIS was a reference under section 307 of the Code of Criminal Procedure by the Officiating Sessions Judge of the Assam Valley Districts. The accused Mati Lal Lahiri was tried in the month of March 1897 before a jury on a charge under section 409 of the Indian Penal Code, of having, as Treasurer of the Dhubri Collectorate, embezzled Government stamps of the value of Rs. 18,493. The jury acquitted the accused ; but the Sessions Judge, being dissatisfied with the verdict of the jury, referred the case to the High Court under section 307 of the Criminal Procedure Code. The High Court (HILL and JENKINS, JJ.) upon that reference, on the 30th July 1897, directed that the case should be retried.

The retrial was held on the 29th of October 1897 and following days, when a majority of the jury again found the accused not guilty, and again the Sessions Judge, disapproving of the verdict, referred the case to the High Court

* Criminal Reference No. 46 of 1898, made by B. G. Melitus, Esq., Offg. Sessions Judge of Assam Valley Districts, dated 23rd December 1898.

under' the abovementioned section. The charge was in these terms so far as is material, viz. :—

" That you, between June 1894 and October 1896 (inclusive), at Dhubri, being entrusted with property in your capacity as the Treasurer of the Government Treasury at Dhubri, committed criminal breach of trust in respect of that property, viz., in respect of stamps or the value thereof to the extent of Rs. 18,498-15-6."

In directing a retrial Mr. Justice HILL pointed out that the order of the Court was not connected with the merits of the case but was founded solely on the nature of the charge which embraced a series of separate defalcations extending over a period of considerably more than two years, and that, according to the recent decisions when a charge was based, as in this case, on a general deficiency in accounting, the charge must be limited to three specific acts of misappropriation committed within a period of twelve months. Mr. Justice JENKINS assigned the same reasons for setting aside the proceedings and directing a retrial. These cases were tried under the Code of 1882 and before the law had been altered in respect of such charges by section 222 (2) of the Code of 1898.

Fresh charges under section 409 of the Penal Code were framed giving particulars of three acts of misappropriation; and a new charge was added under section 477A of the Penal Code. The added charge was :—

" That you being employed as Treasurer at the Dhubri Treasury, and in such capacity being authorised to sell stamps of different denominations to the public, and being required to keep correct accounts of the sale of stamps, and to credit daily the sale proceeds to the said Treasury, wilfully and with intent to defraud, between June 1894 and October 1896 (inclusive), falsified the accounts and registers of the sale of stamps and thereby committed an offence punishable under section 477A of the Indian Penal Code and within the cognizance of the Court of Sessions."

At the second retrial the accused was again acquitted by the jury, and the case was again referred to the High Court, the Judge expressing his opinion that the accused was guilty under section 477A of the Penal Code and not guilty on the other charges.

Mr. Garth, Mr. P. L. Roy, Mr. B. Chakravarti, and Babu Gobind Chunder Day Roy, for the accused.

[562] Babu Dasarathi Sanyal for the Crown.

The judgment of the High Court (Prinsep and Stanley, JJ.) after stating the facts, proceeded as follows :—

It appears that on the hearing of this reference the learned Vakil who appeared for the prosecution stated to the Court that he was in a position to specify three acts of misappropriation by the accused which might properly be made the basis of a charge against him, and Mr. Justice HILL expressed his regret that, this being so, the trial should have been allowed to proceed to an abortive issue upon the charge as it then stood. New charges were framed under section 409, giving particulars of three acts of alleged criminal breach of trust on the part of the accused. In addition to these an entirely new charge was added under section 477A of the Indian Penal Code in the following terms, *ante* p. 561.

This charge is an obvious departure from the charge upon which the accused had been, after two lengthened trials, acquitted by the jury, and would appear to have been added with the object of avoiding the necessity of specifying in the indictment particulars of the items of official misconduct which the High Court considered it requisite that the prosecution should specify.

The accused again pleaded not guilty to the charges, and a lengthened investigation ensued, after which the jury unanimously acquitted the accused.

Again the Sessions Judge has for the third time felt it to be his duty to refer the case to the High Court for orders, being satisfied, as he says, that the accused committed an offence under section 477A of the Indian Penal Code. He considers that the accused was rightly acquitted upon the other charges.

Counsel on behalf of the accused has before us raised two preliminary objections to the review of the case. In the first place he argues that the formulating by the Magistrate of an additional and distinct charge under section 477A was not justified under the circumstances, and having regard to what occurred on the previous trials and on the references to the High Court, that the accused ought to have been tried under [563] section 409 of the Indian Penal Code alone. In the next place he contended that the charge as framed under section 477A was defective as being an arraignment of the accused on general acts of falsification of accounts extending over a period of nearly two and a half years.

As regards the first point taken by Counsel for the accused we think that it is doubtful whether on the former reference the parties ever contemplated that under the order of the Court an entirely new charge might be framed against the accused, but looking at the terms of the order we cannot say that the Magistrate and Sessions Judge over-stepped the limit of their powers.

As to the second objection more serious considerations arise. In place of the charge of criminal breach of trust the accused is charged with a general falsification of his accounts for a period extending from May 1894 to October 1896. No particulars whatever of any falsification are specified, but the accused is put upon his trial on a vague and general allegation of falsification of his accounts during a period of nearly two years and a half. It would seem to us that this charge was in all probability framed with the object of relieving, if possible, the prosecution from the obligation which lay upon them in respect of the charges under section 409 of proving specific acts of misappropriation. Has it done so? We think not. Every act of falsification of a book or account in our opinion would amount to an offence under the Code under section 284 of the Code of Criminal Procedure. An accused can only be charged and tried at one trial for any number of offences of the same kind not exceeding three committed within the space of one year. The explanation appended to section 477A does not purport to override this section. In the present case it does not appear what number of acts of falsification are complained of, but the Sessions Judge finds that false entries were systematically made by the accused for the period above referred to—a period of nearly two years and a half. The papers alleged to have been falsified consisted of single Lock Registers and monthly returns. The charge does not specify any particular single Lock Register or monthly return which was so falsified. [564] The alteration in the law by section 222(2) of the Code of 1898 does not apply to a charge under section 477A of the Penal Code. It applies only to criminal breach of trust or dishonest misappropriation of money.

It appears to us for the foregoing reasons that the charge formulated under section 477A was irregular, if not absolutely illegal.

The Sessions Judge, as we have stated, finds that the charges under section 409 are unsustainable. We are of opinion for the reasons above stated that the second objection advanced by Counsel for the accused is well founded, and we rule accordingly; and under all the circumstances, and having regard to the protracted nature of this prosecution, to the fact that the accused has suffered considerably from the admittedly untenable charges upon which he was originally tried, and to the fact that he has been in confinement for upwards of a year and a half while these abortive proceedings were being

prosecuted, we think that in the ends of justice it is undesirable that further proceedings against the accused be taken, and we accordingly so direct; and we order that the accused be forthwith discharged from custody.

F. K. D.

NOTES.

[See also (1909) 32 All., 57.]

[26 Cal. 564]

FULL BENCH.

The 11th April, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,
MR. JUSTICE MACPHERSON, MR. JUSTICE GHOSE,
MR. JUSTICE HILL AND MR. JUSTICE JENKINS.

Sharoop Dass Mondal.....Defendant

versus

Joggessur Roy Chowdhry.....Plaintiff.*

Limitation Act (XV of 1877), Schedule II, articles 32 and 120 and 143—

Bengal Tenancy Act (VIII of 1885), sections 25 and 155—

Suit to compel the defendant to fill up a tank and to pay compensation, or in the alternative for khas possession.

In a suit brought by a landlord against a tenant where the primary relief sought was a mandatory injunction directing the defendant to fill up [565] a tank excavated by him in contravention of the terms of the tenancy and to pay damages to the plaintiff for his wrongful act, and where the secondary relief sought was ejectment, the defence (*inter alia*) was that the suit was barred by limitation, inasmuch as it was brought more than two years after the excavation of the tank.

Held, that article 32 † of Schedule II of the Limitation Act (XV of 1877), applied to the case, and the suit was barred by limitation.

Soman Gope v. Raghubir Ojha, (1896) I.L.R., 24 Cal., 160, and *Gangadhar v. Zahurriya*, (1886) I. L. R., 8 All., 446, approved.

THIS appeal arose out of an action brought by the landlord against a tenant for ejectment and compensation. The plaintiff's allegation was that the defendant

* Reference to a Full Bench in Appeal from Appellate Decree No. 852 of 1897.

† [Art. 32 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
*Against one who, having a right to use property for specific purposes, perverts it to other purposes.	Two years	When the perversion first becomes known to the person injured thereby.]

had excavated a tank on the land rendering it unfit for the purposes of the tenancy, and he therefore prayed that the defendant might be directed to fill up the tank and to pay damages to him, failing which the Court might award *khas* possession of the said land to the plaintiff. The defence (*inter alia*) was that the suit was barred by limitation, inasmuch as it was brought more than two years after the date of the excavation of the tank.

The Court of First Instance decreed the plaintiff's suit on the ground that article 120 of the Limitation Act applied to the case, and the plaintiff was entitled to bring his suit within six years from the time of the excavation of the tank. On appeal, the Subordinate Judge upheld the decision of the first Court. Against this decision the defendant appealed to the High Court. On the appeal coming on for hearing the case was referred to a Full Bench by MACLEAN, C.J., and BANERJEE, J., on the 10th January 1899, with the following OPINION:—

"In this appeal, which arises out of a suit brought by the plaintiff-respondent to compel the defendant, a tenant under him, to fill up a tank and to pay compensation, or, in the alternative, to recover *khas* possession of the land on which the tank has been excavated, one of the questions for determination is whether the suit, which, according to the finding of the first Court, not displaced by the Lower Appellate Court, was brought more than two years but less than six years after the excavation [566] of the tank, is barred by limitation; in other words whether article 32 or article 120 of the Second Schedule of the Limitation Act applies to the case.

"Upon that question there is a conflict of decisions in this Court, the case of *Kedarnath Nag v. Khettur Paul Sritirutno*, (1880) I. L. R., 6 Cal., 34, laying it down that a suit like the present is governed by article 120 of the Second Schedule of the Limitation Act and is not barred if brought within six years from the time when the cause of action arose, while the case of *Soman Gope v. Raghubir Ojha*, (1896) I. L. R., 24 Cal., 160, decides that such a suit comes under article 32, and is barred if not brought within two years from the date when the land is perverted to an unallowable purpose. There being this conflict of decisions, the question must be referred for determination to a Full Bench; and as the question arises in a second appeal the whole case must be so referred."

Babu Joy Gobind Shome for the Appellant.

Babu Saroda Churn Mitter, Babu Jogendra Chundra Ghose, and Babu Satis Chunder Ghose, for the Respondent.

The judgment of the Full Bench (MACLEAN, C.J., and MACPHERSON, GHOSE, HILL, and JENKINS, J.J.) was as follows:—

Maclean, C.J.—The question submitted for our consideration is whether article 32 or article 120 of the Second Schedule of the Limitation Act applies to the present case.

To ascertain this, we must consider what was the nature of the suit and what was the relief sought. The primary relief sought was in effect a mandatory injunction directing the defendant to fill up the tank in question and to pay the plaintiff compensation for his alleged wrongful act; the secondary relief was for ejectment. We say secondary, for the ejectment was not to follow, and could not follow, save upon failure of the defendant to fill up the tank and make the compensation; it was contingent on that failure. For the tort complained of, the plaintiff had three remedies, (1) damages, (2) a mandatory injunction, and (3) ejectment, contingent upon the tenant not complying with certain conditions. This being the nature of [567] his suit, under which

article of the Limitation Act does the case come? If under article 32, the plaintiff is barred; if under article 120, he is not.

Article 32 is as follows: "Against one who having a right to use property for specific purposes perverts it to other purposes." As a general principle, in construing this Act of the Legislature we ought not to regard a case as coming under article 120, unless clearly satisfied that it does not come under one of the many articles dealing with specific cases. Further, if there be two articles which may cover the case, the one, however, more general and the other more particular or specific, as a principle of construction the more particular and specific article ought to be regarded as the one governing the case. It cannot be successfully contended that, reading the language used according to its usual and ordinary acceptance, the words of article 32 are not sufficiently wide to cover the present case. The case is clearly within the words of the article: it is the precise case provided for by the article. The defendant is one, who, having a right to use the property demised to him for agricultural purposes, has perverted it to another purpose, viz., that of a tank. Upon what principle then can we properly say that the article cannot apply? We are invited rather to wander into the jungle of speculation than follow the beaten track defined by the language used.

It is contended for the respondent, and this was the stress of his contention, that this is an action based upon, or framed under, section 155 of the Bengal Tenancy Act, 1885, and that, as that Act was not in existence when the Limitation Act of 1877 was passed, the Legislature could not have intended that article 32 of the latter Act should apply to cases framed under the provisions of the former Act.

This appears to us a fallacy. Suits against a tenant for perverting property to purposes other than those for which he had the right to use it were well known before the Bengal Tenancy Act of 1885, though before that Act there might have been no right to eject for such perversion independent of contract. Section 155 creates no fresh class of suit: it affords [568] no fresh cause of action; it only provides that in ejectment suits a tenant may obtain relief against forfeiture on certain terms. It would be a strange thing to infer from that section that the Legislature intended to interfere with the operation of the provisions of the Statute of Limitations then in force, or by reason of section 155 to say that when a person is sued for perverting the property demised to him to purposes other than those specified the ordinary Statute of Limitations did not apply. The Bengal Tenancy Act of 1885 deals specifically with the question of limitation in certain cases, and this supports an inference that the Legislature intended that any other cases should be left to the general law, and the policy of shortening the period of limitation in cases more or less analogous to the present, is indicated by article 1 in Schedule III. But even if the plaint had merely asked for ejectment, leaving it to the defendant to raise his claim to relief against forfeiture, as given him by section 155, seeing that the claim to eject is based on the case expressly provided for by article 32, we should have said that that article applied. That article says nothing about the relief to be sought or to be granted; it only lays down within what particular period of limitation a particular suit based upon a particular tort is to be brought.

It is said that the Bengal Tenancy Act describes an action such as this as an "ejectment action," and it is consequently suggested that article 143 applies; but this article, which is more general in its terms than article 32, only applies to a case where the plaintiff is entitled to possession by reason of forfeiture or breach of condition, that is, a condition of the tenancy; but

the plaintiff here would only be entitled to possession upon non-compliance by the defendant with the order of the Court as to filling up the tank and making compensation. The present suit is framed in tort, not on breach of any contract. In our opinion the case is within article 32—a conclusion consistent with the decision in this Court in the case of *Soman Gope v. Raghbir Ojha*, (1896) I.L.R., 24 Cal., 160, and with the principles of the case of *Gangadhar v. Zahurriya*, (1886) I.L.R., 8 All., 446, although in the latter case the [569] plaintiff did not seek to eject. These authorities we prefer to those of the cases of *Kedarnath Nag v. Khettur Paul Sritirutno*, (1880) I. L. R., 6 Cal., 34, and *Gunesh Dass v. Gondour Koormi*, (1882) I. L. R., 9 Cal., 147. The plaintiff is consequently out of time, and the appeal must be allowed with costs, and the suit dismissed with costs.

S. C. G.

Appeal allowed.

NOTES.

I. The special Article rather than the general Article should be applied:—(1902) 26 Bom., 430.

II. As regards the scope of Art. 32, see also (1898) 20 All., 519; (1906) 29 Mad., 500; (1911) 12 I.C., 108 (All.); (1908) 4 M.L.T., 278; 18 M.L.J., 602; (1912) 15 I.C., 295.

III. Art. 120 is residuary and should be applied when there is no other Art. applicable:—(1910) 34 Mad., 167; (1907) 6 C.L.J., 535; (1914) M.W.N., 264; (1905) 32 Cal., 527; (1908) 4 N.L.R., 49; (1912) 22 M.L.J., 485.]

[26 Cal. 569]

CRIMINAL REFERENCE.

The 14th March, 1899.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Queen-Empress

versus

Salemuddin Sheik and others.....Accused.*

Confession—Confession to Police Officer—Evidence Act (I of 1872), s. 25.

The provisions of section 25 of the Indian Evidence Act (I of 1872), which declare that no confession made to a Police officer shall be proved as against a person accused of any offence, applies to every Police officer and is not to be restricted to officers of the regular Police Force.

THIS was a reference to the High Court under section 438 of the Criminal Procedure Code. The facts appear from the letter of reference, which was as follows:—

“The petitioners have been convicted under section 25 of the Indian Forest Act (VII of 1878) for cutting and removing forest produce from a Government reserved forest without a proper license.

“There is no evidence whatever that the petitioners cut and removed the wood in their possession from a Government reserved forest. The petitioners were arrested at a market where they were evidently trying to sell the twenty pieces of *sundri* wood in their possession. There is no evidence except an alleged confession to the *chowkidar* who arrested them to show where they had obtained the pieces of wood in question. Now it has been held that a confession to a *chowkidar* is a confession to a Police officer, and as such is inadmissible in

* Criminal Reference No. 44 of 1899 made by L. Palit, Esq., Sessions Judge of Khulna, dated the 27th February 1899.

evidence. If this confession be therefore excluded, there is absolutely no evidence to support the conviction.

"The Magistrate in his explanation says, that 'there is of course no evidence to prove that the accused were seen within the forest boundary, or when cutting the wood in it. But this is not always possible, and the admission of the accused before the witnesses for the prosecution (*chowki-dars* though they are) is I think legally admissible.' As I have however already remarked, such confessions have been held to be inadmissible.

"I therefore refer the case to the High Court with the recommendation that the conviction and sentence be set aside, and that the fine, if realised, be directed to be refunded."

The judgment of the High Court (Prinsep and Stanley, JJ.) was as follows:—

The petitioner was arrested by a *chowkidar* in possession of a load of newly cut wood, which it was suspected had been cut from a Government reserved forest, and after his arrest it is said that he admitted to the *chowkidar* having so obtained it. He has accordingly been convicted and sentenced to fine under section 25 of the Indian Forest Act (VII of 1878). The Sessions Judge has referred this case to us as a Court of Revision, that the conviction and sentence may be set aside, on the ground that a confession so made is not admissible in evidence, and as that is the only evidence in the case, there is no evidence to justify the conviction and sentence.

Section 25 of the Evidence Act declares that no confession made to a Police officer shall be proved as against a person accused of any offence. We are not inclined to restrict this to officers of the regular Police Force. In our opinion, it applies to every Police officer. In *Empress v. Rama Birapa*, (1878) I. L. R., 3 Bom., 12, it was held to apply to a Police *patel*, and in *In the matter of Hiran Miya*, (1877) 1 C. L. R., 21, it was held that the proper construction of section 25 of the Indian Evidence Act is one that excludes confessions to a Police officer under any circumstances. The High Court, too, accepted the opinion expressed by GARTH, C.J., in *The Queen v. Hurribole Chunder Ghose*, (1876) I. L. R., 1 Cal., 207, that the term "Police officer" should not be read in a strict technical sense, but according to its more comprehensive and popular meaning. As without the confession there is no evidence to prove the offence, the conviction and sentence must be set aside, and the fine if paid refunded.

F. K. D.

NOTES.

[See also 9 C.W.N., 474 ; 22 Bom., 235.]

[571] CRIMINAL REVISION.

The 8th March, 1899.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Umesh Chunder Ghose.....Petitioner

versus

Queen-Empress.....Opposite Party.*

*Opium Act (I of 1878), sections 5 and 9—Licensed Vendor, Liability
of, under section 9 for keeping incorrect accounts.*

Section 5 of the Opium Act (I of 1878) declares that the Local Government, with the previous sanction of the Governor-General in Council, may make rules consistent with the Act regulating the sale of opium. Under this section rules were issued by the Government of Bengal with the previous sanction of the Governor-General in Council on the 21st February 1898, rule 15† of which declares that a person to whom a license has been granted may sell opium by retail in accordance with the conditions specified in the license. The conditions of the license for the retail sale of opium are contained in Form No. 1 made under rule 15†. Under article 13 of this form, the holder of the license is to keep a daily correct account showing the quantity of opium received and sold, and other details. Article 18 sets out that an infringement of any of the conditions contained in the form or imposed by the Opium Act the license may be cancelled.

The petitioner, a licensed vendor of opium, was convicted of having kept incorrect accounts in contravention of the rules made under section 5 of the Opium Act, and having thereby committed an offence punishable under section 9 of that Act. He was sentenced to pay a fine of Rs. 200, and in default of payment to undergo rigorous imprisonment for four months.

Held, that the conviction and sentence must be set aside, there being nothing in any of the rules made under section 5 of the Act which would make the preparation of an incorrect account punishable under section 9.

THE petitioner, Umesh Chunder Ghose, was licensed as a vendor of opium, and was convicted by the Magistrate of Alipur of having kept incorrect accounts of the sale of opium in contravention of the rules made by the Local Government under section 5 of the Opium Act (I of 1878), and of having thereby rendered himself liable to punishment under section 9 of that Act. The Magistrate sentenced him to pay a fine of Rs. 200, [572] and in default of payment to undergo rigorous imprisonment for four months. On appeal this sentence was confirmed by the Sessions Judge.

Rule 15† of the rules made under section 5 enacts that

“ a person to whom a license has been granted . . . may sell opium by retail in accordance with the conditions specified in the license.”

* Criminal Revision No. 31 of 1899, made against the order passed by C. P. Caspersz, Esq., Sessions Judge of Alipur, dated the 8th November 1898.

† Notification No. 1225 S. R., published in the *Calcutta Gazette*, 23rd February 1898.

The specified conditions material to this case were articles XIII and XVIII. Article XIII states that the licensee—

“ shall keep a daily correct account in the following form, to be balanced at the close of each day ; this account to be kept in a printed account book to be purchased at the Collector's office.

DATE.	Quantity of opium remain- ing in store yesterday.	Quantity received this day and whence received.	Total quantity to be accounted for.	Quantity sold this day.	Quantity remaining in store.”
	M. S. C.	M. S. C.	M. S. C.	M. S. C.	M. S. C.

No. XVIII of the conditions states:—

“ That on the infringement of any of the above articles or any of the conditions imposed by the Opium Act, 1878, or by the rules made thereunder, . . . this license and any other license or licenses he may have obtained for the sale of opium may be cancelled by the Collector, and he shall not be entitled to the refund of any fee payable under the license which he has paid in advance, and he must pay the fee for the month in which the license is cancelled ”

Babu Hem Chunder Mitter for the Petitioner.

The Deputy Legal Remembrancer (Mr. Gordon Leith) for the Crown.

The judgment of the Court (Prinsep and Stanley, JJ.) was as follows:—

The petitioner has been convicted by the Magistrate of having kept incorrect accounts of a shop of which he was a licensed vendor of opium, and thereby of having committed a breach of the rules under the Opium Act, and thus of having committed an offence punishable under section 9 of the Act, and he has been sentenced to a fine of Rs. 200 or, in default, to undergo rigorous imprisonment for four months. On appeal, the Sessions Judge has affirmed the conviction and sentence, but has held that the petitioner has brought himself within the purview of rules [573] 39 and 40 of the Government rules. We have not been able to find these rules, but Mr. Leith, who appears for the Government in support of this conviction, informs us that he has reason to believe that these rules are obsolete rules, which have been re-placed by certain rules in the hands of those who appear in this case representing the adverse parties. Now we should not be inclined to set aside this conviction, if, notwithstanding this reference to obsolete rules by the Sessions Judge, it could be shown to us that the facts on which the petitioner has been convicted by both the Magistrate and the Sessions Judge would amount to a breach of the law rendering him so punishable, but we have been unable to find any legal authority justifying the conviction and sentence passed.

The petitioner has been convicted under section 9 of the Opium Act of 1878 of having contravened the rules made under section 5 of that Act. Section 5 declares that the Local Government, with the previous sanction of the Governor-General in Council, may make rules consistent with the Act regulating the sale of opium, and the case for the prosecution is that, by making false or incorrect accounts regarding the sale of opium, the petitioner has contravened these rules. Now, section 15 of the rules issued by the Government of Bengal with the sanction of the Governor-General in Council, on the 21st February 1898, declares that a person to whom a license has been granted may sell opium by retail in accordance with the conditions specified in the license. We are next referred to the subsidiary rules issued under the authority of the Board of Revenue, the appendix attached to which sets out what is described as Form I, professing to have been made under rule 15* (1) already referred

* Notification No. 1225 S. R., published in the Calcutta Gazette, 23rd February 1898.

to. This appendix contains the conditions under which opium licenses are granted. Amongst these conditions, no doubt, is an obligation set out in rule 13 in regard to the regular maintenance of a register in the prescribed form showing the sales of opium and other details relating thereto, and rule 18 sets out the penalty for an infringement of any of the abovementioned conditions, or of any of the conditions imposed by the Opium Act of 1878, or by the rules made under that Act, viz., that the license shall be cancelled. But there is nothing in any of the rules made by the [574] Government under section 5 of the Act which would make the preparation of an incorrect account punishable under section 9. We cannot consider that rule 15 * regularly made under section 5 of the Opium Act, which enables a person to whom license has been granted to sell opium by retail, in accordance with the conditions specified in the license, would subject him for any breach of any of these conditions to a penalty under section 9, unless there was some specific rule declaring that any such breach would so render him liable. The conviction and sentence must, therefore, be set aside and the fine, if paid, must be refunded.

F. K. D.

Conviction set aside.

[26 Cal. 574]

The 22nd March, 1899.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STEVENS.

Anant Pandit and others.....Petitioners

versus

Madhusudan Mandal.....Opposite Party.†

Rioting—Unlawful assembly—Right of Private defence of property—Causing hurt in furtherance of common object—Penal Code (Act XLV of 1860), sections 147, 323.

The party of the accused accompanied by R went armed with *lathis* to fish in a tank in which R had a two annas share. The complainant, who with some other co-sharers represented an eleven annas interest in the tank, went there with some of these co-sharers, to protest on the ground that the accused had no share or interest in the tank. A fight ensued in the course of which some of the complainant's party received slight injuries.

Held, that the accused were rightly convicted of rioting and voluntarily causing hurt under sections 147 and 323 of the Penal Code.

Ganouri Lal Das v. Queen-Empress, (1889) I. L. R., 16 Cal., 206, followed, *Pachkauri v. Queen-Empress*, (1897) I. L. R., 24 Cal., 686, referred to.

A LARGE number of persons, including the accused, and accompanied by Ramchandra Rai, to whose party they belonged, went armed with *lathis* to fish in a tank in which Ramchandra Rai alleged [575] that he had a two annas share. The complainant, Madhusudan Mandal, who with some other co-sharers represented an eleven annas interest, went with some of these shareholders

* Notification No. 1225, S. R., published in the *Calcutta Gazette* 23rd February 1898.

† Criminal Revision No. 216 of 1899 made against the order passed by Moulvie Abdul Sabhan, Deputy Magistrate of Birbhoom, dated 17th of February 1899.

to protest on the ground that the defendants had no share or interest in the tank, and therefore no right to fish there. A quarrel ensued, in the course of which some of complainant's party were beaten, and received slight injuries. It was found by the Deputy Magistrate that Ramchandra Rai was in actual possession of a two annas share in the tank, and that he had satisfactory documents to show his *bond fides* in going to the tank to fish there. He held, however, that Ramchandra Rai had no right to go there with a body of armed men to assert his claim and possession over the tank by force, and he convicted the accused of rioting and voluntarily causing hurt under sections 147 and 323 of the Penal Code. From this conviction the accused applied to the High Court under its revisional powers.

Babu *Karuna Sindhu Mookerjee* for the Petitioner.

The judgment of the Court (Prinsep and Stevens, JJ.) was as follows :—

This is a case in which the petitioners have been convicted of a riot and hurt in connection with their attempt to assert and enforce a right to fish in a certain tank, in which they were opposed by the other co-sharers. The learned pleader for the petitioners maintained that inasmuch as they had a right to fish and are found to have a share in the tank, they were justified in proceeding even by force to enjoy that right, even if they apprehended resistance on the part of others, that is to say, others having a share in the same tank. As an authority for this, our attention was drawn to the case of *Pachkauri v. Queen-Empress*, (1897) I. L. R., 24 Cal., 686. It is extremely difficult in cases of this description to adopt and apply a general proposition of law as applicable to the facts of different cases. Some of the observations made in that case may perhaps be applied to the facts of the present case, but even that seems doubtful. Our attention has also been drawn to the case of *Ganouri Lal Das v. Queen-Empress*, (1889) I. L. R., 16 Cal., 206. That case has [576] been distinguished in the case of *Pachkauri v. Queen-Empress*, (1897) I. L. R., 24 Cal., 686, to which reference has already been made. In our opinion, the law laid down in the case of *Ganouri Lal Das v. Queen-Empress* (1889) I. L. R., 16 Cal., 206, is what should be applied to the present case, and, so far as we understand the facts of that case, they are analogous to the facts of the present case. If this case is properly distinguishable from the case of *Pachkauri v. Queen-Empress*, (1897) I. L. R., 24 Cal., 686, the opinion we hold is not inconsistent with that judgment. We agree with the view of the law expressed by the learned Judges of this Court in the case of *Ganouri Lal Das v. Queen-Empress*, and we therefore refuse this application.

F. K. D.

Application refused.

NOTES.

[See also (1908) 35 Cal., 368 ; (1908) 35 Cal., 384.]

[26 Cal. 376]

The 22nd March, 1899.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Jib Lal Gir.....Petitioner

versus

Jogmohan Gir.....Opposite Party.*

*Recognisance to keep peace—Criminal Procedure Code (Act V of 1898), s. 106—
Security for keeping the peace on conviction—C conviction under
s. 143 of the Penal Code (Act XLV of 1860).*

Conviction of a person under s. 143 of the Penal Code is not necessarily a ground for making an order against him under s. 106 of the Criminal Procedure Code.

In order to bring his acts within the terms of the latter section, there must either be an express finding to the effect that his acts involved a breach of the peace, or an evident intention of committing the same, or the evidence must be so clear as to satisfy the Court (without an express finding) that such was the case.

THE petitioner in this case was convicted under section 143 and section 379 of the Penal Code and sentenced to pay a fine of Rs. 100 or in default to undergo rigorous imprisonment for one month, and was further directed under section 106 of the Criminal Procedure Code to execute a bond for Rs. 500 with one surety of Rs. 500 for keeping the peace for one year, or in default to undergo simple imprisonment for the same period.

[577] Mr. P. L. Roy, and Babu Joy Gopal Ghose, for the Petitioner.

Mr. Jackson, and Babu Joges Chunder Dey, for the Opposite Party.

The judgment of the High Court (Prinsep and Stanley, JJ.) was as follows:—

The petitioner has been convicted under sections 143 and 379 of the Indian Penal Code of being a member of an unlawful assembly and of theft, and in addition to the sentences passed he has been required under section 106 of the Code of Criminal Procedure to give security to keep the peace. A rule has been granted on his application to consider the conviction and sentence for theft and the order under section 106 of the Code of Criminal Procedure.

The complainant and the petitioner have for some time past been disputing regarding the right to the properties which have formed the subject-matter of the theft, and various orders have been obtained from the Civil Courts on this subject. But it is clear that when the act found to constitute the offence of theft was committed no order had been obtained against the petitioner. His act cannot therefore be regarded as a dishonest act within the terms of the Penal Code so as to constitute the offence of theft. Mr. Jackson, who shows cause against the rule, informed us that he was not prepared to maintain this order.

But though the petitioner has been convicted under section 379 as well as under section 143 of the Penal Code, only one sentence of fine has been passed on him, so that if the conviction under section 143 be maintained there is no reason for interfering with that sentence, which is appropriate under section 143. The acts found, both by the Magistrate and by the Appellate Court to have been committed by the petitioner, amply establish the conviction

* Criminal Revision No. 68 of 1899.

under section 143 of the Penal Code, and we accordingly decline to interfere with the sentence.

The question next arises whether the order under section 106 of the Code of Criminal Procedure requiring the petitioner to give security to keep the peace is a valid order.

That section enables certain specified Courts, after convicting a person of any of certain offences, to pass an order summarily [578] binding him over to keep the peace. Amongst those offences an offence under section 143 of the Penal Code does not appear. But it is contended that it is included amongst the offences specified in the section in general terms. Section 106 of the Code of 1898 runs thus: "Whenever any person accused of rioting, assault or other offences involving a breach of the peace or of abetting the same or of assembling armed men or taking other unlawful measures with the evident intention of committing the same is convicted, &c." The terms of section 106 of the Code of 1898 are the same as those of section 106 of the Code of 1882, with the exception of the words "involving a breach of the peace."

Now, being a member of an unlawful assembly does not necessarily involve a breach of the peace; the members may abstain from proceeding to such lengths. It does, however, involve an apprehension that a breach of the peace may result. Nor does a conviction of an offence under section 143 of being a member of an unlawful assembly necessarily amount to a conviction of "taking unlawful measures with the evident intention of committing" a breach of the peace. In order to bring the acts of the accused within either of these terms it is necessary that the Magistrate should expressly find that the acts of the person convicted amount to this, or at all events that the evidence is so clear that without such an express finding a superior Court, such as a Court of Revision, should be satisfied that the acts do involve a breach of the peace or an evident intention of committing the same. In the case before us we are not satisfied that this is established, and we cannot assume that the Magistrate found that this was established. The summary order requiring security to keep the peace must therefore be set aside.

S. C. B.

NOTES.

[The following were similar decisions:—27 Cal., 983; 29 Cal., 393; 30 Cal., 93. 8 C.W.N., 517. See also (1904) 31 Cal., 419.]

[579] APPELLATE CIVIL.

The 23rd March, 1899.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Nisa Chand Gaita and others.....Defendants

versus

Kanchiram Bagani.....Plaintiff.*

Possession, Suit for—Previous possession, short of the statutory period of limitation—Dispossession—Suit brought more than six months after dispossession, Effect of.

Mere previous possession for any period short of the statutory period of twelve years will not entitle a plaintiff to a decree for recovery of possession in a suit brought more than six months after dispossession, even if the defendant could not establish any title to the disputed land.

Wise v. Ameerunnisa, (1879) L. R., 7 I. A., 73, referred to.

Ismail Ariff v. Mahomed Ghous, (1893) I. L. R., 20 Cal., 834 : L. R., 20 I. A., 99, distinguished.

Enaetoollah Chowdhry v. Kishen Soondur Surma, (1867) 8 W. R., 386, and *Mohabeer Pershad Singh v. Mohabeer Singh*, (1881) I. L. R., 7 Cal., 591, dissented from.

THIS appeal arose out of an action brought by the plaintiff to recover possession of a plot of land on establishment of his *jamai* right thereto, as well as on a title acquired by twelve years' adverse possession. The plaintiff's allegation was that he had been in possession of the disputed *jama* for more than twelve years under the *maliks*; that in the year 1295 B.S. defendants 9 and 10 dispossessed him from a portion of the said land, but he recovered possession of the same by a suit brought under section 9 of the Specific Relief Act; that in the year 1296 B. S. the principal defendants wrongfully cut and carried away the paddy grown by him upon the disputed land, and he brought a suit for compensation against the said defendants, which was dismissed. Thereupon the plaintiff brought the present suit.

[580] The defendants denied the plaintiff's alleged *jamai* right as well as his *maliks'* zemindari right to the disputed land; they also pleaded limitation.

The Munsif found that the plaintiff was in possession of the disputed land for about seven or eight years within twelve years from the date of the suit, but he had been out of possession for the last six years; but he held that inasmuch as the plaintiff could not prove his title by adverse possession of twelve years, nor his *jamai* right, the suit must be dismissed notwithstanding that the defendant could not establish any title to the disputed land. On appeal, the Subordinate Judge reversed the decision of the Munsif and decreed the plaintiff's suit.

From this decision the defendants appealed to the High Court.

Babu Saroda Churn Mitter, and Babu Hara Kumur Mitter, for the Appellants.

* Appeal from Appellate Decree No. 770 of 1897, against the decree of Babu Mahima Chandra Ghose, Subordinate Judge of Faridpur, dated the 29th of January 1897, reversing the decree of Babu Chandra Bhusan Mukerjee, Munsif of Madaripur, in that District, dated the 26th of February 1896.

Babu *Nil Madhab Bose* for the Respondent.

The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was as follows:—

This appeal arises out of a suit brought by the plaintiff respondent to recover possession of a plot of land, on his *jamai* right, that is, his right as tenant thereof, as well as on a title acquired by twelve years' adverse possession.

The question for decision is, whether the plaintiff is entitled to a decree merely upon proof of previous possession for a period less than twelve years, on the ground that the defendant has established no title, the suit having been brought more than six months after the date of dispossession. That question was raised in the Courts below. The first Court answered it in the negative, and dismissed the suit. The Lower Appellate Court, on appeal by the plaintiff, has answered the question in the affirmative and given the plaintiff a decree.

In second appeal it is contended that this view is wrong in law; and in support of the contention urged on behalf of the defendants appellants the cases of *Ertaza Hossein v. Bany* [581] *Mistry*, (1882) I.L.R., 9 Cal., 130; *Debi Churn Boido v. Issur Chunder Manjee*, (1882) I.L.R., 9 Cal., 39; *Purmeshur Chowdhry v. Brijo Lal Chowdhry*, (1889) I.L.R., 17 Cal., 256; *Shama Churn Roy v. Abdul Kabeer* (3 C. W. N., 158), and *Wise v. Ameerunnissa Khatoon*, (1879) L. R., 7 I. A., 73, have been relied upon; while, on the other side, the cases of *Enaetoollah Chowdhry v. Kishen Soondur Surma*, (1867) 8 W. R., 386, *Mohabeer Pershad Singh v. Mohabeer Singh*, (1881) I. L. R., 7 Cal., 591, and *Ismail Ariff v. Mahomed Ghous*, (1893) I. L. R., 20 Cal., 834; L. R., 20 I. A., 99, have been cited as supporting the judgment of the Lower Appellate Court.

The cases of *Enaetoollah Chowdhry v. Kishen Soondur Surma*, (1867) 8 W. R., 386, and *Mohabeer Pershad Singh v. Mohabeer Singh*, (1881) I.L.R., 7 Cal., 591, no doubt support the respondent's contention; but the case of *Ismail Ariff v. Mahomed Ghous*, (1893) I. L. R., 20 Cal., 834; L.R., 20 I.A., 99, is quite distinguishable from the present case. If that were not so, then notwithstanding that a different view is taken in the more recent decisions of this Court, we should have been bound to follow the decision in that case, it being a decision of the Privy Council. Now the distinction between the case of *Ismail Ariff v. Mahomed Ghous*, (1893) I. L. R., 20 Cal., 834; L. R., 20 I. A., 99, and the present case is this. There the plaintiff was in possession when he brought his suit, whereas in the present case the plaintiff is out of possession. What the plaintiff asked for in the case of *Ismail Ariff v. Mahomed Ghous* was a decree declaring his right, and an injunction restraining the defendant from disturbing his possession; what the plaintiff asks for in this case is only recovery of possession; and what was said by their Lordships of the Judicial Committee with reference to the plaintiff's right to obtain this relief is to be found in the following passage of their judgment: "It appears to their Lordships that there is here a misapprehension of the nature of the plaintiff's case upon the facts stated in the judgment. The possession of the plaintiff was sufficient evidence of [582] title as owner against the defendant. By section 9 of the Specific Relief Act (I of 1877), if the plaintiff had been dispossessed otherwise than in due course of law, he could by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrong-doer, to obtain a declaration of title as owner, and an injunction to restrain the wrong-doer from interfering with his possession." This shows, as we understand

the judgment, that the reason for their Lordships' decision was this: that as the plaintiff, had his position been rendered somewhat worse by his being dispossessed, could, by instituting a suit within six months for recovery of possession under section 9 of the Specific Relief Act, have recovered possession even as against a person who might establish a better title, it was only right and just that if he brought his suit before he was dispossessed he should be declared entitled to retain possession as against a mere wrong-doer, and should obtain an injunction restraining the wrong-doer from interfering with his possession. But, though that was so in the case of a plaintiff who was in possession, and had, therefore, a possibility open to him of being restored to possession upon mere proof of possession, by instituting a suit under section 9 of the Specific Relief Act upon being dispossessed, it does not follow that it should be so in the case of a plaintiff who had been in possession, and allowed more than six months to elapse after his dispossession, and therefore lost the possibility of recovering possession, by a suit under section 9 of the Specific Relief Act, upon mere proof of previous possession. The case of *Ismail Ariff v. Mahomed Ghous*, (1893) I. L. R., 20 Cal., 834; L. R., 20 I. A., 99, does not, therefore, in our opinion, help the plaintiff in this case.

Then as regards the cases in this Court which have been cited by the plaintiff respondent, they have been regarded in the later decisions of this Court as practically overruled by the decision [583] of the Privy Council in *Wise v. Ameerunnissa Khatoon*, (1879) L.R., 7 I. A., 73. In this last mentioned case their Lordships observe: "It is quite clear that the plaintiffs have failed to make out a title. The defendants were put into possession by the Government, who were entitled to the lands, and they were ordered by the Magistrate under the Code of Criminal Procedure to be retained in possession. If the plaintiffs had wished to contend that the defendants had been wrongfully put into possession, and that the plaintiffs were entitled to recover on the strength of their previous possession, without entering into the question of title at all, they ought to have brought their action within six months, under section 15 of Act XIV of 1859; but they did not do so"; and then their Lordships add: "The High Court with reference to this point say (and in their Lordships' opinion, correctly say): 'Further, *de facto* possession having been given to the defendants under section 318 of the Code of Criminal Procedure, in accordance with the Deputy Collector's award, the plaintiff will not be entitled to a decree until and unless he can show a better title to these lands than the defendants. The fact that the plaintiff's possession as regards B, C and D was confirmed under Act IV of 1840, and that the defendants Nos. 2 and 3 unsuccessfully endeavoured to disturb them by regular suit, does not bar the right of Government. Section 2 of Act IV of 1840 only affects persons concerned in the dispute. If Kalkini had belonged to a private individual he might have reduced into his own possession lands which had accreted to the estate, and which undoubtedly were his. But lands to which he is unable to make out a title cannot be recovered on the ground of previous possession merely, except in a suit under section 15 of Act IV of 1859, which must be brought within six months from the time of that dispossession.'"

Following these observations of their Lordships of the Privy Council, this Court in the cases of *Ertaza Hossein v. Bany Mistry*, (1882) I. L. R., 9 Cal., 130; *Debi Churn Boido v. Issur Chunder Manjee*, (1882) I. L. R., 9 Cal., 39; and [584] *Purmeshur Chowdhry v. Brijo Lall Chowdhry*, (1889) I. L. R., 17 Cal., 256, has held that a plaintiff in a suit for possession brought more than six months after his dispossession, is not entitled to possession, merely upon proof of previous possession short of possession for the statutory period of twelve

years which can give a title by adverse possession; and the last case cited for the appellant, namely, *Shama Churn Roy v. Abdul Kabeer*, 3 C. W. N., 158, also takes the same view, and distinguishes suits for recovery of possession from that class of cases which the Privy Council had to consider in the case of *Ismail Ariff v. Mahomed Ghous*, (1893) I. L. R., 20 Cal., 834 : L. R., 20 I. A., 99. The weight of authority is therefore clearly in favour of the view contended for by the learned Vakil for the appellant. That being so, it is not necessary for us to go into the matter any further. If it were necessary to give reasons in support of this view, we should say that in a suit to recover possession brought more than six months after the date of dispossession, the plaintiff must prove title, and mere previous possession for any period short of the statutory period of twelve years cannot be sufficient for the purpose, because, if that were so, anomalous results might arise; and it would be difficult to determine what should be the relative durations of possession of the plaintiff and the defendant to entitle the former to a decree. For take a case like this: A plaintiff whilst in possession, which had lasted for eight years, is dispossessed by the defendant, and does not bring his suit until after seven years. Why should eight years' possession of the plaintiff entitle him to a decree against the defendant, whose possession, though originating it may be in force, was allowed to continue for seven years peaceably? Or, again, the periods may be reversed; and a plaintiff who was in possession for seven years may be dispossessed, and may not bring his suit until after eight years. These difficulties and anomalies must arise unless we accept the view contended for by Babu Saroda Charan Mitter on behalf of the appellant. It is true section 9 of the Specific Relief Act does not expressly prohibit a person from recovering possession upon [585] mere proof of previous possession in a suit brought more than six months after dispossession; but the inclination of our minds is, that if a person wishes to recover possession merely upon proof of previous possession, without proof of any title, the remedy prescribed for him is to be found in section 9 of the Specific Relief Act. If he does not avail himself of that remedy by bringing a suit within six months, it becomes barred.

The result is, that this appeal must be allowed, and the decree of the Lower Appellate Court be set aside and that of the first Court restored and affirmed, with costs in this Court and the Court below.

S. C. G.

Appeal allowed.

NOTES.

[This decision must be deemed erroneous. In *Perry v. Chissold*, (1907) A.C., 73, the Privy Council, on an appeal from New South Wales, thus explained the nature of the possessory right. "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title.

"On behalf of the Minister reliance was placed on the case of *Doe v. Barnard*, 13 Q.B., 945, which seems to lay down this proposition, that if a person having only a possessory title to land be supplanted in the possession by another who has himself no better title, and afterwards brings an action to recover the land, he must fail in case he shows in the course of the proceedings that the title on which he seeks to recover was merely possessory. It is, however, difficult, if not impossible, to reconcile this case with the later case of *Asher v. Whitlock*, L.R., 1 Q.B., 1, in which *Doe v. Barnard* was cited. The judgment of COCKBURN, C.J. is clear on the point. The rest of the Court concurred, and it may be observed that one of the members of the Court in *Asher v. Whitlock* (LUSH, J.) had been a counsel for the successful party in *Doe v. Barnard*. The conclusion at which the Court arrived in *Doe v. Barnard* is hardly consistent with the views of such eminent authorities on Real Property Law as

Mr. Preston and Mr. Joshua Williams. It is opposed to the opinions of modern text-writers of such weight and authority as Professor Maitland and HOLMES J., of the Supreme Court of the United States."—*per* LORD MACNAGHTEN.

See also (1902) 26 *Mad.*, 514; (1899) 23 *Mad.*, 179; 12 *M.L.T.*, 159; (1903) 5 *Bom. L. R.*, 264; (1904) 31 *Cal.*, 647; 29 *All.*, 52; 24 *All.*, 157; (1910) 15 *C.W.N.*, 168.

In (1913) 21 *I.C.*, 118 (*Cal.*), however, this decision was followed.]

[26 Cal. 585]

ORIGINAL CIVIL. •

The 5th April, 1899.

PRESENT :

MR. JUSTICE STANLEY.

Tarak Mohiney Dassee

versus

Grees Chunder Dass (and two other suits).*

Reference to Registrar—Statement of facts, filing of, after appointed time—

Right of party failing to appear and support such statement—

Practice—Rules of High Court, Nos. 522, 537.

On the 4th February 1899, one *G* was granted a month's time to file his statement of facts in a reference which was pending before the Registrar, and in default thereof it was ordered that the reference should be heard *ex parte* against him. The statement of facts was filed before the Registrar seven days after the proper time. The Registrar refused to deal with the statement of facts without an order of Court. *G* then applied to the Court for an order that the Registrar might be at liberty to refer to the statement of facts, and that *G* might be permitted to appear and support them. The party opposing contended that *G* ought not to be allowed to file his statement of facts, that he might appear in person, but had no right to employ counsel or attorney. *Held*, that *G* was entitled to file his statement of facts, and that the reference should be proceeded with in the usual course.

By a decree in these suits, dated the 26th February 1890, certain inquiries were directed to be made by the Second Assistant Registrar. On the 10th May 1890 it was ordered that the defendant Grees Chunder Dass and two other parties should file their [586] statement of facts within a certain time. No proceedings, however, having been taken in the matter the reference was struck out from the list of references on the 23rd March 1892. The reference was restored on the 18th December 1897, and Grees Chunder Dass was ordered to file his statement of facts within a fortnight, and in default the reference was to be heard *ex parte* as against him. The statement of facts was not filed as directed, and no further proceedings were taken for a year. On the 3rd February 1899 Grees Chunder Dass was served with a Registrar's summons, dated the 28th January 1899, calling upon him to appear on the 4th February 1899 to proceed with the reference. On the 4th February 1899, on the application of Grees Chunder Dass, the Court granted him a month's further time to file his statement of facts and in default thereof the reference was to be heard *ex parte* as against him. Grees Chunder Dass prepared his statement of facts, and on the 2nd or 3rd of March 1899 asked his attorney to file them, but there being at that time a conflict of interest between Grees Chunder Dass and his attorney the latter refused to act for him, and the statement of facts was not filed. Grees Chunder Dass was summoned to appear before the Registrar on the 11th March 1899 to proceed with the reference pursuant to the order of the 4th

* Original Civil Suits Nos. 375 of 1886, 90 of 1887, and 172 of 1888.

February 1899. On the 11th March 1899 he appeared and filed his statement of facts before the Registrar. On the 17th March 1899 the Registrar directed Grees Chunder Dass to obtain an order from the Court authorising him to deal with the statement of facts. On the 29th March 1899 Grees Chunder Dass applied in Chambers for an order that the Assistant Registrar might be at liberty to refer to the statement of facts filed by Grees Chunder Dass, and that Grees Chunder might be allowed to appear and support his statement of facts as in an ordinary reference.

Mr. Pugh for the Defendant Grees Chunder Dass.

Mr. Dunne for the Defendants Kumud Chunder Dass and Benode Chunder Dass.

Mr. Pugh.—Grees Chunder Dass cannot be shut out from defending, though he was late in filing his statement of facts. The [587] only question is that of costs. *Collins v. The Vestry of Paddington*, (1880) L. R., 5 Q. B. D., 368. He is in contempt for not complying with the order of the Court; still it is submitted he is entitled to take any step which may be necessary for the purposes of his defence. *Haldane v. Eckford*, (1869) L. R., 7 Eq., 425; *Fry v. Ernest*, (1863) 9 Jur. N. S., 1151. Where a party summoned to attend on a reference fails to attend at the time appointed the Judge may reconsider the proceedings if he be satisfied that the absent party was not guilty of wilful delay or negligence—Rule 507, Belchamber's Rules and Orders. Had Grees Chunder Dass been guilty of wilful disobedience the Court might then refuse to give him relief. *Haigh v. Haigh*, (1885) L. R., 31 Ch. D., 478.

Mr. Dunne, *contra*.—The order of the 4th February 1899 clearly states that if Grees Chunder Dass does not file his statement of facts within a month the reference should proceed *ex parte*. This Court is bound by that order and cannot review it. Grees Chunder may appear in person and check what we do, but has no right to employ counsel and solicitor. Parties must follow the rules of the Court and take steps within the proper time. The cases of *Mootchand v. Foolchand* and *Radhabullav Dass v. Bholanath Dass*, both unreported, were referred to.

The judgment of the Court was as follows:—

Stanley, J.—In this matter a summons was taken out by Grees Chunder Dass, the defendant in the first mentioned suit and the plaintiff in the second and third mentioned suits, for an order that the Assistant Registrar may be at liberty to refer to the statement of facts filed by him, and that he may be allowed to appear and support the statement of facts filed by him as in an ordinary defended reference.

It appears that a decree was made so far back as the 26th of February 1890, directing an inquiry as to the properties belonging to the defendants jointly, an account of the joint estate and joint and separate liabilities as between the defendants, and an account of the sums spent by the defendants respectively, [588] and whether such sums ought to be debited against the defendants jointly or against the individual making the expenditure. On the 10th May 1890, WILSON, J., ordered the defendants to file a statement of facts. Negotiations took place for the compromise of the suits, and no steps having been taken in prosecution of the same, on the 23rd March 1892 the suit was struck out from the General Reference list as having been abandoned under Rule 537.

On the 27th May 1893 the case was reinstated on the General Reference list on the application of the two defendants who are now resisting this application.

There were no proceedings taken after the reinstatement, and again the suit was under the rule deemed to be abandoned.

On the 18th December 1897 another application was made to restore the case to the list, and an order was made to reinstate it, and by that order Grees Chunder Dass was ordered to file a statement of facts and accounts before the 28th February 1898, and in default of his doing so it was directed that the reference was to be proceeded with against him *ex parte*. Negotiations for a compromise were again opened, and the order of the 18th of December 1897 was not complied with. On the 4th February 1899 an application was again made to restore the case to the list of references, and SALE, J., ordered that the reference directed by the decree of 1890 be proceeded with, and the defendant Grees Chunder Dass was directed within one month to file his statement of facts, and in default the reference was to proceed *ex parte* as against him. The statement of facts was not filed within the month, but was handed to Bahu Grees Chunder Banerjee, the Second Assistant Registrar of the Court, seven days after the expiration of the month, and Grees Chunder Dass asked that the Registrar should proceed with the reference in the ordinary way.

The two defendants, who are opposing the present application, objected to this, and urged that the reference must, under Mr. Justice SALK'S order, be proceeded with *ex parte* as against Grees Chunder Dass. The Assistant Registrar then sent the matter up to the Court for directions.

[589] Mr. Pugh for the applicants submits that the application is one which his client is entitled to have granted *ex debito justitiæ*, and that the only question for the Court relates to the costs of the motion.

Mr. Dunne has offered strenuous opposition to the motion, and he submits that the order of Mr. Justice SALE has determined the matter, and that I am bound by that order and cannot review it; that as the statement of facts was not filed in time the inquiries directed by the decree must proceed *ex parte*, that is, that the applicant cannot be allowed to use the statement of facts filed by him or make any substantive case before the Assistant Registrar or be represented by an attorney on the inquiry.

The order of Mr. Justice SALE directs that the reference directed by the decree be taken up and proceeded with by the Second Assistant Registrar of the Court at the expiration of one month from the date of the order, and orders that Grees Chunder Dass do, within the time aforesaid, file his statement of facts and accounts as directed by the said order, and that in default thereof the said reference be proceeded with *ex parte* as against him. Mr. Dunne contended that the original reference directed by the decree of 1890 had been abandoned, and that the order of Mr. Justice SALE amounted to a new reference. This does not appear to me to be so. Rule 537 says: "If default be made in complying with rule 159, or if at any stage of a reference no steps shall be taken to prosecute it for thirty days, any party may apply, by summons, at Chambers, that the suit be dismissed or discontinued for want of prosecution, and such order may be made thereon as to costs or otherwise as to the Judge shall seem fit. If no such application be made, the suit shall, at the end of fourteen days from the time of such default, or of such thirty days, be struck out of the General Reference list, and be deemed to have been abandoned." Under this rule the suit is deemed to be abandoned, not the reference. Mr. Dunne says it is the reference which must be deemed to have been abandoned and not the suit—and that Mr Justice SALE'S order was a new order of reference and is binding upon me.

I think that is not the proper construction to be placed on [590] the learned Judge's order. Rule 537 merely provides that the suit shall be deemed to have been abandoned if proceedings are not taken in time, but an application can be made to revive it, and, if it is revived, it is revived as a suit in which

a decree has been made directing that the applicant shall file a statement of facts and accounts.

If the order of Mr. Justice SALE is interpreted as an order that the applicant shall not file a statement of facts unless he does so within a limited time, it appears to me that this order would be a modification and over-ruling of the decree in the suit which directs that he shall account. The applicant is bound to account, and so long as he fails to do so he is in contempt and liable, I would say, to attachment.

Can an order of this Court preclude him from purging his contempt? I think not. I understand Mr. Justice SALE's order to amount to nothing more than this, that if the applicant fail to file his statement within the time limited by the order the reference shall notwithstanding proceed. If no statement is filed by the applicant so much the worse for him, as he cannot raise any objection to the accounts filed by the opposite party inasmuch as he had not filed any verified statement. (Rule 522.)

I was referred to two unreported cases recently decided by the Chief Justice of this Court where he laid down that parties must follow the rules of Court as to the time within which steps should be taken. *Moti Chand v. Fool Chand* and *Radhabullav Dass v. Bholanath Dass*. Those cases are distinguishable from the present. There the application was for an extension of time for appealing after judgment had been pronounced when the opposite party had obtained a vested interest in the judgment; here it is different; nothing has been decided between the parties. The questions between them are still undecided. A party cannot be shut out from filing a statement when by doing so he is only purging the contempt he was in in not having done so before. Each party has a right to have the dispute determined on the merits, and the Court should do everything to favour the fair trial of the issues between the parties. The application is, I think, a matter *ex debito justitiæ*.

[591] I have not gone into any of the matters contained in the affidavits dealing with the delays which have taken place or into the charges which have been made by the applicant. I think that these charges ought not to have been made. If they had not been made, Mr. *Dunne's* client would not, I think, have been justified in resisting this application. Consequently, though I hold that the statement of facts may be filed and the reference proceeded with in the usual course, I direct that the applicant shall pay the costs of this application.

Attorney for the Applicant Grees Chunder Dass : Babu Kally Das Bhunjo.

Attorneys for the opposing Defendants : Messrs. *Remfry & Rose*.

D. S.

[26 Cal. 591]

The 9th June, 1899.

PRESENT :

MR. JUSTICE STANLEY.

Nistarini Dassee

versus

Nundo Lall Bose.

Practice—Evidence taken on commission on behalf of defendant—Right of plaintiff to refer to such evidence as part of record of suit—

Civil Procedure Code (Act XIV of 1882), sections 389 and 390—Act VIII of 1859, section 179.

Defendant examined a witness on commission. The commission was returned to the Court. The plaintiff in opening his case claimed the right to refer to the evidence taken on commission as part of the record of the suit. Defendant objected, contending that if plaintiff read it, he must read it as his own evidence.

Held, that the plaintiff was entitled to refer to the evidence as part of the record.

Dwarkanath Dutt v. Gunga Dayi, (1872) 8 B. L. R., App., 102, followed.

IN this case a commission had issued at the instance of one of the defendants, Nundo Lall Bose, for the examination of a witness on his behalf. The examination of the witness having been completed the commission was returned to the Court. The plaintiff in opening his case claimed the right to refer to such evidence taken on commission as part of the record in the case.

The *Officiating Advocate-General* (Mr. J. T. Woodroffe), Mr. [592] W. C. Bonnerjee, Mr. Dunne, Mr. J. T. Woodroffe, and Mr. K. S. Bonnerjee, for the Plaintiff.

Mr. Hill, Mr. O'Kinealy, Mr. Chakravarti, and Mr. B. C. Mitter, for the Defendant Nundo Lal Bose.

Mr. W. C. Bonnerjee submitted he was entitled to refer to the evidence taken on commission on behalf of the defendant Nundo Lall Bose, and referred to *Dwarkanath Dutt v. Gunga Dayi*, (1872) 8 B. L. R., App., 102.

Mr. Hill, *contra*, contended that the plaintiff in his opening was not entitled to refer to and comment on the evidence taken on commission. It has not been tendered and is not yet before the Court, and in commenting on the case in the pleadings Counsel is not at liberty to refer to the evidence taken under commission. If the plaintiff wishes to read the evidence he can only read it as his own.

Mr. W. C. Bonnerjee in reply.—Section 389 of the Civil Procedure Code provides that the commission and the return thereto and the evidence taken under it shall, subject to the provisions of section 390, form part of the record of the suit; therefore this commission forms part of the record of this suit, and I submit that under section 389 I am entitled to refer to the same without putting in such evidence. The case I have cited was under the provisions of section 179 of Act VIII of 1859, and is directly in point.

Stanley, J.—In my opinion, having regard to the language of section 389 of the Civil Procedure Code, the plaintiff is entitled to refer to the evidence as a matter of record. I shall follow the decision in *Dwarkanath Dutt v. Gunga Dayi*, (1872) 8 B. L. R., App., 102.

Attorney for the Plaintiff: Babu Romesh Chunder Basu.

Attorney for the Defendant Nundo Lall Bose : Babu *Hirendra Nath Dutt*.

Attorney for the Defendant Pasupaty Nath Bose : Messrs. *G. C. Chunder & Co.*

D. S.

NOTES.

[The later stage of this case is reported in 26 Cal., 891, and the Appellate judgment is reported in (1903) 30 Cal., 369. The difference between the practice on the Original Side and that in the Mofussil, is pointed out in (1909) 36 Cal., 566 : 13 C.W.N., 525 ; (1907) 35 Cal., 28. See also (1899) 23 Mad., 216 ; (1908) 6 A.L.J., 71.]

[593] APPELLATE CIVIL.

The 18th April, 1899.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE STEVENS.

Janhavi Chowdhurani.....Defendant

versus

Bindu Bashini Chowdhurani and others.....Plaintiffs.*

Right of way—Limitation Act (XV of 1877), section 26—Easement—Prescription—Continuance of enjoyment as of right—Cessation of user—Actual user.

No rule can be laid down as to what would or would not constitute a continuance of the enjoyment as of right of a right of way, when there has been no exercise of it for any given period : that must depend upon the circumstances of each case and the nature of the right claimed.

For the plaintiff to succeed in a suit for the declaration of a right of way, as acquired under section 26† of the Limitation Act, conceding that he need not prove an *actual* user of the way up till the end of the statutory period of twenty years, there must, when there is no user for a long time, be circumstances from which the Court can infer the continuance of enjoyment as of right over the whole statutory period, and the cessation of the user must

* Appeal from Appellate Decree No. 1734 of 1897, against the decree of Babu Dwarkanath Bhattacharjee, Subordinate Judge of Mymensingh, dated the 14th of August 1897, affirming the decree of Babu Kali Krishna Chowdhry, Munsif of Attia, dated the 29th of June 1896.

†[Sec. 26 :—Where the access and use of light or air to and Acquisition of right to for any building have been peaceably enjoyed therewith, as an easements. easement, and as of right, without interruption, and for twenty years,

and where any way or water course, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, way, water-course, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.]

be at least consistent with such continuance. The enjoyment required by the Act cannot be in abeyance and at the same time continue so as to give the plaintiff the special right claimed. The question of continued enjoyment is an inference to be drawn from facts, rather than one of fact, and if there are no facts to sustain the inference, a decision in favour of such enjoyment cannot stand.

The plaintiffs sued the defendant for the declaration of a right of way, as acquired under section 26 of the Limitation Act, over a plot of land belonging to the defendant. It was alleged that in April 1892, the defendant dispossessed the plaintiffs from the dominant tenement; and that the plaintiffs sued the defendant for recovery of possession of it under section 9 of the Specific Relief Act, and having obtained a decree, got possession on the 19th June 1895. It was further alleged that thereupon the defendant, on the 21st June 1895, obstructed the disputed way by erecting sheds. The present suit was instituted on the 25th November 1895.

Held, that the enjoyment of the right of way on the part of the plaintiffs not having continued until within two years of the institution of the suit, the suit must fail.

Koylash Chunder Ghose v. Sonatun Chum Barooie, (1981) I. L. R., 7 Cal., 132, distinguished.

[594] THE facts of the case, so far as they are necessary for the purposes of this report, are as follow:—

The plaintiffs sued for the declaration of their right of way over a piece of land belonging to the defendant, upon the ground that the tenants of plaintiffs Nos. 1 and 2 had used the disputed way peaceably, openly, without interruption, and as of right, for more than twenty years; that in April 1892, the defendant had dispossessed the plaintiffs Nos. 1 and 2 and their tenants from the land forming the dominant tenement, known as the *chunia bari*; that the plaintiffs Nos. 1 and 2 and their tenants brought a possessory suit against the defendant under section 9 of the Specific Relief Act; that having obtained a decree in that suit, they got *khas* possession of the dominant tenement on the 19th of June 1895; and that thereupon the defendant on the 21st of June 1895, obstructed the alleged pathway by raising sheds thereon and thereby prevented their egress from and ingress to the dominant tenement. The present suit was instituted on the 25th November 1895. Besides the statutory easement claimed, the plaintiffs also claimed, in the alternative, an easement of necessity in regard to the alleged pathway.

The defence, amongst other things, was that the plaintiffs, not having been in enjoyment of the disputed right of way within two years of the suit, their claim was barred under section 26 of the Limitation Act.

Upon this plea the Munsif found that, although the plaintiffs never used the pathway during the period that the defendant was in the possession of the dominant tenement, the right of way remained in abeyance during that period, that about eight or nine days after the plaintiffs had recovered possession of the dominant tenement, the defendant raised a straw shed on the spot over which the way was claimed; and accordingly, as well as on the merits, decreed the suit.

On appeal the Subordinate Judge held as follows:—

"I find as a fact, from the evidence adduced by both the parties, that the defendant having taken possession of the *chunia bari*, as also of other *baris* contiguous to it, made material alteration in them, and that since **[595]** then the plaintiff ceased to use the way. The question also admits of being looked at from another point of view. The evidence adduced by the plaintiffs goes to prove that they obtained possession of the dominant holding on the 19th June 1895, and this suit was instituted on the 25th November 1895, i.e., within six months from the date of the delivery of possession. I, therefore, hold that the plea of limitation is untenable."

Agreeing with the Munsif in this, as well as in the other points, the Subordinate Judge dismissed the appeal.

The defendant then appealed to the High Court.

Sir *Griffith Evans*, *Babu Srinath Das*, *Babu Dwarka Nath Chakravarti*, *Babu Basanta Kumar Bose*, and *Babu Kritanta Kumar Bose*, for the Appellant.

Mr. *J. T. Woodroffe*, *Babu Jogesh Chandra Roy*, and *Babu Mukund Nath Ray*, for the Respondents.

The judgment of the High Court (*Macpherson and Stevens, JJ.*) was as follows:—

The Subordinate Judge has in this case affirmed the decision of the Munsif, and held that the plaintiffs have, under the provisions of the 26th section of the Limitation Act, acquired a right of way over the land of the defendant. The plaintiffs claimed to be the owners of a plot of land appertaining to an estate which belonged to their predecessors and the predecessors of the defendant; they said that this plot had been allotted to them when a partition of the estate was made many years ago; that it had since been in their possession, and that the approach to it was by the way in question, which they and their tenants had always used for that purpose. They claimed a right of way both by grant as an easement of necessity and as acquired under section 26 of the Limitation Act. We are only concerned with the last mentioned claim, which is the one found to be established. The others have not been considered. No exception is now taken to the finding that the plaintiffs have proved an uninterrupted enjoyment of the way as of right for a period of twenty years. The points urged are, that it is not directly found that the plaintiffs are the owners of the plot of land to which the right of way is said to be appurtenant, and that it is wrongly found that the twenty years' period of [596] enjoyment continued till within two years of the time when the suit was instituted.

We think there is nothing in the first point. There was no issue upon it and it was not separately dealt with, but the question whether the way had been used by the plaintiffs in the manner alleged depended very largely upon the question whether this plot of land was in their possession or in that of the defendant. The first Court found that the plaintiffs' tenants were in possession of it for more than twenty years, and the Lower Appellate Court took the same view of the evidence.

As regards the second point, the facts found are these: In April 1892 the defendant dispossessed the plaintiffs of the plot which forms the dominant tenement. The plaintiffs got a decree for the possession of it under section 9 of the Specific Relief Act (I of 1877), and in execution of the decree were restored to possession on the 19th of June 1895. Two days after this the defendant obstructed the way, and the plaintiffs brought this suit on the 25th November 1895. They did not use the way after the dispossession in April 1892. On these facts it is contended here, as it was in the Court below, that the claim, in so far as it is based on section 26 of the Limitation Act, must fail. Section 26 enacts that the twenty years' period of enjoyment which must be proved before the plaintiffs can succeed "shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested." The suit referred to must be this suit, as the suit under the Specific Relief Act did not relate to the right of way, and had nothing to do with the statutory period now required to be proved. As the plaintiffs did not use the way for a period of more than three and a half years before suit, the question is, whether notwithstanding such non-user

the enjoyment as of right can be said to have continued so as to complete the statutory period. If it did not continue, the claim under this section must fail.

It was held in the case of *Koylash Chunder Ghose v. Sonatun Chung Barooie*, (1881) I.L.R., 7 Cal., 132, that the term "enjoyment" in section 26 did not [597] mean actual user, although the illustration (b) attached to the section might indicate that it was intended to have that meaning. The right claimed in that case was a right of passage for boats over the defendant's land when it became covered with water during the rainy season; it could only be exercised at a particular season of the year, and then only if the defendant's land happened to be sufficiently flooded. The lower Court had dismissed the suit on the ground that no actual exercise of the right had taken place within two years before suit. This Court held that that was a wrong view of the law, and said, with reference to the particular case before it, that so long as the plaintiffs' right was not interfered with whenever they had occasion to use it, their enjoyment must be considered as continuing all the year round. No rule was or could be laid down as to what would or would not constitute a continuance of the enjoyment as of right when there was no exercise of it for any given period, and obviously that must depend upon the circumstances of each case and the nature of the right claimed.

But, conceding that the plaintiffs need not prove an actual user of the way up till the end of the statutory period, there must, when there is no user for a long time, be circumstances from which the Court can infer the continuance of an enjoyment as of right over the whole statutory period, and the cessation of the user must be at least consistent with such continuance. The circumstances under which the plaintiffs ceased to use the way preclude, we consider, any inference of a continued enjoyment. The defendant, wrongfully it may be, took possession of the dominant tenement; and the plaintiffs ceased to use the way which led to it over the defendant's land.

It cannot be said that during the period of dispossession, a period of more than three years, the plaintiffs had, or supposed they had, an open, peaceable, uninterrupted enjoyment of the way as of right, or that the defendant suffered such enjoyment, although there was no attempt to exercise it. The defendant did not, it is true, actually obstruct the way till June 1895, but when the plaintiffs ceased to use it there was no necessity to obstruct it, and the plaintiffs can derive no benefit from the circumstance that it [598] was not obstructed earlier. The Munsif considered that the enjoyment was in abeyance during the period of the plaintiffs' dispossession, but we are unable to see how the enjoyment required by the Act could be in abeyance, and at the same time continue so as to give the plaintiff the special right claimed. The grounds on which the Subordinate Judge found that the enjoyment continued are not clearly stated, but he seemed to consider that it was sufficient that the suit was brought within a few months of the time when the plaintiffs recovered possession of the dominant tenement. That we think does not help the plaintiffs and does not bring the case within the provisions of the section which requires that the way shall have been enjoyed in the manner specified for the full defined statutory period of twenty years. At whatever time the suit is brought the enjoyment must be found to have continued till within two years of that time, and if that cannot be found, the claim fails.

It is said that the question of continued enjoyment is a question of fact. It is an inference to be drawn from facts, and if, as here, there are no facts to sustain the inference, the decision cannot stand.

We must, therefore, set aside the decision of the Subordinate Judge, and hold that the right claimed under section 26 has not been established. The

case must go back in order that he may determine whether the plaintiffs are entitled to succeed on either of the other claims. The appellant will get his costs in this Court.

M. N. R.

Appeal allowed ; case remanded.

NOTES.

[See also (1904) 31 Cal., 944 ; (1908) 32 Bom., 146.]

[26 Cal. 598]

The 6th February, 1899.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Raj Narain Purkait.....Defendant No. 1

versus

Ananga Mohan Bhandari and othersPlaintiffs.*

Review—Civil Procedure Code (Act XIV of 1852), sections 102, 103 and 623—

Dismissal of a suit for default under section 102—Review of judgment

without applying to re-instate the suit under section 103 of the Code.

[598] Where a suit was dismissed for default under section 102 of the Code of Civil Procedure, and an application for review of judgment was made by the plaintiff without a previous application to have the order of dismissal set aside under section 103 of the Code :

Held, that the Court had jurisdiction to entertain the application for review of judgment. *Koulash Mondol v. Nabadvip Chandrakar*, (1896) 2 C. W. N., 318, distinguished.

THE facts of this case, so far as they are necessary for the purposes of the report, are shortly these : In a suit for partition of a certain family property the plaintiff failed to appear on the date fixed for the hearing of the case, but the defendant appeared, and the Court of First Instance dismissed the suit under section 102 of the Civil Procedure Code. Thereupon the plaintiff, instead of applying to the Court for an order to set aside the dismissal under the provisions of section 103 of the Code, made an application for review of judgment. The review was granted and the suit was tried on its merits. The Subordinate Judge decreed the suit in accordance with the report of the Commissioner. On appeal to the District Judge he varied the decree to a small extent, but confirmed the decision of the first Court in the main. Against this decision the defendant appealed to the High Court, mainly on the ground that the Court of First Instance had no power to entertain an application for review of judgment made after the dismissal of the suit for default under section 102 of the Code of Civil Procedure, but the proper course for the plaintiff was to make an application to have the order of dismissal set aside under section 103 of the Code.

* Appeals from Appellate Decrees Nos. 775 and 840 of 1897, against the decrees of J. Pratt, Esq., District Judge of 24-Pergunnahs, dated the 22nd of January 1897, modifying the decree of Babu Sham Chand Dhur, Subordinate Judge of that District, dated the 18th of February 1896.

Dr. Ashutosh Mookerjee, and Babu Sarat Chunder Ghose, for the Appellant.
 Babu Nil Madhub Bose, and Babu Shib Chunder Palit, for the Respondents.

The judgment of the High Court (Banerjee and Rampini, JJ.) was as follows :—

These two appeals arise out of a suit for partition of certain joint property, Appeal No. 775 being a second appeal from [600] the preliminary decree for partition, and Appeal No. 840 being a second appeal from the final decree made in the suit.

The questions raised by the learned Vakil for the defendant-appellant are, *first*, whether the application for review of judgment made after the dismissal of the suit for default was not barred by limitation, and whether the subsequent proceedings in the suit were not therefore altogether null and void ; *second*, whether, on the pleadings, the learned Judge below should have gone into the question as to whether Arannagore was joint property ; and, *third*, whether on the facts found, the tank referred to in the judgment ought not to have been kept joint.

Upon the first question it is argued that as the suit was originally dismissed under section 102 of the Code of Civil Procedure for default on the part of the plaintiff, his proper course was to make an application for setting aside the order of dismissal under section 103 : that the Court had no power to entertain an application for review of judgment under section 623 in respect of an order of dismissal under section 102 ; and that as at the time when the application in question was made, the time for making an application under section 103 had expired, the plaintiff cannot derive any benefit by asking the Court to consider his application made under section 623, as one under section 103 ; and in support of this contention the case of *Korlash Mondol v. Nabadwip Chandra Kar*, (1896) 2 C. W. N., 318, is cited. It is further argued that if the application for review was not entertainable, and if the time for making an application under section 103 had expired, the order dismissing the suit ought to stand, and the subsequent proceedings in the case ought to be set aside as being null and void. This point does not appear to have been raised in either of the Courts below. But as it is a point of law which touches the legality of the whole of the proceedings we allowed it to be raised on second appeal. We are, however, of opinion that this contention ought not to prevail. It is quite true that the case cited is authority for the proposition that where a suit is dismissed under section 98, no application for review [601] of judgment under section 623 of the Code of Civil Procedure can be entertained against the order of dismissal. But in the present case the dismissal was one not under section 98, but under section 102 of the Code of Civil Procedure ; and the difference between the two sections, so far as the present point is concerned, is this, that whereas section 98, which applies to the case of neither party appearing, provides that " the suit shall be dismissed unless the Judge, for reasons to be recorded under his hand, otherwise directs," section 102, which applies to a case in which the defendant appears and the plaintiff does not, directs that " the Court shall dismiss the suit unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder." So that, while in regard to cases which come under section 98 where the Court does not otherwise direct, a dismissal of the suit is the only consequence, and the proviso, " unless the Judge, for reasons to be recorded under his hand, otherwise directs," evidently relates to the postponing of the case and not to the making of any final order in it, in cases

coming under section 102, the dismissal of a suit need not be the only final order which the Court can make, but a partial decree might be passed in some cases; and therefore, whilst it would be unreasonable to say that there may be an application for review of judgment in a case coming under section 98, because, there is no judgment, neither party having appeared before the Court, and the Court having simply dismissed the suit, it cannot be said that it would be equally unreasonable for the plaintiff, in a case coming under section 102, to apply for review of judgment under section 623, for it may be open to him to show that the partial decree, which the Court has made upon the defendant's admission, gives him less than the Court ought to have given upon that admission, and that upon that ground he is entitled to have the judgment reviewed. We are, therefore, of opinion that the reason for the decision in the case of *Koilash Moudol v. Nabadwip Chandra Kar*, (1896) 2 C. W. N., 318, [602] does not in its integrity apply to a case like the present. The argument based on the ground of the unreasonableness and unmeaningness of an application for review of judgment, is, in our opinion, strictly applicable only to an order of dismissal made under section 98 of the Code of Civil Procedure and does not apply equally to an order of dismissal made under section 102.

We may observe that in the present case in which the suit was one for partition, there was, if not very clear and express, at least an ambiguous and implied admission that some of the properties of which partition was claimed were joint properties, so that it cannot be said that an application under section 623 was altogether not entertainable in this case. The first contention of the appellants, therefore, in our opinion, fails.

As to the second contention, the argument is that upon the facts stated in the plaint the question whether Arannagore was joint property did not arise. But the learned District Judge has in his judgment explained the circumstances under which he allowed that question to be raised. He observes: "Much has been made of the omission in the plaint to specifically mention the exclusion" (that is of the property Arannagore). "It must be remembered that the plaintiff was an old man at death's door, and I think allowance must be made for his having given imperfect instructions for drawing the plaint." That being so, we cannot give effect to the second contention raised before us.

As to the third contention there is no doubt some hardship in the defendant's proprietorship of the tank being subjected to a right of user of the ghat and the water by the plaintiff, but the existence of this hardship has been taken into consideration, and it is in view of this circumstance that the amount payable to the plaintiff by the defendant has been reduced by the Lower Appellate Court.

We do not therefore think that any ground has been made out for our interference with the judgment of the Lower Appellate Court. We accordingly affirm it, and dismiss Appeal No. 840 with costs. That being so, Second Appeal No. 775 will also be dismissed.

S. C. G.

Appeals dismissed.

NOTES.

[This was followed in (1911) 16 C.W.N.. 643; (1913) 19 I.C., 481 (Punjab).]

[603] *The 7th February, 1899.*

PRESENT :

MR. JUSTICE HILL AND MR. JUSTICE RAMPINI.

Babar Ali.....Plaintiff

versus

Krishnamanini Dassi and another.....Defendants.*

Bengal Tenancy Act (VIII of 1885), sections 11, 12 and 13—Sale of a tenure in execution of a decree not for arrears of rent—Effect of Non-payment of landlord's fee or the fee for service of notice of the sale on the landlord before the confirmation of sale.

Under section 13 of the Bengal Tenancy Act, when a permanent tenure is sold in execution of a decree other than a decree for arrears of rent due in respect thereof, and the landlord's fee prescribed by section 12 of the said Act is not paid before the confirmation of the sale, the sale is invalid.

THIS appeal arose out of an action for arrears of rent and cesses with interest in respect of a *seputni* tenure alleged to have been held by the defendant No. 1 under the plaintiff. The allegation of the plaintiff was that the defendant No. 1 took a *seputni* lease of lot Kolebatpore under a registered *kabuliat*, dated 2nd December 1892, and since then he had been in possession of the property by collecting rents from the tenants; the defendant having failed to pay rent for the period between October 1895 and May 1896, the present suit was brought. The defence, *inter alia*, was that the *seputni* was sold on the 9th December 1895 in execution of a decree other than a decree for arrears of rent and was purchased by one Babu Ram Mitter, and that therefore the defendant had no interest in the tenure after the sale, and was not liable to pay any rent which became due after that date. The sale in which Babu Ram Mitter purchased the tenure was confirmed on the 16th January 1896, but the purchaser did not, before the confirmation of the sale, pay either the landlord's fee or the fee for the service of the notice of the sale on the landlord.

The Subordinate Judge held that the confirmation of the sale to Babu Ram Mitter effectually extinguished the defendant's interest in the tenure, and accordingly he dismissed the suit, in [604] so far as it related to the rent for the period subsequent to the confirmation of the sale. On appeal the District Judge confirmed the decision of the Subordinate Judge.

Against this decision the plaintiff appealed to the High Court.

Babu Saroda Churn Mitter, and Babu Haro Kumar Mitter, for the Appellant.

Babu Boidya Nath Dutt, Babu Bepin Behary Ghose, and Babu Jadu Nath Mundle, for the Respondents.

The judgment of the High Court (Hill and Rampini, JJ.) was as follows:—

The suit out of which this appeal arises was brought by the plaintiff, the holder of a *darputni* tenure against a *seputnidar* for arrears of rent for the period between Kartik 1302 and Jaista 1303 B. S. (October 1895 to May 1896).

* Appeal from Appellate Decree No. 1079 of 1897, against the decree of J. F. Bradbury, Esq., District Judge of Hooghly, dated the 26th of March 1897, affirming the decree of Babu Kali Prasanna Mukerjee, Subordinate Judge of that District, dated the 22nd of December 1896.

It appears that in execution of a decree other than a decree for arrears of rent the *seputni* tenure had been put up for sale on the 9th December 1895 and purchased by one Babu Ram Mitter. That sale was confirmed on the 16th January 1896, but the purchaser did not, before the confirmation of the sale, pay into Court, as required by section 13 of the Bengal Tenancy Act, either the landlord's fee or the fee for service of notice of the sale on the landlord, nor has either of these fees been since paid.

The defendant's answer to the suit was that under the sale of the 9th December 1895 her interest in the tenure had passed to Babu Ram Mitter, and that she was therefore not liable for any rent which became due after that date. As to the period prior to that date she pleaded payment. But it is only with the former branch of her answer that we are now concerned.

Upon that question both the Courts below agreed in holding that the confirmation of the sale to Babu Ram Mitter effectually extinguished the defendant's interest in the tenure, and they accordingly dismissed the suit, in so far as it related to the rent for the period subsequent to the confirmation of the sale. The question, which we have now to decide, is whether they were right or wrong in so doing.

[605] Section 13 of the Bengal Tenancy Act, upon which this question turns, provides, so far as it is material, that "when a permanent tenure is sold in execution of a decree other than a decree for arrears of rent due in respect thereof, the Court shall, before confirming the sale under section 312 of the Code of Civil Procedure, require the purchaser to pay into Court the landlord's fee prescribed by the last foregoing section, and such further fee for service of notice of the sale on the landlord as may be prescribed." It was argued on behalf of the appellant (the plaintiff in the suit) that the effect of this section is to prohibit the confirmation of a sale unless the prescribed fees have been previously paid into Court. For the respondent it was contended, on the other hand, that the duty is cast on the Court of requiring the purchaser to pay these fees; that an omission on the part of the Court to discharge this duty amounts merely to an irregularity which is cured by the confirmation of the sale; that the language of the section is merely directory; and that this view is supported by a comparison of the language of section 13 with that of section 12 in which the duties of a registering officer are laid down.

It appears to us that the contention of the appellant must prevail. The sale of permanent tenures of the kind now in question is regulated by the Bengal Tenancy Act, by section 11 of which the general rule is laid down that every permanent tenure shall, subject to the provisions of the Act, be capable of being transferred in the same manner and to the same extent as other immoveable property. Then follows section 12, which provides the rules, subject to which a voluntary transfer of a permanent tenure may be made, and section 13 which provides similarly for the sale of a permanent tenure in execution of a decree other than a decree for rent. The law thus enacted has effected considerable changes in the law relating to the sale of permanent tenures, dispensing as it does with the recognition of the sale by the landlord, as a condition to its validity. And we entertain no doubt that the more unfettered freedom of transfer confirmed by the Act was intended to be exercised, if at all, in strict conformity to the conditions which the Act prescribes, [606] and that unless those conditions are substantially complied with the transfer is invalid and ineffectual.

Much stress was laid by the respondents' pleader upon the absence from section 13 of express words of prohibition.

This consideration is, however, to our minds by no means conclusive; a prohibition may be implied although not conveyed in express language, and although the enactment is silent as to the consequences or non-observances of the forms which it prescribes. The question is as to the intention of the Legislature, and "where," as it is put by Sir P. H. MAXWELL (Maxwell on the Interpretation of Statutes, 3rd edition, p. 518) "the whole aim and object of the Legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other, no doubt can be entertained as to the intention." We certainly think that were we to hold that it is a matter of indifference so far as concerns the validity of the transfer whether the fees for which section 13 provides have or have not been paid prior to the confirmation of the sale, we should be defeating the obvious intention of the Legislature and rendering nugatory the scheme which it thought fit, for reasons which are well understood, to substitute for the previous law on the subject.

Nor are we pressed by the consideration upon which reliance was also placed, that there is a change of phraseology in section 13, as compared with section 12, in which latter section clear words of prohibition are no doubt employed. That may be accounted for in various ways and does not by any means necessarily imply a change of intention on the part of the Legislature (see Maxwell, p. 452). What we have to look to is the substance of the matter, and we entertain no doubt that the Legislature intended by enacting section 13 to prohibit the confirmation of a sale such as is contemplated by the section unless prior to the confirmation the purchaser has paid into Court the fees for which the section provides.

We are, therefore, of opinion that the sale to Babu Ram Mitter was invalid and ineffectual as a transfer of the tenure [607] from the defendant. This being so, the decree appealed against must be set aside, in so far as it affects the plaintiff's claim for the period subsequent to the 16th January 1896, and the case must be remitted to the Lower Appellate Court to be dealt with by it according to law. Costs to abide the result.

S. C. G.

Appeal allowed. Case remanded.

NOTES.

[Act I of 1903 B.C., validated transfers even when the landlord's fee had not been paid, and this was held to be retrospective: (1904) 1 C.L.J., 500; (1904) 8 C.W.N., 239.

In (1904) 7 C.W.N., 591 it was held that the *judgment-debtor's* position was not altered.]

[28 Cal. 807]

The 22nd March, 1899.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Kamikhya Nath Mukerjee and another.....Defendants

versus

Hari Churn Sen and others.....Plaintiffs.*

Probate and Administration Act (V of 1881), sections 40 and 90—Letters of administration—Effect of Transfer of immoveable property by a Hindu widow with the Judge's sanction, on obtaining letters of administration—Legal necessity—Fraudulent representation.

An alienation made with the permission of the District Judge by a Hindu widow who had obtained letters of administration in respect of the estate, is valid as an absolute alienation under section 90† of the Probate and Administration Act (V of 1881), irrespective of the existence of legal necessity.

THIS appeal arose out of an action brought by the plaintiffs who were the reversionary heirs of defendant No. 3, for a declaration that the alienation made by the said defendant No. 3, a Hindu widow, in favour of defendants Nos. 1 and 2, was invalid beyond the life-time of the widow, inasmuch as the alienation was made without legal necessity and in collusion with defendants Nos. 1 and 2 in order to defraud the plaintiffs.

The defence of defendant No. 1 was that he had no concern with the purchase ; but defendant No. 2 set up that the purchase made by her was *bond fide*, and that defendant No. 3 had legal necessity for the transfer.

The Subordinate Judge found that there was no legal necessity ; that defendant No. 3 had obtained the letters of administration to the estate of her husband and the permission [608] of the District Judge to sell the property by fraudulent misrepresentation of fact ; and that defendants Nos. 1 and 2 acted in collusion with the defendant No. 3 in obtaining such permission ; and he decreed the plaintiffs' suit.

On appeal by defendants Nos. 1 and 2 the District Judge confirmed the decision of the first Court, holding that there was no legal necessity for the transfer ; that the fact of its having been effected with the permission of the District Judge did not affect the question ; but he did not confirm the finding of the first Court upon the question of fraud.

Against this decision the defendants appealed to the High Court.

Sir Griffith Evans, Babu Nilmadhub Bose, and Babu Shib Chunder Palit, for the Appellants.

* Appeal from Appellate Decree No. 1632 of 1897, against the decree of J. F. Bradbury, Esq., District Judge of Hooghly, dated the 14th of June 1897, confirming the decree of Babu Abinash Chunder Mitter, Subordinate Judge of that district, dated the 21st of August 1896.

† [Sec. 90 :— An executor or administrator has power, with the consent of the Court by which the probate or letters of administration was or were granted, to dispose of the property of the deceased, either wholly or in part, in such manner as he thinks fit :

Provided that the Court may, when granting probate or letters of administration, exempt the executor or administrator from the necessity of obtaining such consent as to the whole or any specified part of the assets of the deceased.]

Babu Boidya Nath Dutt for the Respondents. *

The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was as follows:—

Banerjee, J.—This appeal arises out of a suit brought by the plaintiffs, respondents, who are the reversionary heirs of the defendant No. 3, a Hindu widow, for a declaration that the alienation made by the defendant No. 3 in favour of defendants Nos. 1 and 2 is invalid beyond the life-time of defendant No. 3, on the ground that the transfer was made without legal necessity, and is vitiated by fraud and collusion.

The defence was, that the alienation was valid and binding; that there was no fraud or collusion in the matter, and that the defendant No. 1 had no concern with the purchase, which was really made by the defendant No. 2 on her own behalf.

The first Court found that the alienation in question was made without any legal necessity, that the defendant No. 3 had obtained letters of administration to the estate of her deceased husband and the District Judge's permission to sell the property now in suit, upon fraudulent misrepresentation of facts, and that the defendants Nos. 1 and 2 made the purchase with the full knowledge of the fraudulent representations made by the defendant No. 3 in [609] obtaining the permission to sell, and had acted in collusion with the defendant No. 3 in obtaining such permission.

On appeal by the defendants Nos. 1 and 2 the learned District Judge has confirmed the decree of the first Court in favour of the plaintiffs, on the ground that the sale in question was not for legal necessity, and that the fact of its having been effected by the defendant No. 3 with the permission of the District Judge under section 90 of the Probate and Administration Act (Act V of 1881) does not affect the question; but he has not confirmed the finding of the first Court upon the question of fraud, and he has in one or two places questioned the correctness of the inference of fraud from certain of the circumstances relied upon in the Subordinate Judge's judgment.

In second appeal it is contended for the defendants Nos. 1 and 2 that the learned District Judge is wrong in holding that the alienation in question was invalid beyond the widow's life-time, on the ground of the absence of legal necessity, when he ought to have held that the alienation having been made with the permission of the District Judge by the defendant No. 3 who had obtained letters of administration in respect of the estate, it was valid as an absolute alienation under section 90 of the Probate and Administration Act of 1881.

We are of opinion that the view taken by the learned District Judge that the permission obtained by the defendant No. 3 under section 90 of the Probate and Administration Act can give no validity to the alienation, simply because it was an alienation by a Hindu widow and was made without legal necessity, is wrong. For by section 4 of the Probate and Administration Act, the administrator of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in the Administrator as such; and by section 90 of the Act the Administrator has, subject to the provisions of that section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under section 4 of the Act; and the provision of the law to which this power is subject is contained in sub-section 3 of section 90, which says that "an administrator may not, without the previous sanction [610] of the Court by which the letters of administration were granted, mortgage, charge or transfer by sale, gift, exchange

or otherwise any immoveable property for the time being vested in him under section 4."

Here the sale in favour of the defendants Nos. 1 and 2 was effected by the defendant No. 3, not in her character as the widow of her deceased husband, but in her character as administrator of his estate, and the deed of sale in favour of the defendants Nos. 1 and 2 distinctly recites that the alienation is made by her, she having been authorised in that behalf by the permission granted to her by the District Judge. That being so, the alienation would be valid, irrespective of the existence of legal necessity, by virtue of the provisions of section 90 of the Probate and Administration Act. The ground therefore upon which the learned District Judge has based his decision in favour of the plaintiffs is untenable, and his decision must, therefore, be set aside.

Then arises the question, whether the case ought not to be remanded to the Lower Appellate Court in order that it may come to a finding upon the question of fraud which was raised in the plaint, and upon which a finding was arrived at by the first Court in favour of the plaintiffs. It was not disputed by the learned Counsel for the appellants, and it cannot be disputed, that if the alienation in question was brought about with the object of defrauding the plaintiffs who are the reversionary heirs, and if the District Judge's permission was obtained by a false representation of facts made by the defendant No. 3, the vendor, and the purchasers, the defendants Nos. 1 and 2, were aware of the fraud and took the conveyance from the defendant No. 3 with the knowledge that the District Judge's permission had been obtained by her upon a fraudulent misrepresentation of facts, in that case section 90 of the Probate and Administration Act could not make the alienation valid; for fraud would in such a case vitiate the permission and the transfer in favour of the defendants Nos. 1 and 2 who would be participators in the fraud.

But we are asked to hold that as the learned District Judge has, with reference to one or two points, questioned [611] the correctness of the learned Subordinate Judge's inference of fraud, he has in fact altogether negatived the findings of fraud in this case. Reading the learned District Judge's judgment as a whole we are unable to come to that conclusion. It is true that the learned District Judge does not confirm the first Court's finding on the question of fraud, but he has not negatived the finding of fraud which that Court arrived at upon a consideration of the evidence. The case must, therefore, go back to the Lower Appellate Court in order that it may dispose of the appeal after determining upon the whole of the evidence on the record whether the fraud alleged in the third and fourth paragraphs of the plaint has been established, and established, not only as against the defendant No. 3, but also as against the defendants Nos. 1 and 2. If that question is answered in the negative the suit must be dismissed with costs; if, on the other hand, that question is answered in the affirmative, the plaintiffs will be entitled to a decree. The costs of this appeal will abide the result.

S. C. G.

Appeal allowed. Case remanded.

[26 Cal. 611]

The 5th May, 1899.

PRESENT:

MR. JUSTICE HILL AND MR. JUSTICE RAMPINI.

Krishna Chandra Son and others.....Plaintiffs

versus

Sushila Soondury Dasse and othersDefendants.*

Bengal Tenancy Act (VIII of 1885), sections 74 and 179—Stipulation for payment of abwab—Permanent tenure-holder.

The defendant, a *dur-patnidar*, stipulated in the *kabulyat* for the annual payment of Rs. 4 in lieu of certain quantities of jack fruit, bamboos and fish. This stipulation was contained in a clause perfectly distinct from that containing the payment of rent which was payable quarterly.

Held, (i) such a stipulation is a stipulation for the payment of an *abwab*.

(ii) A stipulation for the payment of an *abwab*, under a permanent *mokurari* lease is valid, and section 74 of the Bengal Tenancy Act does not control section 179 of the Act.

[612] *Assanulla Khan v. Tirtha Bashni*, (1895) 1. L. R., 22 Cal., 680, and *Atulya Churn Bose v. Tulsi Das Sarkar*, (1895) 2 C. W. N., 543, referred to and followed.

Basanta Kumar Roy Chowdhry v. Promotia Nath Bhattacharjee, (1898) *Ante*, p. 130, distinguished.

THE plaintiffs were *patnidars* and the defendants *dur-patnidars*. In the *kabulyat* executed by the defendants, there was a stipulation for the annual payment of Rs. 4 in lieu of certain quantities of jack fruit, bamboos and fish, which the defendants were to present annually to the plaintiffs in one instalment, and this was stipulated for in a perfectly distinct clause from that in which the payment of the rent was contracted for. Further, the rent was payable quarterly. The plaintiffs sued the defendants for the payment of sums under this stipulation.

The Court of First Instance found that the payment of Rs. 4 was an *abwab* and as such was not recoverable.

The Lower Appellate Court agreed with the finding of the Court of First Instance that the payment of Rs. 4 is an *abwab* and not recoverable.

From this decision the plaintiffs appealed to the High Court.

Babu Nalini Ranjan Chatterjee for the Appellants.—The payment of Rs.4 per annum is not an *abwab*, but a payment by way of rent; and even if it is an *abwab*, as the plaintiffs are *patnidars* and the defendants *dur-patnidars*, the plaintiffs are, under section 179 of the Bengal Tenancy Act, entitled to recover that amount. In *Assanulla Khan v. Tirtha Bashni*, (1895) 1. L. R., 22 Cal., 680, it is pointed out by the learned Judges that section 179 is not governed by section 74 of the Bengal Tenancy Act, and the case of *Atulya Churn Bose v. Tulsi Das Sarkar*, (1895) 2 C. W. N., 543, is analogous to the present.

Babu Karuna Sindhu Mookerjee, (and Babu Lal Mohan Ganguly) for the Respondents.—The payment of Rs. 4 is clearly an *abwab*, as [613] it is not consolidated with rent, and is in lieu of jack fruit, bamboos and fish, and is payable separately from the rent. Section 74 of the Bengal Tenancy Act

* Appeal from Appellate Decree No. 720 of 1898. against the decree of Babu Atul Chandra Ghose, Subordinate Judge of Birbhumi, dated the 10th of December 1897, modifying the decree of Babu Apora Prosad Mukerjee, Munsif of Suri, dated the 5th of January 1897.

invalidates all stipulations as to payment of *abwabs*, and section 179 of the Act must be controlled by it. In *Basanta Kumar Roy Chowdhry v. Promotha Nath Bhattacharjee*, (1898) *Ante*, p. 130, it was held that section 67 of the Bengal Tenancy Act does control section 179 of the Act, and there is no reason why section 74 should not also control section 179 of the Act.

The judgment of the High Court (Hill and Rampini, JJ.) was as follows:--

This is an appeal against a decree of the Subordinate Judge of Birbhum, dated the 10th December 1897.

Two grounds of appeal have been urged before us: (1) that the sum of Rs. 4 per annum, which the Subordinate Judge has held to be an *abwab* and disallowed, is not an *abwab*; and (2) that even if it is an *abwab*, as the plaintiffs are *patnidars* and the defendants *dur-patnidars*, the plaintiffs are, under section 179 of the Bengal Tenancy Act, entitled to recover the amount.

On the first point, we think we must affirm the finding of the Subordinate Judge. The annual payment of Rs. 4 is, according to the defendants' *kabulyat*, not part of the rent. It is payable in lieu of certain quantities of jack fruit, bamboos and fish, which the defendants were to present annually to the plaintiffs, and is stipulated for in a perfectly distinct clause from that in which the payment of the rent is contracted for. Further, the rent is payable quarterly. The quantities of produce, or their money equivalent, were to be given, or paid, in one instalment. We think that in these circumstances the Rs. 4 per annum now in dispute is undoubtedly an *abwab*.

The second contention of the appellant is not so easily dealt with. The learned pleader for the appellant relies on the provisions of section 179, and on the cases of *Assanulla Khan v. Tirtha Bashini*, (1895) I. L. R., 22 Cal., 680, and *Atulya Churn Bose v. Tulsi Das Sarkar*, (1895) 2 C.W.N., 543. [614] In the former case it is said, though by way of an *obiter dictum*, that though there is some repugnancy between section 179 and section 74, there seems good reason for thinking that section 179 is not controlled by section 74. In other words, the provisions of section 74 do not prevent the holder of a permanent tenure (such as a *patnidar*) from granting a permanent *mokurari* lease (such as has been granted to the defendant in this case) "on any terms" he pleases, that is, even stipulating for the payment of *abwabs*.

The second case cited by the pleader for the appellant is analogous in principle to that of *Assanulla Khan v. Tirtha Bashini*, (1895) I. L. R., 22 Cal., 680. It rules that section 179 controls section 178 (3) (c); so that a permanent tenure-holder may in granting a sub-lease of his tenure stipulate for the payment of interest at a higher rate than that allowed by section 67. The contrary has, however, been laid down in *Basanta Kumar Roy Chowdhry v. Promotha Nath Bhattacharjee*, (1898) *Ante*, p. 130. The learned Judges who decided this latter case make no reference to the case of *Atulya Churn Bose v. Tulsi Das Sarkar*, probably because it was not brought to their notice.

Another case which has some analogy to the question under discussion is *Mokbul Hossain v. Ameer Sheikh*, (1897) I. L. R., 25 Cal., 131, in which it has been held that, notwithstanding the provisions of section 89, holders of service tenures can be ejected otherwise than in execution of a decree.

The learned pleader for the appellants contends that the sections 179, 180, 181, 182 and 183, all contained in Chap. XV, take the tenures and holdings to which they relate to a large extent outside the other provisions of the Bengal Tenancy Act; and though it is somewhat difficult to suppose that the framers of the Act can have intended to allow the proprietors or permanent tenure-holders to stipulate for the payment of *abwabs* by their tenants, yet it

may be that it was considered that an [615] arrangement of this nature, so objectionable and liable to give rise to oppression in the case of ordinary *rai-yats*, was fraught with less danger in the case of permanent *mokurari* leaseholders. Anyhow, the words of section 179 "nothing in this Act" are so wide that it seems impossible to resist the contention of the learned pleader for the appellants, and we are therefore constrained to give effect to it.

We accordingly decree this appeal with costs.

M. R. M.

Appeal allowed.

NOTES.

[In the case of a *patni* lease executed before the Bengal Tenancy Act 1885, which contained a stipulation for supplying fire-wood without making its value an integral component of the rent, it was held following 33 Cal., 683 : 3 C.L.J., 391 ; 4 C.L.J., 527 : 10 C.W.N., 527 ; and 12 C.W.N., 175 that it was an *abwab* which could not be recovered.]

[26 Cal. 615]

The 15th May, 1899.

PRESENT:

MR. JUSTICE HILL AND MR. JUSTICE RAMPINI.

Kuldip Singh.....Plaintiff

versus

Gillanders Arbuthnot & Co....Defendants.*

Bengal Tenancy Act (VIII of 1885), section 88—Transfer of a portion of occupancy holding—Custom—Ejectment—Possession.

The transfer of a portion of an occupancy holding is contrary to the spirit, if not the letter, of section 88 of the Bengal Tenancy Act VIII of 1885 ; and the existence of a custom in a particular place by which such a holding is transferable is immaterial and gives no right to the transferee as against the landlord.

IN this suit the plaintiff was the purchaser of 6½ bighas of an occupancy *jote* of 8 bighas belonging to one Nanku Roy and others. The plaintiff was dispossessed by the defendants, who are the landlords of the occupancy *jote* of 1 bigha and 15 cottahs, and he sued them for possession by declaration of title.

The Court of First Instance held that as the defendants did not allege that the old tenants had abandoned their holding, and as the sale of a portion of an occupancy *jote* does not constitute a ground for forfeiture, the *jote* must be considered for the purpose of this suit to be a transferable one ; and as the plaintiff was in possession of the disputed land as proved in the case, whatever might be the title of the plaintiff, the defendants had no right to dispossess him, and upon these findings decreed the plaintiff's claim.

[616] This decision was reversed by the Lower Appellate Court, on the grounds that the plaintiff, as the transferee of a portion of an occupancy holding, had no title as against the defendants, and that the suit not being a summary suit for possession but a suit for possession by declaration of title,

* Appeal from Appellate Decree No. 941 of 1898, against the decree of Babu Karunamoy Banerjee, Subordinate Judge of Bhagulpore, dated the 7th of February 1898, reversing the decree of Babu Syama Charan Banerjee, Munsif of Beguserni, dated the 27th of July 1897,

the plaintiff could not recover possession, unless he showed title as against the defendants.

The plaintiff thereupon appealed to the High Court.

Dr. *Ashutosh Mookerjee* for the Appellant.—The plaintiff seeks only to recover possession of the disputed land from which he has been wrongfully ejected; he does not seek to be recognised as a tenant of the defendants. Bengal Tenancy Act, section 88, does not apply, as a right of occupancy is different from a holding, and there is no law to prevent the transfer of such a right. Further the appellant alleges that there is a custom, which makes an occupancy holding transferable, and if so, then such a transfer is good in spite of the Bengal Tenancy Act, section 88. Hence the suit should at least be remanded for a finding, whether the occupancy holding is transferable by custom or not.

The respondent did not appear.

The judgment of the High Court (**Hill and Rampini, JJ.**) was as follows:—

In this suit the plaintiff alleges that he has purchased 6½ bighas of an occupancy *jote* of 8 bighas belonging to Nanku Rai and others. He further pleads that he has been dispossessed by the defendants who are the landlords of the occupancy *jote* of 1 bigha 15 cottahs, and he sues them for possession.

The Lower Appellate Court has dismissed the suit on the ground that the plaintiff, as the transferee of a portion of an occupancy holding, has no title as against the defendants. The plaintiff now appeals, and on his behalf it has been contended that the plaintiff does not seek to be recognized as a tenant by the landlords, but merely prays to be restored to possession of the disputed land from which he has been wrongfully ejected.

We think, however, that the plaintiff is not entitled to recover possession on proof of mere wrongful dispossession. This is not a possessory suit under section 9 of the Specific [617] Relief Act. That being so, he must show some title to the land as against the defendants. We agree with the Subordinate Judge in thinking that he has proved none. He no doubt shows that he has purchased 6½ bighas of the *jote* from the occupancy *raiyat*, but this transfer is not binding against the landlords, the present defendants, who are in no way bound to recognize it. As against the landlords, the plaintiff shows no title under which he can demand to be restored to possession of a portion of the holding.

The learned pleader for the appellant urges that there is no law which prohibits the transfer of portion of an occupancy holding. But there is no law under which any such contention as set up by the plaintiff in this case can be supported, and it would seem to us that to admit it to have any force would be contrary to the spirit, if not the letter, of section 88 of the Bengal Tenancy Act.

The learned pleader prays that the case may be remanded for a finding whether the occupancy holding, from a portion of which the plaintiff alleges himself to have been dispossessed, is or is not transferable by custom. We think it unnecessary to do so, for in either case in our opinion the plaintiff would have no right as against the defendant to recover possession of a portion of the holding.

We therefore dismiss the appeal without costs, the respondent, not appearing.

M. R. M.

Appeal dismissed.

NOTES.

[This subject was dealt with by the Full Bench in *Dayamayi v. Ananda Mohan Roy Choudhury*, (1914) 42 Cal., 179, after an exhaustive argument in which all the previous case-law was reviewed. With reference to this case, it was observed that it had been followed only once in (1905) 9 C.W.N., 843 (42 Cal., at p. 214; 204; see also p. 212) and doubts expressed in (1904) 9 C.W.N., 134; (1905) 2 C.L.J., 369; see also (1908) 8 C.L.J., 161; (1903) 8 C.W.N., 55; (1900) 27 Cal., 545.

In the Full Bench decision it was held, "The transfer is *operative as against the landlord* in all cases in which it is operative against the raiyat, provided the landlord has given his previous or subsequent consent. When the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding; but where the transfer is of a part only of the holding or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (a) an abandonment within the meaning of sec. 87 of the Bengal Tenancy Act, or (b) a relinquishment of the holding, or (c) a repudiation of the tenancy. Whether there has been a relinquishment or repudiation or not depends on the substantial effect of what has been done in each case."—42 Cal., at 223.]

[26 Cal. 617]

The 17th March, 1899.

PRESENT:

MR. JUSTICE MACPHERSON AND MR. JUSTICE STEVENS.

The Secretary of State for India in Council.....Defendant

versus

Kajimuddi and others.....Plaintiffs.*

Enhancement of rent—Bengal Tenancy Act (VIII of 1885), sections 50 (sub-section 2), 115, 104 (sub-sections 2 and 3), 113—Record of Rights—

Presumption as to fixity of rent—Settlement of fair and

equitable rent—Enhancement for excess land—

Enhancement for rise in price of crops.

[618] The provision contained in section 115 of the Bengal Tenancy Act against the presumption as to fixed rent under section 50 (2) of the Act arising in certain cases, has no application in a suit brought by a tenant for the purpose of contesting the correctness of the decision of a Revenue Officer in regard to the entry as to the status of a *raiyat* in a record-of-rights prepared under Chapter X of the Act. In such a suit the tenant is entitled to the benefit of the presumption.

Given the circumstance of an increase or decrease in the area of the land for which a tenant is paying rent, it is competent to the Revenue Officer under section 104 (2) of the Bengal Tenancy Act to settle a fair and equitable rent in respect of the whole of the land of the tenant, including the excess area, and the Revenue Officer can in such a case enhance the rent under the provisions of the Tenancy Act, *e.g.*, on the ground of the rise in the prices of the food crops, and so forth.

THIS appeal and twenty-six other analogous ones arose out of seventeen suits brought by different tenants of a Government *khas mehal* known as *hissa 4 annas* and odd gundas in Pergunnah Shingergaon, in the District of Tipperah, against the Secretary of State for India in Council, for a declaration that the final record (*Khatian*) of rights framed and published by the Revenue Officer in respect of the said *mehal* under Chapter X of the Bengal Tenancy Act, be declared illegal and void, and that the tenures and holdings held by the different plaintiffs be declared not liable to enhancement of rent, having borne uniform rents from the time of the Permanent Settlement. They prayed also in the

* Appeals from Appellate Decrees Nos. 1743 of 1897 and 26 others, against the decrees of Babu Kailash Chandra Mozumdar, Subordinate Judge of Tipperah, dated the 22nd of May 1897, modifying the decrees of Babu Rojoni Kant Mukerjee, Munsif of Chandpur, dated the 26th of June 1896.

alternative that if the said tenures and holdings be liable to enhancement of rent, proper rents might be fixed by the Court or by Revenue Officers.

By a notification, dated the 6th November 1888, the Local Government made an order under section 101 (1) of the Bengal Tenancy Act, directing that a survey be made, and a record of rights be prepared, in respect of the lands included in the *khas mehal* in question, and specifying therein the particulars to be recorded as required by section 102 of the Act. Although no application was made by either the Government or the tenants for settlement of rent, the Settlement Officer appointed to prepare the record of rights of his own motion settled what he considered fair and equitable rents, apparently on the ground that the tenants were holding land in excess of, or less than, that for which they [619] were paying rent, as also on the ground that there had been a rise in the average prices of the food crops. After the draft record was published under section 105 (1) of the Act, the plaintiffs objected to certain entries on the ground that their rents were not liable to enhancement. After disallowing these objections, the Settlement Officer finally framed and published the record under section 105 (2) of the Act. Thereupon the plaintiffs, without appealing to the Special Judge against the orders of the Settlement Officer, instituted the present suits.

The Munsif dismissed the suits on the preliminary ground that the decision of the Settlement Officer under section 101 and 105 of the Act operated as *res judicata* and was not liable to be set aside by a Civil Court. On appeal the Subordinate Judge set aside the decree of the Munsif and remanded the suits for trial on the merits. On second appeal, the High Court affirmed the decision of the Subordinate Judge, holding that the entries in the record were, properly speaking, undisputed entries, which under section 109 of the Act were to be presumed to be correct until the contrary was proved (See *Secretary of State for India v. Kajmuddy*, I. L. R., 23 Cal., 257). The suits were then tried by the Munsif on the merits and dismissed. The Munsif held that in view of the special provisions of section 115 of the Bengal Tenancy Act, the presumption under section 50 (2) of that Act could not arise in favour of the plaintiffs, and that the whole burden of proving that they had held at the same rate of rent from the time of the Permanent Settlement was laid on them. He also held that it was competent to the Settlement Officer to enhance the rent on account of the rise in the price of produce, under section 30 of the Act.

On appeal the Subordinate Judge agreed with the Munsif as to the plaintiffs not being entitled to the presumption under section 50 (2) of the Act, but held that the Settlement Officer acted without jurisdiction in settling the rents on the ground of the rise in the price of the produce, and that therefore his acts in this respect were null and void. In the result, sixteen of the appeals were either wholly or partially decreed, and one of them was dismissed.

[620] In eleven of the appeals the plaintiffs, and in sixteen appeals including No. 1743, the defendant, appealed to the High Court.

In Appeal 1743 of 1897 —

Babu *Ram Charan Mitter*, for the Appellant.

Babu *Akhoy Kumar Banerjee*, for the Respondents.

The judgment of the High Court (**Macpherson and Stevens, JJ.**) was as follows:—

In the year 1888 the Local Government notified under section 101 of the Bengal Tenancy Act that a survey and record of rights would be made in a local area which includes the Government *khas mehal* to which these suits relate. A survey was made and a record of rights prepared by a Revenue Officer, who, in the course of his proceedings, settled the rents payable by

certain of the tenants. It is conceded that he was not authorized to settle all rents, and that no application for such settlement was made either by the landlord or by the tenants; and we must take it that the only authority which he had was that conferred by section 104 of the Tenancy Act, in cases in which the tenant was holding land in excess of or less than that for which he was paying rent.

The record was finally framed and published in March 1891. None of the tenants preferred an appeal to the Special Judge against the decision of the Revenue Officer on any of the points which he was required to determine, or as regards the rent which had been settled. In the same month the tenants brought seventeen suits, which have given rise to these appeals, to have it declared, speaking generally, that the proceedings of the Revenue Officer were illegal and not binding on them, and that their rents could not be enhanced consistently with the provisions of the Bengal Tenancy Act. They also asked that the Court would, if it considered that the rents were enhanceable, fix a fair rent. All these suits were dismissed by the first Court on the ground that they were not maintainable, the decision of the Revenue Officer being final and binding on the parties. This decision was reversed by the Lower Appellate Court on the ground, substantially, that the Settlement Officer [621] had acted *ultra vires* in settling the rents of the tenants, and the cases were remanded for trial on the merits.

There was then a second appeal to this Court which held that the remand order was right. After remand the suits were again dismissed by the Munsif on their merits; but on the appeal of the defendants they were, with one exception, wholly or partially decreed. Of the appeals now before us, sixteen, namely, numbers 1743 and 2143 to 2157 were preferred by the Government, the defendant in the suit; and eleven, namely, numbers 1898 and 2380 to 2389, were preferred by the tenants, the plaintiffs.

We may at once dispose of the appeal, 1898, on the ground that it is not pressed, it being admitted that the rent settled is somewhat less than the rent which was before paid. That appeal is, therefore, dismissed with costs.

In dealing with the remaining cases, we cannot, of course, go behind the remand order of this Court, it being conceded that that is an order now binding on the parties. It is necessary therefore to see what was then decided. The learned Judges said, "the first question to be determined is, whether the Settlement Officer had jurisdiction under the Tenancy Act to settle rents in respect of the land held by the plaintiffs." They held that he had jurisdiction to do that of his own accord on the ground that the tenants were holding land in excess of or less than that for which they were paying rent, and that the Lower Appellate Court was wrong in considering that there was no such authority merely because the record of rights as prepared did not show what the excess lands were, or that the Revenue Officer was acting under this particular provision of the law. Then they said they had to consider the legal effect of his proceedings under sections 104 and 105 of the Tenancy Act; and they came to the conclusion that his decision on the points which he had to decide, and which had to be shown in the record of rights, had not the force of a decree under section 107 of the Tenancy Act, but that the entries in the record of rights must be taken as undisputed entries which are to be presumed to be correct until the contrary is proved, and that it was open to the plaintiffs in this suit to establish the incorrectness of those entries.

[622] Two points were, therefore, we think, distinctly settled: *First*, that the Revenue Officer did not act without authority in settling the rents, although the Court did not decide how the rents were to be settled or whether they had

been' properly settled. And, *secondly*, that the entries made in the record of rights must be presumed to be correct; that it was for the plaintiffs in these cases to show that the entries were wrong, and that they could only succeed by so doing.

After the remand one of the issues tried was this: "Have the holdings and the tenures of the plaintiffs existed from the time of the Permanent Settlement at fixed *jamas*, and are the plaintiffs' *jamas* not fit to be enhanced."

The Munsif decided that they were enhancible, but he threw upon the plaintiffs the burden of proving that their tenures and holdings had been held from the time of the Permanent Settlement at a uniform rent, and said that they were not entitled to the benefit of any presumption under section 50 of the Tenancy Act, because, according to the provisions of section 115 of that Act, the presumption could not apply to them.

That view has been endorsed by the Subordinate Judge, who, like the Munsif, held that the tenants had not proved the fixity of rent from the time of the Permanent Settlement. Section 115 enacts that "when the particulars mentioned in section 102, clause (b) have been recorded under this chapter in respect of any tenancy, the presumption under section 50 shall not thereafter apply to that tenancy."

It seems clear that that section has no application to the present case, and cannot deprive the tenants of the benefit of the presumption if they can show that they are entitled to it.

The suits are brought for the purpose of contesting, amongst other things, the correctness of the Revenue Officer's decision in regard to the entry as to the status of the *raiyyats*; and the question which the Courts had to decide was whether their status was that of *raiyyats* holding at fixed rents or not. Section 115 seems to contemplate a case in which a *raiyyat* is seeking to get the benefit of the presumption for a period [623] subsequent to the time when the record-of-rights was framed. The appeals of the tenant defendants, with the exception of appeal 2384, must therefore succeed to this extent that there has been no proper decision as to whether their rent can or cannot be enhanced. These appeals all relate to *raiyyati* holdings. Appeal 2384 relates to a *taluk*, and what I have said has no bearing upon that case because it is distinctly found by both the Courts that the *taluk* has been held for terms of years, and the provisions of section 50 do not apply to tenures of that description.

As regards the Government appeals, it appears that the Revenue Officer settled the rents of the tenures and holdings by assessing rent on lands found to be in excess of the original holding, and also by allowing for an increase in the rise of the prices of the food crops.

The Subordinate Judge has held that in settling the rent he had no power to increase it on the ground of the rise in the value of prices, and that, in so doing, he acted without jurisdiction. Substantially, therefore, he has disallowed the whole of the increase on that ground, and has taken the rent to be the rent formerly payable, *plus* a fair and equitable rent for the land found to be in excess. He says that the Revenue Officer had only power to deal with the excess land, and could not, under section 104 of the Tenancy Act, increase the rent of the holdings on any other ground.

The contention on the part of Government in the appeals before us is that the Subordinate Judge was wrong in this view of the law, and we think the contention must succeed. Section 104, clause 2, runs thus: "When it appears that a tenant is holding land in excess of or less than that for which

he is paying rent, or either the landlord or the tenant applies for a settlement of rent, or in any case under section 101, sub-section (2), clause (d), the officer shall settle a fair and equitable rent in respect of the land held by the tenant." The third clause provides that: "In settling rents under this section, the officer shall presume, until the contrary is proved, that the existing rent is fair and equitable, and shall have regard to the rules laid down in this Act for the [624] guidance of the Civil Court in increasing or reducing rents, as the case may be."

Given then the circumstance of an increase or decrease in the area of the land for which the tenant was paying rent, it seems to us that under section 104 the Revenue Officer was competent to settle a fair and equitable rent in respect of the whole of the land of the tenant including the excess area. It would be difficult to say that "the land held by the tenant" is to mean, in the case of a decrease of land, the land which is left, and in a case of excess land, the land which is in excess; or that it has a different meaning in each of the cases referred to in clause 2 of section 104.

Another strong reason for holding that the rent of the entire holding is to be settled, is to be found in section 113 of the Tenancy Act, which provides that "when the rent of a tenure or holding is settled under this chapter it shall not, except on the ground of a landlord's improvement, or of a subsequent alteration in the area of the tenure or holding, be enhanced, in the case of a tenure or occupancy holding, for fifteen years * "

The assessment of rent on land for which the tenant was not before paying rent is not, strictly speaking, an enhancement of the rent. It is merely an addition to the rent which had been before paid on account of land for which rent had not been before paid; and it could hardly have been intended by the Legislature that when rent was settled merely by adding to the old rent, the rent which the tenant had to pay for some excess land, there should be no enhancement of the rent, except on the special grounds, for a period of fifteen years.

We must set aside the decree of the Subordinate Judge in all the appeals except appeal No. 1898, to which I have referred, and appeal No. 2384, so far as it relates to the enhancibility of the rent of the *taluk*. The Court must decide whether or not the plaintiffs have made good a case for the presumption referred to in section 50, and, if they have done so, whether that presumption has been rebutted by the defendant. If it is found that the rent of the holding cannot be enhanced, the existing rent must hold good, but the tenant will of course be liable to pay [625] additional rent for any land in his possession which is in excess of the land for which he had been before paying rent.

If the rents are found to be enhancible the Court must decide whether the rent fixed by the Revenue Officer for the whole holding is a fair and equitable rent, having regard to the rules laid down in the Tenancy Act for the guidance of the Civil Court in increasing or reducing rents, as the case may be; the burden of shewing that the rent so fixed is not fair and equitable being, as already stated, on the plaintiffs. If it is found that the rents settled by the Settlement Officer are not fair and equitable rents, the Court must decide, in accordance with the prayer of the plaintiffs, what is a fair and equitable rent in respect of the *taluks* and holdings, having regard, in this respect also, to the provisions of the Tenancy Act.

We much regret to be under the necessity of prolonging this litigation by directing another remand, but it is impossible, as the record now stands, to dispose of the cases finally.

The Subordinate Judge will take them up, and dispose of them with the least possible delay.

The appellants will get their costs in each case other than in appeals 2384 and 1898.

M. N. R.

Appeal allowed : case remanded.

NOTES.

[See also (1907) 12 C.W.N., 122.

As regards the scope of sec. 115 of the Bengal Tenancy Act, 1885, see 37 Cal., 30.]

[26 Cal. 625]

CRIMINAL REVISION.

The 20th April, 1899.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE WILKINS.

Doulat Koer.....2nd Party, Petitioner

versus

Rameswari Koeri *alias* *Dulin Saheba.....1st Party, Opposite Party.*

Criminal Procedure Code (Act V of 1896), section 145—possession, Order of Criminal Court as to—Jurisdiction of Magistrate—Order made by a Civil Court—Power of revision by the High Court.

It is the duty of the Magistrate when the right to possession has been declared within a time not remote from his taking proceedings under section [626] 145 of the Criminal Procedure Code to maintain any order which has been passed by any competent Court ; and therefore to take proceedings which necessarily must have the effect of modifying or even cancelling such orders, is to assume a jurisdiction which the law does not contemplate.

The power of revision to be exercised by the High Court is limited to matters of jurisdiction, that is to say, to cases in which it is found that the Magistrate by taking proceedings under section 145 has acted without jurisdiction.

IN this case there was a dispute concerning the possession of a village between Rani Rameswari Koeri *alias* Dulin Saheba and Mussamat Doulat Koer. Originally the village belonged to one Narain Das. After his death there was a dispute among his heirs as to the genuineness of his will, his widow Doulat Koer being one of the parties. Civil suits were instituted, and the District Judge of Gya gave his decision in favour of Doulat Koer. On appeal the decision of the Judge was reversed by the High Court, but the Privy Council finally decided in favour of Doulat Koer on the 15th of December 1897. During the pendency of these proceedings the property of the said Narain Das, deceased, was placed in the hands of a Receiver. On the 11th of June 1898 the District Judge of Gya made an order directing the Receiver to make over possession of the properties to Doulat Koer, and on the 29th of August possession was made over to her, and on the 1st of November the

* Criminal Revision No. 128 of 1899, made against the order passed by B. C. Sen, Esq., Sub-Divisional Magistrate of Jahanabad, dated the 31st of January 1899.

Sub-divisional Magistrate of Jahanabad took proceedings under section 145 of the Criminal Procedure Code to determine the possession of the village and decided in favour of Dulin Saheba.

The Magistrate found that on the 19th of April 1894 Doulat Koer transferred her right and interest in the village to one Mahadeo Dutt Misser by a deed of *dur-mokurari* lease, and that Dulin Saheba on the 15th of March 1898 purchased the *dur-mokurari* right from the heirs of Mahadeo Dutt, and that Dulin Saheba had "securely lodged herself in the village and was only waiting for the formal withdrawal of the Receiver to declare her possession openly."

Doulat Koer obtained a rule to show cause why the proceedings taken by the Magistrate under section 145 of the Criminal Procedure Code should not be set aside on the ground that they [627] were taken without jurisdiction, inasmuch as they were inconsistent with the orders passed by the District Judge relating to the possession of the property.

Mr. Hill, Mr. P. L. Roy, and Babu Raghunandan Prosad, for the Petitioner.

Mr. J. T. Woodroffe, Sir Griffith Evans, Mr. C. Gregory, Babu Saligram Singh, and Babu Mukhum Lal, for the Opposite Party.

The following judgments were delivered by the High Court (PRINSEP and WILKINS, JJ.)

Prinsep, J.—This is a case under section 145 of the Code of Criminal Procedure, in which the Magistrate has passed an order in favour of Mussamat Dulin Saheba, known as the first party. The rule has been granted on the application of Mussamat Doulat Koer, the second party, to show cause why the proceedings should not be set aside on the ground that they were taken without jurisdiction, inasmuch as they were inconsistent with the orders passed by the District Judge relating to the possession of this property.

In the present state of the law, as we understand it, the power of revision to be exercised by this Court is limited to matters of jurisdiction, that is to say, to cases in which it is found that the Magistrate, by taking proceedings under section 145, has acted without jurisdiction. It is in that sense that we have to consider the point raised on this application.

The property, which is the subject-matter of these proceedings, has formed part of a litigation which has been taken up in appeal to Her Majesty in Council, and the result has been that the case was decided in favour of Doulat Koer by an order declaring that she is entitled to letters of administration in respect of the estate of her deceased husband. It seems to us that Dulin Saheba also holds a share in this property under a different title. In 1893, a Receiver was appointed to manage this property until the final result of that suit, and, having regard to the order passed in favour of Doulat Koer, we must take it that the Receiver has been acting as on her behalf and in her interests. In December [628] 1897, there was some interference on the part of Dulin Saheba in regard to this property, and the District Judge passed an order warning her to abstain from interference. Doulat Koer, having obtained an order in her favour, was consequently entitled to possession of this property, and we find that on the 11th June 1898 she obtained an order from the District Judge of Gya declaring that as soon as the Receiver shall have completed his accounts with reference to these properties, he should make them over to Doulat Koer. It further appears that on the 29th August following, when the Receiver vacated, possession of some sort was made over to her. On the 1st November the Magistrate took proceedings under section 145 to determine the possession of this property so as to prevent a breach of the peace, which, in his opinion, was

likely to take place, and he has after a trial decided in favour of Dulin Saheba and against Doulat Koer.

Now the object of section 145, as we understand it, is to enable a Magistrate to intervene and to pass a temporary order in regard to the possession of the property in dispute to have effect until the actual right of one of the parties has been determined by any competent Court. It is consequently his duty, when that right has been declared within a time not remote from his taking proceedings under section 145, to maintain any order which has been passed by any competent Court, and, therefore, to take proceedings which necessarily must have the effect of modifying, or even cancelling, such orders, is to assume a jurisdiction which the law does not contemplate. In this case we have it that so late as the end of August possession was formally given over to Doulat Koer. Nevertheless, the Magistrate has found that Dulin Saheba obtained possession about the same time, and that she and not Doulat Koer is shown to have been in actual possession, and he comes to this conclusion from evidence regarding the receipt of rents from some of the tenants between the end of August and the 1st of November. Dulin Saheba, as has already been mentioned, is a co-sharer in this very property, and, therefore, it would be a matter of no difficulty on her part to obtain such evidence from persons who would be her [629] *rayats* certainly in regard to that right. Her title, we are told, is derived from one Mahadeo, who is said to have taken a *dur-mokurari* of the same property from Doulat Koer, the lease being given for the purpose of obtaining money to carry on litigation to the Privy Council, and Dulin Saheba is said to have purchased the *dur-mokurari* title from Mahadeo. It is not for the Magistrate in this summary proceeding to consider whether as against Doulat Koer this confers a perpetual title to possession. The duty of the Magistrate was to carry out the orders of the Civil Court and to maintain those orders by assisting the possession of any person whose title is found by that Court. Under such circumstances, we are of opinion that the proceedings under section 145 were without jurisdiction, and that the Magistrate, on a breach of the peace being certified to him, ought to have contented himself with declaring that the orders of the Civil Court should be maintained. In this view we think that the proceedings under section 145 were without jurisdiction, and must be set aside, and the possession of Doulat Koer maintained until a competent Court awards possession to some other person.

Wilkins, J.—I generally concur in what has been said. I would like to add that it seems to me that the Magistrate was debarred from exercising jurisdiction in this matter under section 145. for, from 1893, when the Receiver was appointed, the Civil Court was in possession through that Receiver and on behalf of the parties to the suit, and that Court was not concerned with any claims of, or rights which may have accrued to, any third party by reason of any assignment or transfer during the pendency of that suit. Any interference with that possession by any such third party would be a contempt of the authority of the Civil Court. When the petitioner had been declared entitled to the property by the final decree in the suit, the Civil Court had no option but to give her possession of it upon her taking out the usual letters of administration, and, therefore, the order of the 11th June 1898 was not only a legal order, but it was the only order which could properly be made under the circumstances. The Court having been in possession of the property on behalf of the parties to the suit, was bound to give possession to the successful party in that suit. [630] Any one else entering into possession would be a trespasser. This being so, there remained practically no question of possession within the power of any other Court, such as the Court of the Magistrate, to decide. All that the

Magistrate could do was to leave it to the Civil Court to dispose of the property and direct Dulin Saheba to assert her rights as she might be advised. It seems therefore quite clear that this was certainly a case in which the Magistrate had no jurisdiction whatever under section 145 of the Code of Criminal Procedure, and I agree in making this rule absolute.

S. C. B.

Rule made absolute.

NOTES.

[For similar decisions regarding the value of prior orders in civil proceedings, see also 29 Cal., 208; 6 C.W.N., 161; 841; 7 C.W.N., 118; 32 Cal., 796; 33 Cal., 33; 5 C.W.N., 563.

As regards revisional powers, see also 24 All., 315; 31 All., 150; 29 Cal., 382; 28 Cal., 446; 35 Cal., 774.]

[26 Cal. 630]

The 31st May, 1899.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Tafazzul Ahmed Chowdhry and others....Petitioners

versus

Queen-Empress.....Opposite Party.*

Penal Code (Act XLV of 1860), section 353—Deterring a public servant from discharge of his duty—Public servant acting under warrant of attachment—Non-production of the warrant at the trial.

One of the accused was convicted under section 353 of the Penal Code (assaulting or using criminal force to a public servant in the execution of his duty) and two others of the abetment of an offence under that section. But the warrant of attachment under which the public servant was acting was not produced at the trial, nor was any secondary evidence given to show its contents.

Held, in the absence of any evidence as to the terms of the warrant either by the production of the original or in the form of secondary evidence, it was impossible to hold that the conviction was good.

THE Settlement Officer of Comilla made a certificate under the Public Demands Recovery Act against Tafazzul Ahmed for the cost of certain settlement operations in which Tafazzul Ahmed was concerned. The amount not having been paid, a warrant was issued for the execution of the certificate by attachment of the moveable properties belonging to Tafazzul Ahmed. The Settlement Officer's Nazir proceeded to the house of Tafazzul [631] Ahmed. He was not at home at the time, and the Nazir stated the object of his visit to Abbas Ali, who described himself to be the house-muktear of Tafazzul. Abbas Ali being informed of the amount, asked for time, and went out, saying that he would collect the money and pay. The Nazir waited for about two hours, and when there was still no sign of the house-muktear's return, he made a list of the articles in the *boitokhana*, had them removed out of the house on to the road, and began despatching them by coolies to the

* Criminal Revision No. 253 of 1899, made against the order passed by B. G. Geidt, Esq., Sessions Judge of Tipperah, dated the 16th of March 1899, modifying the order of E. F. Ainslie, Esq., Deputy Magistrate of Komilla, dated the 3rd of March 1899.

Settlement Office record room. At this time Tafazzul Ahmed drove up, and having learnt the reason of the Nazir's visit, asked the Nazir to proceed with despatch, so that he might not be put to shame before the people. About this time Chunder Kumar Sen, who is called the estate-muktear of Tafazzul Ahmed, arrived at the place, and after reading the warrant and finding that Tafazzul was described in it as living at Bhattogram, he declared that the attachment of the property at Comilla was illegal. He then urged Tafazzul and others to resist the execution of the warrant. Abbas Ali appeared in front of the Nazir and pulled away a shawl and the warrant, and a list of the attached properties. The Nazir then ran away to the Settlement Officer, and complained of the treatment he had received.

The Deputy Magistrate convicted Tafazzul and Chunder Kumar under section 379, section 147 and section 353 read with section 34 of the Penal Code, and Abbas Ali under section 379, section 147 and section 353 of the Penal Code.

The Sessions Judge, on appeal, altered the conviction of the first two accused into one under section 353 read with section 114 of the Penal Code, and that of Abbas Ali to one under section 147 and section 353 of the Penal Code, and reduced the sentences.

The accused, on application to the High Court, obtained a rule on the ground that the warrant was not a legal one, and therefore the conviction for forcibly resisting its execution could not be sustained. The warrant was not produced in the lower Court, but there was on the record another warrant issued on the failure of the first warrant, though there was nothing to show that the contents of the two warrants were the same, nor was there any-[632]thing to show what the contents of the first warrant were, to whom it was addressed, or for what period it was current.

Mr. Jackson, Moulvi Serajul Islam and Babu Gobinda Chundra Das, for the Petitioners.

The *Officiating Deputy Legal Remembrancer* (Mr. Abdur Rahim) for the Crown.

The judgment of the High Court (Prinsep and Hill, JJ.) was as follows :—

The petitioners have been convicted, one of them under sections 353 and 147 of the Indian Penal Code, and the others of abetment of an offence under section 353, that is, of assaulting or using criminal force to the complainant, a Nazir, in the execution of his duty as such, with the intention of preventing or deterring him from discharging his duty. The case for the prosecution is that the Nazir was executing a warrant for the attachment of certain property belonging to Tafazzul Ahmed in satisfaction of a certificate under the Public Demands Recovery Act for costs in certain proceedings. In the first instance, the attachment proceeded quietly, but, after a little while, a man who was the muktear of the debtor, appeared and required to see the warrant of attachment. He then declared that this warrant was an illegal warrant, which could not be properly executed, and he instigated the debtor and others forcibly to resist the execution. Thereupon the Nazir was assaulted, and he ran away to the Settlement Officer, by whom the warrant had been issued. Objections were raised in the trial in the lower Court, as well as before us, and it was upon this point that a rule was granted, that the warrant was not a legal one, and that, therefore, the conviction for forcibly resisting its execution could not be sustained.

It is very unfortunate that, after the lengthy proceedings that have been held, we should find at this stage of the case that the warrant has neither been produced in the lower Court, nor has secondary evidence been given, after

proper steps taken to produce the original had failed, to show its contents. We have on the record only another warrant issued on the failure of the first warrant, but there is nothing to show that the contents of the two warrants were the same, nor is there any [633] thing to show what the contents of the first warrant were, to whom it was addressed, or for what period it was current. It is impossible, therefore, to say how far it was a valid warrant. The lower Court seems to have held that the warrant was for the attachment of whatever property the Nazir, the officer executing it, might find on search as belonging to the judgment-debtor. The area of the search is not described, and, if it were a valid warrant, it would be competent to the Nazir to seize any property that he believed belonged to the judgment-debtor at any place within the jurisdiction of the Court issuing it. It seems unnecessary to point out the serious objections that there would be to allowing such a warrant to be regarded as a valid warrant. It is different from the form prescribed by the Code of Civil Procedure, Schedule IV, No. 136, for warrants of this description, inasmuch as it does not fix any responsibility on any person for the attachment of any moveable property which may be found not to belong to the judgment-debtor; whereas the terms of the form, as given in the Code, are express in this respect. In the absence, therefore, of any evidence as to the terms of the warrant, either by the production of the original or in the form of secondary evidence, it is impossible for us to hold that the conviction is good and can be sustained. One of the petitioners has been convicted of rioting, and in respect of that conviction it is only necessary to say that the charge does not declare what was the common object of the assembly by which the riot was committed. It is impossible, therefore, to say that this petitioner has been properly convicted of that offence. The rule is made absolute, the conviction and sentence will be set aside in respect of all the petitioners, and the fine, if paid, will be refunded.

S. C. B.

Conviction set aside.

NOTES.

[See also (1899) 3 C.W.N., 605.]

[634] APPELLATE CIVIL.

The 6th March, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Kedar Nath Mitter.....Defendant

versus

Sarojini Dasi.....Plaintiff.*

*Probate—Probate of a part of a will—Probate and Administration Act
(V of 1881), section 25.*

Probate can be granted of a portion only of a will to the extent to which the contents are proved where the other portion is lost; and there is nothing in section 25 of the Probate and Administration Act (V of 1881) to prohibit such a grant of probate.

Sugden v. Lord St. Leonards. (1876) L.R., 1 P. D., 154 referred to.

THE facts of this case are shortly as follow: One Sarojini Dasi applied for the probate of a will left by her father's sister Thakomoni Dasi; she alleged that the testatrix died in the year 1898, executing a will long before her death by which she bequeathed the major portion of her properties to the petitioner; that the said will was written on two sheets of paper and those two sheets were stitched together, but only the first sheet was found in spite of search having been made for the second sheet. In the second sheet, the petitioner alleged, it was written that Rs. 100 would have to be paid on the occasion of the marriage of her sister's son Monoranjan Mullick, and the balance should be spent on the testatrix's funeral rites and *sraddh*; that she came to know that the said Monoranjan Mullick having been married during the lifetime of the testatrix, the said money was paid by her; and that inasmuch as assets to the extent of Rs. 1,295 would probably come into the hands of the petitioner, she made the present application.

One Kedar Nath Mitter, alleging himself to be the brother's son of the husband of the deceased Thakomoni Dasi, put in a petition of objection to the granting of the probate, on the [635] grounds that the will was a forgery, and that he being the legal heir of the deceased would be entitled to the properties left by her, and as such he prayed that letters of administration of the estate of the deceased might be granted to him.

The lower Court, upon the evidence holding that the will was executed by the testatrix, and that after her death search was made, but only the first sheet of it was found, allowed the petition and granted probate of the piece of the will produced.

Against this decision the objector appealed to the High Court.

Babu Boudya Nath Dutt, and Babu Mon Mohun Dutt, for the Appellant.

Babu Bhowani Churn Dutt, and Babu Lal Mohun Das, for the Respondent.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.) :—

Maclean, C.J.—There cannot be any reasonable doubt that the testatrix, Thakomoni Dasi, did execute a will some time in the year 1894, nor any

* Appeal from Original Decree No. 127 of 1898, against the decree of F. F. Handley, Esq., District Judge of 24-Pergunnahs, dated the 25th of February 1898.

reasonable doubt that the sheet now produced, and of which probate is sought, formed a portion of that will. It appears from the evidence that the will was written upon two sheets of paper, and only one sheet, apparently the first sheet, was to be found, and was found after the testatrix's death amongst her depositories. The sheet we have practically disposes, by means of legacies, of the bulk, though not the whole, of her property. Application is now made for probate of that portion of the will and the application is resisted by the testatrix's heir. We have to consider whether probate of this portion of the will can be properly granted.

The heir contends that, inasmuch as the will remained in the custody of the testatrix, which is not disputed, and only a portion of it—the first sheet—has been found amongst her papers at her death, she must be presumed to have destroyed the second sheet, and that she did so *animo revocandi*. But this presumption may be rebutted, and has, I think, been rebutted in the present case. Looking at the sheet we have, it would appear from the two small holes at the top left hand corner that it had been tied [636] to the other sheet—it is proved that the will was written on two sheets of paper—by a piece of string. It may be that the testatrix did tear off the second sheet, but the inference I am inclined to draw from the extrinsic evidence afforded by the appearance of the extant sheet is that, either from the string having become rotten—a not unlikely result in this climate— or from some other accidental cause, the second sheet became detached and lost, and that it was not either mutilated or destroyed by the testatrix herself. This view gains a little support from a passage in the evidence of the witness Atul Krishna Dutt, who says that the testatrix never told him before her death that the will had been damaged or destroyed, and the testatrix lived some four or five years after the execution of the will. No evidence is adduced by the heir to show that the testatrix ever spoke of having destroyed the will. It is a fair inference from the circumstances of the case that the sheet in question was lost and not destroyed. This disposes of the first point.

It is next contended for the appellant that under the law prevailing in this country probate cannot be granted of a portion only of a will, where the other portion is lost. It must, I consider, be taken as settled law in England—see *Sugden v. Lord St. Leonards*, (1876) L. R., 1 P. D., 154, that probate can be granted of a portion of a will, though, if the extant portion be only the residuary clause, some question may arise, as was pointed out by Lord HERSCHELL in the case of *Woodward v. Goulstone*, (1886) L. R., 11 App. Cas., 469. We are not, however, dealing with any such clause in the present case. It must be taken to be established by the English decisions that, where the contents of a lost will are not completely proved, probate can be granted to the extent to which they are proved. The present will is proved to the extent of the first sheet; but the appellant says that the law in England on this point does not apply to India; that the present case is governed by section 25 of the Probate and Administration Act (V of 1881); and that that section only enables the Court to grant probate, when the contents, not of a part of the will, but of the whole will, are established by evidence. In my opinion that contention is not well founded. There is no prohibitory, no negative, word in the section: it is an enabling section, and to place the narrow construction upon it for which the appellant contends, would lead to manifest absurdities. For instance, we might find a will written on half a dozen consecutive sheets of paper tied together by a piece of string; the first five sheets might dispose in a clear and specific manner of property valued at lakhs of rupees among named legatees, and all that was

left to be disposed of by the remaining sixth sheet, might be a sum of perhaps Rs. 10 or 20. The sixth sheet becomes detached from the other and is lost. If the argument of the appellant is to prevail, probate cannot be granted of the first five sheets which dispose of the bulk of the property, and the testator's dispositions, though perfectly well known and proved, are thus rendered inoperative. I am not disposed to accept this view. There is to my mind nothing in the section in question to prevent us from following the rulings on this point of the Courts in England. The learned Judge in the Court below has not gone very fully into the matter, but I think that, save upon the question of costs, his conclusion is right.

With respect to the costs, there is force in the argument of the appellant that the costs in the Court below should have come out of the estate, and under the circumstances this would be right. It is not opposed by the respondents. Subject to this modification, the appeal must be dismissed with costs.

Banerjee, J.—I am of the same opinion. I only wish to add a few words with reference to two points raised in the case, namely, first, that the fact of a part of the will being lost raises a presumption that the will had been destroyed or mutilated by the testatrix with intent to revoke it; and second, that no probate can be granted of a part of a will.

As to the first point, judging from the nature of the document, as it stood when complete, as deposed to by the witnesses examined in the case, and judging from the appearance of the part that has been preserved, I am of opinion that the fact of a part being wanting raises no presumption of the destruction [638] or mutilation of the will with intent to revoke it. All that we can say about the condition of the document is, that a part of it has been lost. The appearance and nature of the portion of the document that has been preserved constitute material evidence upon the question as to whether the loss of the remainder should raise any presumption of revocation or not. This stands to reason and common sense, and if authority were needed in support of the view I take, I may refer to the case of *In the goods of Woodward*, (1871) L. R., 2 P. & D., 206 (208), in which Lord PENZANCE, after quoting certain observations of Sir J. DODSON in the case of *Clarke v. Scripps*, (1852) 2 Rob. Ecc., 563, observes: "I think that is a very good way of regarding the question, for it is obvious that the mutilation must be of such a part and in such a manner as to afford evidence that the deceased did not intend the document any longer to operate as his will. If, for instance, he should tear off the will or his own signature? Applying the reasoning to the present case, I have come to the conclusion that, in the absence of any evidence to the contrary, the mere cutting off of eight lines at the beginning of the document does not show any intention to revoke the whole will."

As to the second point, it is quite true that the Probate and Administration Act (V of 1881) does not contain any express provision for the granting of probate of a part of a will. Section 25 of the Act, which relates to the granting of probate of a lost or destroyed will, in terms relates to the grant of probate in respect of a will if its contents can be established by evidence. But then that is only an enabling section, and there is no prohibition in the Probate and Administration Act to the grant of probate of a part of a will, provided such grant is not in any way opposed to reason and justice, and therefore I see no objection to our following the rule laid down in *Sugden v. Lord St. Leonards*, (1876) L. R., 1 P. D., 154, subject of course to certain qualifications which have been indicated in the case of *Woodward v. Goulstone*, (1886) L. R., 11 App. Cas., 469. In the present [639] case the grant of probate of the portion of the will that has been preserved does not in any way infringe any of the qualifying

rules subject to which such grants ought to be made. The bequest to the petitioner for probate, Sarojini, stands quite independently of the other provisions of the will whatever they might have been. There is nothing to show that those provisions would interfere with the bequest contained in the will in favour of Sarojini in the portion of the will which has been preserved. On the contrary, the evidence would indicate that the bequest to Sarojini was the primary object of the will and that it was intended to be an unqualified one.

S. C. G.

Appeal dismissed.

NOTES.

[Probate may be granted of a part of a Will leaving out portions proved to have been inserted without the testator's knowledge.]

[26 Cal. 639]

The 8th March, 1899.

PRESENT :

MR. JUSTICE PRINSEP, MR. JUSTICE BANERJEE, AND MR. JUSTICE RAMPINI.

Bodh Narain.....Plaintiff

versus

Mahomed Moosa.....Defendant.*

Bengal Tenancy Act (VIII of 1885), section 66, clauses 2 and 3—Landlord and Tenant—Suit for arrears of rent—Execution of decree for ejectment for arrears of rent—Extension of time for payment.

Per PRINSEP and BANERJEE, JJ.—The extension of time authorised by section 66, clause 3, of the Bengal Tenancy Act can be granted by the Court after the decree, and not only when framing the decree under clause 2 of that section.

Per RAMPINI, J.—*contra*.

Per PRINSEP and BANERJEE, JJ.—The decree for ejectment passed under section 66, clause 2, of the Bengal Tenancy Act need not incorporate the terms as to the ejectment being avoided by payment within fifteen days from the date of the decree. These terms are rather in the nature of a direction to the Court of execution.

Per PRINSEP, J.—The application for such extension of time may therefore be made by the judgment-debtor on a mere petition, and not in the form of an application for review of judgment.

IN this case the plaintiff, Bodh Narain, obtained a decree for arrears of rent against Mahomed Moosa, under section 66 of the Bengal Tenancy Act, in the Court of the Munsif of Gya. The decree was signed on the 17th May 1898, and directed that if [640] the decretal amount were not paid within 15 days from the date thereof, the plaintiff would be entitled to eject the defendant in execution of the decree. On the 25th of May, the defendant applied for two weeks' extension of time to pay off the decretal money. The Munsif granted extension of time till the 12th of June, under section 66 (3) of the Bengal Tenancy Act. Against

* Appeal from Order No. 353 of 1898, against the order of E. G. D. Brockman, Esq., District Judge of Gya, dated the 23rd of July 1898, affirming the order of N. N. Dbur, Esq., Munsif of Gya, dated the 26th of May 1898.

this order, the plaintiff decree-holder appealed to the District Judge, on the ground that the Court had no jurisdiction to extend the time subsequent to passing the decree, and that the extension could only be granted at the time of passing the decree. The District Judge, having affirmed the order of the Munsif and dismissed the appeal, the decree-holder appealed to the High Court. The appeal originally came on for hearing before BANERJEE and RAMPINI, JJ., who differed in opinion, and the case was referred under section 575 of the Code of Civil Procedure to PRINSEP, J., who agreed with BANERJEE, J.

The *Advocate-General* (Sir Charles Paul), and Babu Karuna Sindhu Mukerjee, for the Appellant.

Dr. Rash Behary Ghose, and Moulvi Sirajul Islam, for the Respondent.

The following judgments were delivered by the High Court:—

Banerjee, J.—In this appeal, which arises out of an application for extension of time for the satisfaction of a decree in a suit for ejectment for arrears of rent under section 66 of the Bengal Tenancy Act, the question for determination is, whether the extension of time authorized by sub-section 3 of section 66 can be granted by the Court after decree. The Courts below have answered it in the affirmative, and granted the judgment-debtor's application for extension of time, which was made before the expiry of fifteen days from the date of the decree; and hence this appeal by the decree-holder.

The contention on behalf of the appellant is that the extension of time authorized by section 66 of the Bengal Tenancy Act can be granted by the Court only at the time of passing the decree, and that after the decree is passed, the Court has no power to extend the time within which it may be satisfied. On the other [641] hand, it is contended for the respondent that there is no such limitation on the Court's power to grant extension of time.

Section 66, after providing in sub-section (1) for the institution of a suit for ejectment of certain classes of tenants for arrears of rent, enacts in sub-section (2) that, "A decree passed in favour of the plaintiff shall specify the amount of the arrear and of the interest (if any) due thereon, and the decree shall not be executed if that amount and the costs of the suit are paid into Court within fifteen days from the date of the decree, or when the Court is closed on the fifteenth day, on the day upon which the Court re-opens." And sub-section (3) which provides for extension of time runs in these words: "The Court may for special reasons extend the period of fifteen days mentioned in this section."

The main arguments in support of the respondent's contention are the following:—

In the first place, there is nothing in the language of section 66 to limit the power of the Court in the manner contended for on behalf of the appellant, the section merely providing that the Court may for special reasons extend the period; and in order to give effect to the appellant's contention we must interpolate the words "at the time of passing the decree" after the word "may" in sub-section (3). I may add that the word "extend," to use the language of COTTON, L. J., in *In re Yeaton Local Board*, (1889) L. R., 41 Ch. D., 52 (58): 58 L. J., Ch., 563 (566), "necessarily infers the existence of an originally limited time;" and I think it carries with it the idea of a subsequent enlargement of time.

In the second place, the general tenor of the section is opposed to any such interpolation. For sub-section (2), while providing that the decree shall specify the amount of the arrear and the interest if any, does not require that the decree shall specify the time, whether it be fifteen days or more, within

which it shall not be executed; and sub-section (3) speaks of the period of fifteen days as "mentioned in the section," and not as "specified in the decree," and there is no good reason why when [642] the ordinary period of fifteen days for which execution must be stayed, is not required to be mentioned in the decree, any special and extended period for which the Court may think fit to stay execution should be specified in the decree.

In the third place, ejectment for non-payment of rent, being in the nature of a penalty or forfeiture, the provision in sub-section (3) of section 66 for extension of time for payment to avoid the penalty of forfeiture is a remedial provision, and should be construed liberally, so as not to restrict to remedy and make it inapplicable to cases to which it ought obviously to extend, but which it would be prevented from reaching if the appellant's contention be given effect to. Thus, take a case in which the arrear due is a fairly large amount, but the tenant, when the decree is passed, has no special reason upon which he can ask for extension of time for payment. Suppose that he was coming to Court with the money due, in time to be able to deposit it in Court within fifteen days from the date of the decree, when he was robbed on the way, and so he finds himself unable to make the deposit in time. He has now a special reason for asking for extension of time, but the Court will have no power to grant such extension if the appellant's contention be correct. Such a result could not have been intended by the Legislature.

The only arguments urged for the appellant in support of the opposite view are: *First*, that the section contemplates the procedure prior to decree and not any matters subsequent to the decree; *second*, that if the Court be held authorized to extend the time after the decree, it may extend the time any number of times, and this indefinite extension of time might render the limitation of time in sub-section (2) practically nugatory in many cases: and *third*, that the cases of *Sunkur Singh v. Huree Mohun Thakoor*, (1874) 22 W. R., 460, and *Nubo Kisto Mookerjee v. Ramessur Goopto*, (1866) 18 W. R., 412, note: 2 Wyman, 75, go to show that the Court executing a decree for ejectment cannot modify the terms of the decree with regard to the time within which payment should be made.

Let us examine these arguments. As to the first, I do not [643] think it correct to say that section 66 only contemplates the procedure prior to decree when sub-section (2) expressly says: "The decree shall not be executed if that amount" (i.e., the amount of the arrear of rent or interest) "and the costs of the suit are paid into Court within fifteen days from the date of the decree,"—that is, speaks of payment into Court which is to be after the decree.

As to the second argument, though upon the respondent's view there may be granted more extensions of time than one, it does not follow that the proceedings may be indefinitely protracted, when the extension is to be granted not as a matter of course, but only "for special reasons," and when the judicial discretion of the Court will be a sufficient safeguard against any unreasonable extension of time.

As to the third and last argument, the cases cited have no bearing upon the question now before us. They were decided under the former law (Act X of 1859, section 78, and Bengal Act VIII of 1869, section 52), under which the Court had no power to extend the period of fifteen days. In the earlier of the two cases cited, this Court nevertheless allowed a decree directing execution to be stayed for a longer period than fifteen days to stand, on the ground that the Court which had power to determine the matter on the merits might pass such a decree. And in the later case, namely, *Sunkur Singh v. Huree Mohun*

Thakoor, (1874) 22 W. R., 460, the learned Judges of this Court, in distinguishing the earlier case from the one before them, observed: "But we do not think that either of the Judges who gave their opinion in that case intended to lay down that any other Court than the Court which had the merits of the case before it, and therefore was able to pass a sufficient and proper decree between the parties, could modify the terms of the decree with regard to the period within which the payment should be made, in order to save the judgment-debtor from the alternative consequences of the original decree." No doubt that was so under the old law; and as I understand the two cases cited, what they lay down is this, that though under the general power which the Court has to make a proper decree according to [644] the merits of the case, the Court may, when making its decree in a suit for ejectment for non-payment of arrears of rent, under section 78 of Act X of 1859 or section 52 of Bengal Act VIII of 1869, provide in the decree that it shall not be executed for any period exceeding fifteen days, yet, after the decree is once made, the Court has no power to extend the statutory period of fifteen days. But the reason of this was that the Court had no power to extend the time under the old law. The present law expressly gives the Court power to extend the time; and if this express provision is to be held to be limited to giving the Court power to extend time only when making the decree, a power which according to the cases cited it possessed under the old law, the express provision of sub-section (3) of section 66 would become mere matter of surplusage.

The cases cited do not, therefore, in my opinion lend any support to the appellant's contention.

Upon weighing the arguments on both sides, I am of opinion that the reasons in favour of the respondent's view far outweigh those on the opposite side; and I would therefore affirm the order of the Lower Appellate Court and dismiss this appeal with costs.

Rampini, J.—The question for determination in this appeal is whether, when, under the provisions of section 66 (3) of the Bengal Tenancy Act, a Court for special reasons extends the period of fifteen days within which, on payment of the arrears due, a decree for ejectment can be stayed, it can do so subsequently to the framing of the decree, or can only do so when framing the decree. The Judge in the Court below has held that a Court may extend this period subsequently to the framing of the decree, and on behalf of the appellant it is contended that his view of the matter is erroneous.

It must be admitted that owing to the section containing no express provision on the point, the question is not free from doubt. But I am inclined to think for the following reasons that the Judge is in error, and that when for special reasons a Court extends the period mentioned in sub-section (2) of the [645] section, it can only do so when framing the decree and not at any later time.

In the first place, the whole section deals with the framing of the decree and the terms in which it should be couched. It does not seem to me to contemplate any proceeding subsequent to the preparation of the decree. It seems to me to prescribe how a decree for ejectment is to be drawn up and what is to be contained in it. It goes on to lay down that a decree for ejectment is not to be executed if the arrears due are paid within fifteen days, and gives a Court power for special reasons only to extend that period. Surely the special reasons must be stated at the time of the preparation of the decree, and the period must be extended there and then. If it were contemplated by the section that the judgment-debtor might subsequently apply for an extension of the period mentioned in the section, would this not have been expressly

prescribed, and would not this matter (an entirely separate and distinct matter from the framing of the decree) not have been dealt with in a separate section?

Then, if the period mentioned in the section can be extended subsequently, it can apparently be so extended at any subsequent time as long as the decree remains unexecuted. And, further, it can apparently be so extended repeatedly from time to time. So that it would be within the power of a Court to delay the payment of a landlord's arrears, and yet preclude him from ejecting his recusant tenant for years. I cannot think that the Legislature ever intended to give a Court so great a power and so wide a discretion as this, which would enable it to render the provisions of sub-section (2) of the section entirely nugatory. It is to be remembered that one of the objects of the passing of the Bengal Tenancy Act was to give the landlords "reasonable facilities for the recovery of their rents."

Again, once a decree is framed, a Court is judicially *functus officio*. All subsequent proceedings, except applications for review, must relate to the execution of the decree. But if an order under sub-section (3) can be passed subsequently to the preparation of the decree, then it would seem that in the case of a decree for ejectment the terms of the original decree can be modified in [646] execution, which would appear to me to be contrary to the usual course of judicial procedure.

The history of sub-section (3) would also seem to me to support me in the conclusion I have come to with regard to this matter. The former law (*i.e.*, section 78 of Act X of 1859 and section 52 of Bengal Act VIII of 1869) contained no such provision as sub-section (3) of section 66 of the present Act. But in the rulings of the Courts, under those sections, it was held that the Court passing the decree, or the Appellate Court, but not the Court executing the decree, had a discretion to extend the period of fifteen days by payment within which period execution could be stayed (see *Nubo Kisto Mookerjee v. Ramessur Goopto*, (1866) 18 W. R., 412, note: 2 Wyman, 75; *Sunkur Singh v. Huree Mohan Thakoor*, (1874) 22 W. R., 460, and *Puresh Nath Ghose v. Krishito Lall Dutt*, (1874) 23 W. R., 50. Under the old law, then, the period of fifteen days could only be extended by the Court of First Instance at the time of framing the decree, or by the Appellate Court when disposing of the appeal from the decree. It could not be extended subsequently by the Court executing the decree. Sub-section (3) of section 66 of the present Act is no doubt based on these rulings, and it is reasonable to suppose that it is intended to give a Court no further power than in these rulings it was ruled that it was advisable that a Court should have.

For these reasons I would decree the appeal.

Prinsep, J.—In this case a decree for ejectment of a tenant was passed under section 66 of the Bengal Tenancy Act. That section (2) requires that in a decree for ejectment for an arrear of rent, the decree shall specify the amount of the arrear and of the interest, if any, due thereon. The decree would also specify the amount of costs, if any, when made payable under it. The object of this is made clear by the following part of that sub-section which declares that "the decree shall not be executed if that amount and the costs of the suit are paid into Court within fifteen days from the date of the decree or, when the Court is [647] closed on the fifteenth day, on the day on which the Court re-opens."

Sub-section (3) further declares that "the Court may for special reasons extend the period of fifteen days mentioned in the section."

The tenant in this case, before the expiry of the period of fifteen days specified in sub-section (2), applied under sub-section (3) for an order to have that period extended.

The question raised is whether the application should be made to the Court of execution or to the Court which passed the decree.

The lower Court held that the application was properly made to the Court of execution.

The learned Judges who heard this second appeal have differed in their construction of this sub-section. Mr. Justice BANERJEE is of opinion that the application should be made to the Court of execution, while Mr. Justice RAMPINI holds that, as it involves an alteration and a reconsideration of the decree for ejectment, the Court which passed the decree is alone competent to deal with the matter. The appeal has now been referred to me as the third Judge.

At the outset I would observe that the matter under consideration is purely a matter of form. The Court which passed the decree would ordinarily be the Court to execute it. No doubt decrees are occasionally transferred for execution to another Court (see section 223 of the Code of Civil Procedure), but having regard to the character of a decree for ejectment of a tenant under section 66 of the Bengal Tenancy Act, it is very difficult to conceive any case in which such a decree would not be executed by the Court which passed it.

In the present case, too, the application under sub-section (3) to extend the period of fifteen days during which execution under sub-section (2) could not be taken out, is made within that time and before proceedings had been, or indeed could have been, taken by a Court of execution. The application, therefore, could only be made to the Court which passed the decree. The question under consideration in [648] this case is, therefore, purely one of form rather than of substance. It has undoubtedly been made to the proper Court, but has it been made in a proper form? Can it be made, as it has been made, by a mere petition asking for an order under sub-section (3) and setting out special reasons as valid grounds, or if it involves a reconsideration of the terms of the decree, should it not be made in the form of an application for review of judgment?

I propose to consider whether an extension of the term for which execution of a decree for ejectment is suspended is necessarily a modification of the decree. The decree is for ejectment. The law does not require, as in a decree for foreclosure or sale in a suit on a mortgage, that the decree shall specify the date on which the decree shall become absolute in regard to foreclosure or sale, and an order making it absolute. It merely requires that certain items shall be specified in it, and the object of this is to give information to the debtor, so that he may make the necessary payment, and thus avoid the ejectment; and the law then proceeds to declare that the decree shall not be executed, if the amount so specified and the costs of the suit are paid into Court within fifteen days from the date of the decree, or where the Court is closed on the 15th day, on the day on which the Court re-opens. That seems to me to be a direction to the Court of execution rather than to require a Court in passing a decree for ejectment to state these terms in its decree, and it is also a notice to the debtor how he may avoid the operation of the decree against him. Notwithstanding any order under sub-section (3) the decree would remain unaffected in its terms. The object of the application is only to obtain suspension of its execution so as to extend to the debtor further time to satisfy the demand of the landlord decree-holder. Probably, in respect of the procedure to be followed, there would be little difference

in dealing with such an application, whether it be regarded as an application to the Court of execution or to the Court which passed the decree. But there would be a great difference in the Court-fees payable. Court-fees would be payable on an application to the Court of execution merely as on an ordinary petition, whereas on an application for review of judgment, the fee payable [649] would be that of one-half of the fee payable on the plaint. The difference would thus be very considerable. Such considerations would alone make me hesitate to hold that in such a matter the Legislature ever intended to impose such a heavy burden on a tenant to enable him for good cause or for special reasons as set out in section 66 (3) to avert ejectment from the lands held by him, if for some unforeseen cause he was unable to liquidate within the prescribed time the arrears of rent for which the ejectment had been decreed.

Again, if we turn to section 244 of the Code of Civil Procedure which applies to cases under the Bengal Tenancy Act, we find that questions arising between the parties to a suit in which a decree was passed and relating to the execution of the decree are to be determined by order of the Court executing the decree. It has been said that if an extension under sub-section (3) be allowed in execution of a decree, it may be extended repeatedly from time to time, and that thus a Court will be able to delay payment of a landlord's arrears and also deprive him of the right to eject the tenant. I confess that I can see no hardship in so reading the law. The money due to the landlord will still bear interest, so that pecuniarily he will be protected, and the Court can grant an extension of time only *for special reasons*, which I understand to be that the tenant must show that he is, for some special reason, entitled to ask for such an indulgence. One of the objects of the Bengal Tenancy Act may be to give landlords "reasonable facilities for the recovery of their rents," and this is not really defeated by an order under sub-section (3). But another and an equally paramount object is not to allow the ejectment of a tenant except for cogent reasons. One of such reasons in the case of a tenant not having a saleable tenant-right is an arrear of rent at the end of a year, and, if this sum is paid within a time for special reasons fixed by the Court beyond the statutory period, I confess that I fail to see where an injustice is done to the interests of any party. The Act throughout is as much for the tenant as the landlord, and, within reasonable limits, it gives a discretion to the Courts under section 66 (3) *for special reasons* to step in and avert the [650] termination of a tenancy by carrying into execution a decree for his ejectment.

The reported cases on this subject are of little assistance. They were all decided under the now repealed Act X of 1859 and Bengal Act VIII of 1869, which were similar to section 66 (2) of the Bengal Tenancy Act; but these Acts were without any such powers as now contained in section 66 (3) of the Bengal Tenancy Act to mitigate the effect of the execution of a decree for ejectment. It was probably because the Courts held that under those laws a decree for ejectment was absolute, that this discretionary power has been given to be exercised for special reasons. I cannot agree that the exercise of such powers modifies the decree itself. It only suspends its execution, and, during this term, it gives the tenant power to prevent that execution by satisfying the claim of the landlord, and I can find no sufficient reason why such power should not be exercised under section 244 of the Code of Civil Procedure, as in other matters, between the parties, relating to the execution of the decree.

For these reasons I agree with Mr. Justice BANERJEE in dismissing this appeal with costs.

M. N. R.

Appeal dismissed.

[26 Cal. 650]

ORIGINAL CIVIL.

The 20th June. 1899.

PRESENT :

MR. JUSTICE STANLEY.

Mohesh Chunder Addy

versus

Manick Lall Addy.

Practice—Commission, Right of purdahnashin lady to be examined on—Civil Procedure Code (Act XIV of 1882), section 640.

The defendant applied for a commission to examine a Hindu *purdahnashin* lady. The plaintiff objected on the ground that the lady had prior to this appeared in public, and had also been examined in Court in a *palki*. Held, the lady being a *purdahnashin* she was entitled to be examined on commission.

IN this case the defendant Manick Lall Addy applied in Chambers for issue of a commission to examine a Hindu *purdahnashin* lady, one Sarut Coomary Dasse. The plaintiff opposed the application.

[651] Mr. Dunne for the Plaintiff.

Mr. W. C. Bonnerjee for the Defendant Manick Lall Addy.

Mr. Bonnerjee.—Sarut Coomary Dasse is a Hindu *purdahnashin* lady and is entitled to be examined on commission. Counsel referred to the judgment of TREVELYAN, J., in the case of *Chamatkar Mohiney Dabee v. Mohesh Chunder Bose*.

Mr. Dunne, *contra*.—I submit the Court ought not to issue the commission. Sarut Coomary appeared in Court in 1884, and was examined in a *palki*; she also appeared in public on another [652] occasion. She ought to come to Court and be examined in a *palki*.

* The 1st February, 1892.

PRESENT :

MR. JUSTICE TREVELYAN.

Chamatkar Mohiney Dabee

versus

Mohesh Chunder Bose.

The judgment in this case was as follows :—

Trevelyan, J.—This is an application for the examination of a Hindu lady, the plaintiff, under commission. It is opposed on the ground that she is not entitled to the benefit of section 640† of the Code of Civil Procedure. In the first place charges of immorality are made against her. I do not think I need consider them. I don't think they are relevant.

Exemption of certain women from personal appearance.

† [Sec. 640 :—Women, who according to the customs and manners of the country ought not to be compelled to appear in public, shall be exempt from personal appearance in Court.

But nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process.]

Stanley, J.—I am quite averse to granting commissions for the examination of witnesses, not merely on account of the expense, but also of their unsatisfactoriness. The laws of evidence are often not adhered to, and the advantage of *viva voce* examination before the Court is lost. At the same time the Legislature has thought fit to determine that *pardahnashin* ladies shall not be obliged to appear in public. The question is, is this lady to be examined under commission. On one occasion she did appear in Court in a *palki*. For so doing she was outcasted. There is evidence that on another occasion mentioned in the affidavits she appeared in public. Undoubtedly on that occasion she did not observe the rules of the *pardah*, but the statement that she appeared in public is exaggerated. Whether she took a seat beside Mr. Rose as alleged is not very clear. She was however covered with a *chudder*, which shows that she was not openly defying the rules and customs so strictly observed by Hindu ladies. Even assuming that a *pardahnashin* lady does offend against the rules of her class, I do not think that that deprives her of her right to be examined under commission. I quite agree with TREVELLYAN, J., in the case to which I have been referred. That was a stronger case than the present. For these reasons I shall issue a commission, and I shall reserve the costs. Commission to issue in terms of summons. Counsel cert fied for.

Attorneys for the Plaintiff: Messrs. *Banerjee & Halder*.

Attorney for the Defendant Manick Lall Addy: Babu *Bhupendro Nath Bose*.

Attorney for the Defendant Sarat Coomary Dassee: Mr. *Rose*.

D.S.

NOTES.

[For similar decisions, see also (1892) 3 C.W.N., 750; (1899) 3 C.W.N., 753 (*commission*); (1901) 5 C.W.N., *ccxxvii*.]

It may be Mr. *Garth* is right, and that they show she has appeared in public. It is then said that she has been in the habit of appearing in public and has no regard to the customs of her country and religion. Her denial is given in general terms, and though there are difficulties in the case I should be exceedingly careful before I forced into the public gaze a woman who may have gone outside the *pardah* either by way of experiment or otherwise. Many a woman may desire to taste the sweets of unsecluded life and have gone out of the *pardah*, and may desire to go back. Because a woman may once or twice have gone outside the *pardah* is the Court to keep her outside? The question is not whether this woman, who does more or less frequently go about in public, should be made to appear in Court, but whether I ought to compel her to appear in public. On the materials before me I think I shall be erring on the right side if I refuse to take away from her the privilege she is entitled to, and which but for the circumstances which have been stated, and which are denied, she would unquestionably have been entitled to. On the whole, it is safer to let the commission go. Costs of motion to be costs in the cause. Costs of examination of the lady to be reserved. With regard to the examination of the other witnesses Mr. *Bonnerjee* admits the evidence is what would be given on the account, not before the taking of the account. There will be liberty to renew this application as to them on notice. The commission to be executed in Calcutta. As this application is on summons in Chambers, I will certify for Counsel.

[683] FULL BENCH.

The 11th April, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,
MR. JUSTICE MACPHERSON, MR. JUSTICE GHOSE,
MR. JUSTICE HILL AND MR. JUSTICE JENKINS.

Girish Chunder Mitter.....Plaintiff

versus

Jatadhari Sadukhan.....Defendant.*

*Slander—Cause of action—Damages for insult, loss of reputation
and mental pain by the use of abusive language—Suit for
libel and slander—Special damage.*

Held, by the majority of the Full Bench (MACLEAN, C.J., MACPHERSON, HILL, and JENKINS, JJ., GHOSE, J., dissenting) that mere use of abusive and insulting language, such as *sala* (wife's brother), *haramzada* (base born or bastard), *soor* (pig), *baper beta* (son of the father, that is, ironically, bastard) apart from defamation, is not actionable irrespective of any special damage.

Per GHOSE, J.—A case like the present should be decided according to the principles of justice, equity and good conscience, and therefore it is but just and right that a person thus vilified, who has suffered from insult and mental pain, should be entitled to maintain an action irrespective of any special damage.

THE facts of this case are shortly as follow :—

The plaintiff, Girish Chunder Mitter, who is a respectable gentleman and a *kaystha*, had erected a fence which the defendant, Jatadhari Sadukhan, who is a *kolu*, i.e., an oilman, alleged had encroached on his land. Later on, the defendant sought out the plaintiff at his house. There it was alleged the defendant somehow got angry and began to abuse the plaintiff, using the following abusive epithets : *sala*, *haramzada*, *soor*, *baper beta*, etc. Thereupon the plaintiff instituted criminal proceedings against the defendant, and the latter was convicted and fined. The plaintiff then instituted an action, out of which the present appeal arose, to recover from the defendant Rs. 500 as damages for insult, loss of reputation, and mental pain, caused by the abusive words aforesaid.

The defendant denied having abused the plaintiff, and objected to the amount of the damages claimed.

[654] The Munsif held that the defendant had used to the plaintiff the abusive words complained of, and that in consequence thereof he was insulted and must have felt mental pain, and decreed Rs. 50 as damages with full costs of the suit.

On appeal, the District Judge held that what the defendant "indulged in was mere abuse and idle threatening. No one who heard him did or could imagine that he really meant to asperse the chastity of the plaintiff's sister or mother, or thought the plaintiff a pig. There was no defamation or intent to defame. What the defendant did was insulting to the plaintiff, but did not affect the plaintiff's reputation a whit ;" The District Judge also held upon an examination of the cases that mere angry or vulgar abuse was not actionable

* Reference to a Full Bench in Appeal from Appellate Decree No. 781 of 1897.

without proof of special damage. He accordingly dismissed the suit,* but without costs.

The plaintiff thereupon appealed to the High Court, and the appeal came on for hearing before MACLEAN, C.J., and BANERJEE, J., who referred the case to a Full Bench with the following OPINION :—

This appeal arises out of a suit brought by the plaintiff-appellant, to recover damages from defendant for insult, loss of reputation, and mental pain, caused by the defendant by the use of abusive language. The defendant denied using the alleged abusive language, and objected to the amount claimed as being excessive.

The first Court decreed the suit in part; but, on appeal by the defendant, the Lower Appellate Court has reversed the decision of the first Court and dismissed the suit, on the ground that mere abusive and insulting language, which did not affect the plaintiff's reputation, was not actionable.

In second appeal it is contended for the plaintiff-appellant that the decision of the Lower Appellate Court is wrong in law, and that abusive and insulting language, such as was used in this case, the words used being *sala* (wife's brother), *haramzada* (base-born or bastard), *soor* (pig), *baper beta* (son of the father, that is, ironically, bastard), which according to the finding of the first Court, not displaced by the Appellate Court, must have outraged the feelings of the plaintiff and caused him mental pain, was [655] actionable, apart from any special damage or injury to reputation, and in support of this contention the following cases are cited, namely, *Hossein v. Baker Ali*, (1864) W.R., Gap. No. 302; *Kanoo Mundle v. Rahamoolah Mundle*, (1864) W.R., Gap. No. 269; *Gholam Hossein v. Nur Gobind Dass*, (1864) 1 W.R., 19; *Tukee v. Khoshdel Biswas*, (1866) 6 W.R., 151; *Osseemooddeen v. Futteh Mahomed*, (1867) 7 W.R., 259; *Gour Chunder Puteedundee v. Clay*, (1867) 8 W.R., 256; *Sreenath Mookerjee v. Komul Kurmohar*, (1870) 16 W.R., 83; *Kali Kumar Mitter v. Ramgati Bhattacharjee*, (1871) 6 B.L.R., Ap., 99; 16 W.R., 84; *Srikant Roy v. Salcori Shaha*, (1878) 3 C.L.R., 181; *Ibin Hosein v. Haidar*, (1885) I.L.R. 12 Cal., 109; *Trailokhya Nath Ghose v. Chundra Nath Dutt*, (1885) I.L.R., 12 Cal., 424; *Kashiram v. Bhadu Bapuji*, (1870) 7 Bom. H.C., A.C., 17; *Parvathi v. Mannar*, (1884) I.L.R., 8 Mad., 175; and *Dawan Singh v. Mahip Singh*, (1888) I.L.R., 10 All., 425. The respondent, however, contends that some of the above cases support his view. On the other hand, for the respondent, the cases of *Phoolbasee Koer v. Parjun Singh*, (1869) 12 W.R., 369; *Chunder Nath Dhur v. Issur Dossee*, (1872) 18 W.R., 531; and *Nil Mudhub Mookerjee v. Dookeeram Khottah*, (1874) 15 B.L.R., 161, are relied upon as supporting the view taken by the Court of Appeal below.

The respondent further contends that this being a second appeal, the matter is disposed of by the findings of the Judge of the Lower Appellate Court.

The cases cited on each side more or less support the contention of that side. In this conflict of decisions, and regard being had to the importance of the question raised, we think it necessary [656] to refer the matter for decision to a Full Bench. The question, for decision of which the case is referred to a Full Bench, is, "Whether abusive and insulting language, such as that used in the present case, is actionable, irrespective of any special damage." And as that question arises in an appeal from an appellate decree, under rule 2 of the rules relating to References to a Full Bench, we must refer the appeal for the final decision of a Full Bench.

Babu Mahendra Nath Roy, for the appellant, submitted that the question should be answered in the affirmative. Although there is some conflict, the balance of Indian authorities is in the plaintiff's favour. The following authorities are in the plaintiff's favour: *Kano Mundle v. Rahamoolah Mundle*, (1864) W.R., Gap. No. 269; *Hossain v. Baker Ali*, (1864) W.R., Gap. No. 302; *Gholam Hossein v. Hur v. Gobind Dass*, (1864) 1 W.R., 19; *Tukce v. Khoshdel Biswas*, (1866) 6 W.R., 151; *Osseemooddeen v. Futteh Mahomed*, (1867) 7 W.R., 259; *Gour Chunder Futeedundee v. Clay*, (1867) 8 W.R., 256; *Sreenath Mookerjee v. Komul Kurmokar*, (1871) 16 W.R., 83; *Kali Kumar Mitter v. Ramgati Bhattacharjee*, (1870) 6 B.L.R., Ap., 99; 16 W.R., 84; *Srikant Roy v. Satcori Shaha*, (1878) 3 C.L.R., 181; *Ibin Hossein v. Haidar*, (1885) I.L.R., 12 Cal., 109; *Jogeswar Sarma v. Dina Itam Sarma*, (1898) 2 C.W.N., cxiii; *Kashiram v. Bhadu Bapuji*, (1870) 7 Bom. H.C. A.C., 17, decided by COUCH, C.J.; *Parvathi v. Mannar* (1884) I.L.R., 8 Mad., 175, and *Dawan Singh v. Mahip Singh*, (1888) I.L.R., 10 All., 425. The Calcutta cases cited amount to this, that mental distress caused by abusive words is sufficient to sustain an action for damages. With regard to the particular words used in this case, I submit that the case of *Ibin [657] Hossein v. Haidar*, (1885) I. L. R., 12 Cal., 109, is an authority for the proposition that the word *haramzada* is actionable *per se*, and that case is exactly in point. Regard must be had to the effect that the words were calculated to produce, and not to what the bystanders might have believed. *Chunder Nath Dhu v. Isurree Dossee*, (1872) 18 W. R., 531, and *Nil Madhub Mookerjee v. Dookeeram Khottah*, (1874) 15 B. L. R., 161, are apparently against the plaintiff. But in the former case it was not necessary to decide the point, and in the latter case, which was the decision of a single Judge, there was merely an opinion against encouraging actions for slander, the point really decided being quite different. *Trailokhya Nath Ghose v. Chundra Nath Dutt*, (1885) I. L. R., 12 Cal., 424, is not against the plaintiff, as it follows *Srikant Roy v. Satcori Shaha*, (1878) 3 C. L. R., 181.

My second point is that the view I am contending for is in accordance with the principles of "justice, equity and good conscience:" see Regulation VII of 1832, section 9. It is in consonance with Hindu Law [see *Narada*, pp. 207--212, *Vrihaspati*, p. 355, *Vishnu*, pp. 27, 28, 36, &c.—Max Muller's Sacred Books of the East, and Mandlik's *Jajnavalka*, p. 232, section 205] and with Roman Law, in which personal insult is made the basis of an action. [See Sandars' Institutes of Justinian, 4, 4, 1—p. 418.] I shall state my proposition thus: Every man has an absolute and positive right not to be so insulted as to cause him mental distress; therefore any act in violation of such a right is actionable *per se*, and general damage, as distinguished from special damage, is recoverable. See *Katchffe v. Evans*, (1892) L. R., 2 Q. B., 524 (528), and the Indian Penal Code, section 44.

My next point is that my contention is in harmony with the criminal law in this country as contained in the Indian Penal Code. Criminal liability furnishes a safe and proper test of civil liability: see *Abdul Hakim v. Tej Chandar Mukarji*, (1881) I. L. R., 3 All., 815 (817); *Augada Ram Shaha v. Nemat Chand Shaha*, (1896) I. L. R., 23 Cal., 867 (871), and sections 499 and [658] 504 of the Indian Penal Code. The present case comes under section 499, or at any rate certainly under section 504. No special damage need be proved when the wrong complained of is in violation of a statutory obligation imposed: see *Chamberlaine v. Chester and Birkenhead Railway Co.*, (1848) 18 L. J., Ex., 494 (496). The criminal law abolishes the distinction between libel and slander.

Lastly, I submit that the distinction which obtains in the English law between libel and slander is based more on authority than on reason, and ought not to be introduced into this country, having regard to the social conditions which prevail here. If the words complained of in the present case were reduced to writing, an action would lie without proof of special damage, according to the English law. There is no reason why there should be any difference, when the words are *spoken* and not *written*. The distinction has been condemned by English Judges: See *Thorley v. Lord Kerry*, (1812) 4 Taunt., 355 (363); 13 Rev. Rep., 626 (634), (*per* MANSFIELD, C.J.) and *Allsop v. Allsop*, (1860) 29 L. J., Ex., 315. Women could get no redress when slandered, a state of things which was characterised as barbarous in *Lynch v. Knight*, (1861) 9 H. L., C., 577 (594). It grew so unsatisfactory that the Legislature was compelled to interfere and to pass the Slander of Women Act, only so late as in 1891. Even the word *bastard* is not actionable (see Folkard on Libel and Slander, p. 149), it being merely an ecclesiastical offence to call one by that name, unless the use of the word amounts to slander of title. See also Pollock on Torts, 2nd edition, ch. VII, pp. 220, 221.

Babu *Sharada Charan Mitra*, for the respondent, contended that the case was concluded by the findings of fact. As to the law, the appellant must make out a case of defamation before he can succeed. No hard and fast rule should be laid down. He referred to *Phoolbasee Koer v. Parjun Singh*, (1869) 12 W. R., 369; *Chunder Nath Dhur v. Issuree Dossee*, (1872) 18 W. R., 531; *Nil Madhab Mookerjee v. Dookeeram*; [659] *Khottah*, (1874) 15 B. L. R., 161; *Srikant Rai v. Satcori Shaha*, (1878) 3 C. L. R., 181; and *Trailokhya Nath Ghose v. Chundra Nath Dutt*, (1885) I. L. R., 12 Cal., 424, as supporting his contention. The words complained of are the common form of abuse in this country, and knowing how litigation was rampant here, if the question were answered in the affirmative, the result would be simply disastrous. See also *Baylis v. Lawrence*, (1841) 11 A. & E., 920. [JENKINS, J.—*Komul Chunder Bose v. Nobin Chunder Ghose*, (1868) 10 W. R., 184; 1 B. L. R., S. N., 12, and *Mahomed Ismail Khan v. Mahomed Tahir*, (1873) 6 N. W. P., H. C., 38, are in your favour.] The Indian Penal Code satisfies the requirements of public policy.

Babu *Mahendra Nath Roy*, in reply, referred to the cases of *Parrat v. Carpenter*, Croke's Rep., 502 (38 Eliz); *Baker v. Pierce*, 6 Mod. Rep., 23 (2 Anne); and *Ayre v. Craven*, (1834) 2 A. & E., 2 (7), and to Bentham's Theory of Legislation, p. 299, in which it was shown that the absence of any relief granted by law in cases like the present, led to the practice of duelling.

The following **opinions** were delivered by the Full Bench (MACLEAN, C.J., MACPHERSON, GHOSE, HILL and JENKINS, JJ.):—

Maclean, C.J. (MACPHERSON, HILL and JENKINS, JJ., *concurring*).—This appeal arises out of a suit brought by the plaintiff to recover damages from the defendant for insult, loss of reputation, and mental pain, caused by the defendant by the use of abusive language. The defendant denied using the alleged abusive language, and objected to the amount claimed as being excessive.

The first Court decreed the suit in part; but on appeal by the defendant the Lower Appellate Court has reversed the decision of the first Court and dismissed the suit, on the ground that mere abusive and insulting language, which did not affect the plaintiff's reputation, was not actionable.

[660] Against that decision of the Lower Appellate Court this appeal has been preferred, and the learned Judges before whom the appeal came on for hearing, in view of the conflict, or apparent conflict, of decisions, have referred the matter to a Full Bench.

The actual question referred is expressed in these terms :—

“Whether abusive and insulting language, such as that used in the present case, is actionable, irrespective of any special damage.” But as the question referred arises in an appeal from an Appellate decree, under rule 2 of the rules relating to References to a Full Bench, the whole appeal is referred.

It has been contended for the plaintiff before us that the decision of the Lower Appellate Court is wrong in law, and that abusive and insulting language, such as was used in this case, [the words used being *sala* (wife's brother), *haramzada* (base born or bastard), *soor* (pig), *baper beta* (son of the father, that is, ironically, bastard)], is actionable. In support of this contention, it has been argued that, in a suit for defamation, based on verbal slander, it is unnecessary to allege or prove such special damage as the English law requires, and that apart altogether from defamation a suit will lie for abuse which causes or is calculated to cause mental distress or pain. The tendency and probable effect of words must be determined in reference to the circumstances under which they are used, and thus in the judgment of the Lower Appellate Court it is said: “No one who heard him did or could imagine that he really meant to asperse the chastity of the plaintiff's sister or mother or thought the plaintiff a pig. There was no defamation or intent to defame. What the defendant did was insulting, but did not affect the plaintiff's reputation a *whit*.”

This finding wholly excludes that which is an essential element of actionable defamation, and it therefore is outside the scope of our inquiry to determine whether or not the English rule which requires special damage to be established in an action for oral defamation should prevail in this country.

We therefore only have to consider whether an action will lie for insult or abuse, with resultant pain and distress of mind, [661] apart from defamation. The first question one naturally asks is what is the gist of this actionable wrong?

In the argument before us it was suggested that the cause of action was the injury to the abused man's feelings, his mental distress and pain.

It is difficult to suppose that the causing of mental distress and pain can *per se* be actionable. Mental condition of this sort may obviously arise from causes other than abuse or insult, and a moment's reflection makes it clear that the proposition thus widely expressed would lead to manifest absurdities. For instance if *A* and *B* are sitting in a room together, and *A* loses his temper, and uses insulting and abusive language towards *B*, whose feelings are wounded, *B* may bring an action against *A*, or if *A* uses such language of some relation or friend of *B*, which equally wounds *B*'s feelings, an action will lie. Such a view does not commend itself to one's common sense, nor is it reasonable.

It is said that the reported decisions of the Indian Courts, and in particular of this Court, support the position that, to cause mental pain and distress by insult or abuse, as distinct from defamation, is actionable, and a large number of authorities have been cited to us as establishing this. It appears to us, however, unnecessary to discuss these cases in detail. Many of them are so inadequately reported that it is impossible to discover what was the state of facts then under consideration.

This is so of the cases of *Kanoo Mundle v. Rahamoolah Mundle*, (1864) W. R., Gap. No. 269; *Gholam Hossein v. Hur Gobind Dass*, (1864) 1 W. R., 12; *Tuke v. Khoshdel Biswas* (1866) 6 W. R., 151; *Osseemooddeen v. Futteh Mahomed*, (1867) 7 W. R., 259; *Gour Chunder Putcedundee v. Clay*, (1867) 8 W. R., 256. and *Sreenath Mookerjee v. Komul Kurnokar* (1871) 16 W. R., 83. From a perusal of those cases in which the facts are set out, it is apparent that

in each there was sufficient to support a suit for defamation. In none of the cases on [662] which the plaintiff relies, as we read them, was the point raised or at any rate determined, whether abuse, as distinct from defamation, was actionable, the question rather being whether proof of special damage was an essential condition of the plaintiff's success. On the other hand, this precise point was clearly raised and determined adversely to the view now advanced by the present plaintiff in the case of *Komul Chunder Bose v. Nabin Chunder Ghose*, (1868) 10 W. R., 184: B. L. R. S. N., 112, and that decision has been followed in the case of *Mahomed Ismail Khan v. Mahomed Tahir*, (1873) 6 N. W. P. H. C., 38. It will thus be seen that the weight of authority is not in the appellant's favour as he has urged.

Apart then from authority, ought mere personal insult or abuse, as distinct from defamation, and not touching the plaintiff's credit or reputation, to be actionable in this country, if it produce mental pain or distress? It has been urged that insult being punishable under the Penal Code, as it was under the old Hindu penal system, it must be sufficient ground-work for a civil suit. But we think the assumption underlying this argument has no justification, for though the facts, which go to make a penal offence may, in general, suffice to constitute a civil wrong, it requires no exhaustive examination of the forms of civil and criminal liability to show that the latter is no infallible guide to the former. This appears to us to be made clear by the very section of the Penal Code which prescribes a punishment for insult, for the purpose of the penalty imposed is to prevent a breach of the peace.

Do then considerations of public policy demand that we should decide in favour of the proposition for which the appellant contends? We think not. If illustrations were needed of the mischief to which such a decision would lead, it is furnished by this present case. For words of idle abuse uttered in the heat of excitement, incapable of touching the plaintiff's reputation or credit, the defendant has been prosecuted and punished in the Criminal Courts: and then, as though that were not enough, the [663] plaintiff has sued him in the Civil Courts carrying the case for that purpose, through three separate Courts, though it has been found, as is obvious to any one, that the words used "did not affect the plaintiff's reputation a whit." Section 504 of the Penal Code provides a remedy, and that an ample remedy, for conduct such as that of the defendant's; and in our opinion there is no principle of public policy which requires that, in addition, the party complaining should have a remedy by civil suit.

We would, therefore, answer the question embodied in the reference by expressing the view that abusive and insulting language, not amounting to defamation, is not actionable. Section 95 of the Penal Code indicates that harm of a trumpery nature, i.e., "so slight that no person of ordinary sense and temper would complain of it," is not to be treated as an offence. If mere vulgar abuse, uttered in a moment of anger, abuse to which no person of ordinary sense and temper would attach the slightest importance, is, if it cause mental distress, to afford a ground of action, it is lamentable to think to what an alarming extent the floodgates of litigation would, in this country, become open. We are but little disposed to favour any such view. On the contrary we agree with the expression of opinion of PONTIFEX, J., in the case of *Nil Madhub Mookerjee v. Dookeeram Khottah*, (1874) 15 B. L. R., 161 (166), that actions for verbal slander ought not to be encouraged.

The appeal must be dismissed with costs.

Ghose, J.—The question referred to the Full Bench in this case is "whether abusive and insulting language, such as that used in the present case, is actionable irrespective of any special damage."

The words of abuse used by the defendant towards the plaintiff were *sala* (wife's brother), *haramzadu* (bastard), *soor* (pig), *baper beta* (son of father, ironically, bastard) which, according to the finding of the Court of First Instance, not displaced by the Appellate Court, must have caused mental pain to the plaintiff. It appears from the judgment of the Munsif that the plaintiff is a respectable person, and much above the defendant in social [664] position, and that there were several persons present on the occasion when the defendant thus abused the plaintiff.

The learned Judge of the Court below was, however, of opinion that "no one who heard him did or could imagine that he (the defendant) really meant to asperse the chastity of the plaintiff's mother or thought the plaintiff a pig. There was no defamation nor intent to defame: what the defendant did was insulting to the plaintiff, but did not affect the plaintiff's reputation a whit."

The circumstances under which the insult was offered to the plaintiff are thus described by the District Judge: "What happened in this case? The appellant believed or affected to believe that the plaintiff had encroached on his land and ought to retire a particular fence or hedge. Nothing happened when the fence was erected or repaired; but later the appellant sought out the plaintiff at home. He did not begin vilification at once. The plaintiff's witness, Tarini Kundu, says the defendant began by hailing the plaintiff as *kaka-babu* and *dada-babu*, but the plaintiff remaining indoors and preserving silence the defendant got angry and launched into abuse of the plaintiff. What the defendant's precise provocation was we don't know. He must have had or thought he had a grievance." According to the opinion of the learned Judge, the plaintiff did not suffer any special damage; but the fact remains that grave insult was offered to him in the presence of other people, and his feelings were outraged, and that the defendant, without any provocation that we know of, but apparently influenced by a desire to avenge the plaintiff for a supposed grievance, vilified him in the manner alleged. And the question is whether for this the plaintiff is entitled to maintain an action.

There is no written law on the subject either in this country or in England, except what is provided for in the Slander of Women's Act, 1891 (54 and 55 Vic., ch. 51). The law is to be gathered from the opinions of Judges expressed in different cases from time to time, and from what may be the common law of the country. According to the English law "slander is an actionable wrong when special damage can be shown to [665] have followed from the utterance of the words complained of, and also in the following cases: Where the words impute a criminal offence; where they impute having a contagious disease, which would cause the person having it to be excluded from society; where they convey a charge of unfitness, dishonesty or incompetence in an office of profit, profession or trade; in short, where they manifestly tend to prejudice a man in his calling. This is not so in the case of libel, for it is enough to make a written statement *prima facie* libellous, that it is injurious to the character or credit (domestic, public or professional) of the person concerning whom it is uttered or in any way tends to cause men to shun his society or to bring him into hatred, contempt or ridicule." (See the Law of Torts by Pollock, p. 230, 5th edition.)

This distinction, however, has been disapproved by several eminent Judges in England [see the observations of MANSFIELD, C.J., in *Thorley v. Lord Kerry*, (1812) 13 Rev. Rep., 635: 4 Taunt., 355 (363); *Lynch v. Knight*

(1861) 9 H. L. C., 577 (594); *Roberts v. Roberts*, (1864) 33 L. J., Q. B., 249.] In the case of *Parvathi v. Mannar*, (1884) I. L. R., 8 Mad., 175, TURNER, C. J., sitting with MUTHUSAMI AYYAR, J., condemned the distinction which exists under the English law between slander and libel. He thus expressed himself: "The difference between the extent of the publication of defamatory terms, according as to whether they are committed to print or uttered orally, is in reality accidental. Defamatory matter, when written, is frequently addressed only to a single person; when printed, its publication may be arrested immediately. The publication of a defamatory imputation in a newspaper circulated extensively in a place where the person defamed is unknown may cause him far less injury, whether pecuniary or sentimental, than its publication orally in the neighbourhood in which he resides, to his acquaintances or to persons who can influence his advancement in life. In this country we are not bound to adopt the rules regulating compensation for injuries which are recognised by the [666] English Courts, though it has been the practice of Judges in British India to regard the decisions of the English Courts with the highest respect as embodying the wisdom and experience of a judiciary, whose reputation is second to none for independence and ability. But the distinction drawn by the English law between written or printed and oral slander, which is said to have had its origin in the circumstance that the most frequent instances of oral slander were at one time punishable by Ecclesiastical Courts (2 Salkeld, 694) has been condemned by many eminent English lawyers. Mr. Starkie observes that the distinction 'must be regarded as an absolute peremptory rule not founded in any obvious reason or principle.' In *Roberts v. Roberts*, (1864) 33 L. J., Q. B., 249, COCKBURN, C. J., and CROMPTON, and BLACKBURN, JJ., pronounced the law of England unsatisfactory and regretted they were bound by it. In *Lynch v. Knight*, (1861) 9 H. L. C., 577 (594), the Lord Chancellor CAMPBELL expressed the same views, and Lord BROUGHAM, in the same case, declared that the English law was in this respect not only unsatisfactory but barbarous. The Indian Law Commission, of which Lord Macaulay was a member, in its report on the proposed Penal Code, demonstrated that the English law regarding defamation was inconsistent and unreasonable (Introductory Report, note, p. 7, Macaulay's Works, p. 546). The civil law does not recognise the distinction, nor does the Law of Scotland, and the recommendations of Lord Macaulay's commission were approved and accepted by the British Indian Legislature. We, therefore, feel justified in giving effect to our conviction that the rule we are considering is not founded on natural justice, and should not be imported into the law of British India."

Later on, he observed. "Nevertheless, reason suggests that a distinction should be drawn between cases where the slanderer acts from mere carelessness or in an honest but mistaken belief as to his duty, and cases where the slanderer is insolent without any provocation or is influenced by a desire to gratify his enmity. The person defamed may be content to accept a sum sufficient to establish his innocence of the charges made in the former [667] case; in the latter he is entitled to full compensation for the pain inflicted on him."

It is, I think, a well-known maxim of law that all members of a community are under a general duty towards their neighbours to do them no hurt without lawful cause or excuse; and the question here arises whether the act of the defendant is not a violation of the personal right of the plaintiff—a right of protection against any outrage or affront by others, and whether it is not an injury to the plaintiff. Justinian thus defines the word "injury": "*Injuria*, in its general sense, signifies every action contrary to law: in a special sense it

means "sometimes the same as *contumelia* (outrage), which is derived from *contemnere* the Greek *ὑβρις*; sometimes the same as *culpa* (fault), in Greek *ἀδικύμα* as in the *lex Aquilia*, which speaks of damage done *injuria*; sometimes it has the sense of iniquity, injustice, or in Greek *ἀδικία*; for a person against whom the proctor or judge pronounces an unjust sentence is said to have received an *injuria*. *Injuria*, then, is used in three senses—(1) a wrongful act, an act done *nullo jure*; (2) the fault committed by a judge who gives judgment not according to *jus*; (3) an outrage or affront. An injury is committed not only by striking with the fist, or striking with clubs or the lash, but also by shouting till a crowd gathers round anyone, by taking possession of anyone's goods, pretending that he is debtor to the inflictor of the injury, who knows he has no claim on him; by writing, composing, and publishing a libel or defamatory verses against any one; by maliciously contriving that another does any of these things; by following after an honest woman or a young boy or girl; by attempting the chastity of any one;" and, in short by numberless other acts. (See Institutes of Justinian by Sandars, p. 509). And in section 44 of the Indian Penal Code we find the following definition: "The word 'injury' denotes any harm whatever illegally caused to any person, in body, mind, reputation or property." Though this definition is given with reference to a criminal offence, I think it may well be followed in determining the question, whether a civil action may be brought where the plaintiff has sustained an injury either in body, mind, reputation or property.

Bentham in his "Theory of Legislation," observes: "To [668] perceive all the evil which may result from these offences, it is necessary to put all remedies out of view: it is necessary to suppose there are none. Upon this supposition, these offences may be repeated at will. an unlimited career is opened to insolence; the person insulted to-day may be insulted to-morrow, the next day, every day and every hour; each new affront facilitates another, and renders more probable a succession of injuries of the same kind. Now under the notion of a corporal *insult* is comprehended every act, offensive to the person, which can be inflicted without causing a lasting physical evil, every act which produces a disagreeable sensation, inquietude or pain. But an act of this sort, which, if single, would be scarcely sensible, may produce, by force of repetition, a very painful degree of uneasiness, or even intolerable torture;" and later on he said "what is signified by these verbal assaults is this, that the person assailed is thought worthy of public contempt; but on what particular account is not specified. The probable evil which may result is the renewal of similar reproaches. We may fear, too, lest a profession of contempt publicly made may invite other men to join in it. It is in fact an invitation which many will be ready to accept. The pride of censure, the pleasure of triumphing at another's expense, the spirit of imitation, the inclination to believe all strong assertions, give weight to these sorts of injuries. But they seem to owe their principal importance to the negligence of the laws, and to the usage of duelling—that subsidiary remedy by which the popular sanction has attempted to supply the silence of the laws." And it seems to be obvious that for the peace and well-being of society, verbal abuse, if it is calculated to bring another into contempt, ought to be discouraged.

The distinction between oral and written slander, as it exists in the English law, does not, as I understand it, obtain according to Scotch law, where anything defamatory, which produces uneasiness of mind, is actionable; and so it is under the Roman Law, according to which a party is not only entitled to sustain an action for contumelious words spoken concerning himself, but also

in respect of those spoken of others of his family, if they tend collaterally to subject him to degradation and contempt [669] (see Starkie's Law of Slander and Libel by Folkard, 4th edition, p. 19).

If a man commits an assault upon another, though he may not actually touch him at all, or if he lifts up his cane or his fist in a threatening manner at another, or strikes him, however slightly, he is liable to an action for damage; and one fails to see what difference in principle exists between a case like this and a case where a man offers another gross insult in the presence of other people—insult calculated to bring him into contempt and to cause him mental torture.

According to the common law in this country, as expounded in the text of the sages, verbal abuses are punishable (see the Sacred Books of the East by Professor Max Muller, vol. 7, p. 270 and vol. 33, p. 207; Mandlik's Byabahara Mayukha, p. 232). And I find that ever since the establishment of the High Court in this province, it has almost invariably been held that verbal abuse, though no actual damage has been caused, is actionable. In the case of *Kanoo Mundle v. Rahamoolah Mundle*, (1864) W. R., Gap. No. 269, NORMAN, C.J., expressed himself as follows: "The words, which are of the coarsest abuse, do undoubtedly impute that to the plaintiff which would, if believed, have been hurtful to the feelings of his family and have lowered his character in respect of his caste, and the uttering of them, therefore, amounts to an offence under section 499 of the Penal Code. Applying the test familiar to English law, the uttering of the words in question, standing by itself, was a wrong, and therefore gave to the individual aggrieved by it a right of action independently of any proof of special damage or actual pecuniary injury;" and later on he observed: "No doubt actions for slander are often vexatious. But to prevent people from taking the law into their own hands, and for the preservation of peace and order, it is a matter of the greatest importance that Courts of Justice should afford an effectual remedy to persons feeling themselves aggrieved by wanton and virulent abuse." The same view was adopted in the case of *Gholam Hossein v. Hur Gobind Dass*, (1864) 1 W. R., 19; in *Tukee v. Khoshdel* [670] *Biswas*, (1866) 6 W. R., 151; in *Osseemooddeen v. Futteh Mahomed*, (1867) 7 W. R., 259; *Gour Chunder Puteedundee v. Clay*, (1867) 8 W. R., 256; as also in the case of *Sreenath Mookerjee v. Komul Kurmohar*, (1871) 16 W. R., 83, where MITTER, J., in delivering the judgment of the Court, observed as follows: "We think that the Judge is wrong in holding that the abusive words complained of by the plaintiff in this case are not actionable. It is true that the plaintiff might have instituted proceedings against the defendant in the Criminal Court; but his failure to do so does not deprive him of his right to bring a suit in the Civil Court. The case is governed by the ruling of a Division Bench of this Court in the case of *Kali Kumar Mitter v. Ramgati Bhattachajee*, (1870) 16 W. R., 84, note: 6 B. L. R., Ap., 99. The words alleged to have been used were certainly such as to wound the feelings of the plaintiff." And he remanded the case for the purpose of a finding upon the question whether the defendant did use the words imputed to him or not. In the case of *Srikant Roy v. Satcoori Shaha*, (1878) 3 C. L. R., 181, MITTER and MACLEAN, JJ., took the same view of the matter. I find also that in the case of *Ibin Hossein v. Haidar*, (1885) 1. L. R., 12 Cal., 109, FIELD, J., sitting with O'KINEALY, J., took practically the same view of the law; and he observed: "We do not propose to lay down as a general rule that the use of every kind of abusive language is actionable. But we think that language, which, having regard to the definition of defamation in the Indian Penal Code, is calculated to injure the reputation, language which, having regard to the respectability and position of the person

abused, is calculated to outrage his feelings, lower the estimation in which he is held by persons of his own class, and so bring him into disrepute, is actionable. We think there is no doubt that the language alleged to have been used in this case comes within this principle:" and in so deciding the learned Judges followed the rulings to which I have adverted. [671] In the case of *Trailokyanath Ghose v. Chundra Nath Dutt*, (1885) I. L. R., 12 Cal., 424, PRINSEP and MACKAY, JJ., adopted the same view, and followed the case of *Srikant Roy v. Satcoori Shaha*, (1878) 3 C.L.R., 181, and the opinion expressed in *Parvathi v. Mannar*, (1884) I. L. R., 8 Mad., 175, to which I have already referred. And, lastly, we have a very recent case decided by BANERJEE and WILKINS, JJ., (unreported) where the learned Judges, upon the point whether slander is actionable in the absence of special damage, expressed themselves as follows: "Though the rule of English law requires proof of special damage to sustain an action for slander except in certain cases, and though there is some conflict of authority in this country, the later cases are in favour of the view that where the abusive language used is such that, having regard to the respectability and position of the person abused, it is calculated to outrage his feelings or lower the estimation in which he is held by persons of his own class, and so bring him into disrepute, it is actionable without proof of special damage." [*Dina Ram Sarma v. Jogeswar Sarma*, (1898) 2 C. W. N., cxxiii].

In the other provinces also, very nearly the same view of the law has been adopted. In *Kashiram v. Bhadu Bapuri*, (1870) 7 Bom., H.C., A.C., 17, COUCH, C.J., followed the rulings of the Calcutta High Court, and he held that the case must be decided according to the principles of justice, equity and good conscience; and he was of opinion that mere verbal abuse without proof of actual damage was actionable. In the case of *Parvathi v. Mannar*, (1884) I. L. R., 8 Mad., 175, the learned Chief Justice, among other matters, observed: "It is often impossible to bring specific proof of the damage which a man may suffer in his business or in his friendships from such an injury. The injury may be occasioned before he has any opportunity of rebutting the slander, and the memory of the slander may survive its contradiction, and may at any time influence his [672] neighbours unconsciously to his disadvantage; nor is the suffering trivial which such a wrong may inflict on its victim." It will be observed that although TURNER, C.J., in one portion of his judgment, expressed that "mere hasty expressions spoken in anger or vulgar abuse to which no hearer would attribute any set purpose to injure character would of course not be actionable," still he held that "the action should be allowed where the defamation is such as would cause substantial pain and annoyance to the person defamed, though actual proof of damage estimable in money may not be forthcoming," and that "a distinction should be drawn between cases where the slanderer acts from mere carelessness, or in an honest but mistaken belief as to his duty, and cases where the slanderer is insolent without any provocation, or is influenced by a desire to gratify his enmity." In the case of *Abdul Hakim v. Tej Chandra Mukarji*, (1881) I. L. R., 3 All., 815, STRAIGHT, J., held that the law of defamation, which should be applied in suits in India for defamation, is that laid down in the Penal Code, and not the English law of libel and slander, and he observed that "the state of society and the condition of things in the two countries is wholly dissimilar, and to lay it down as an inflexible rule that any false and malicious statements, no matter how defamatory, may be made with impunity if only embodied in a petition filed in reference to some pending case, could not but entail the most mischievous consequences."

In *Dawan Singh v. Mahip Singh*, (1888) I.L.R., 10 All., 425, where, upon the plaintiff being cited as a witness in a suit, and where after giving his evidence the defendant was examined by the Court and stated that there was enmity between him and the plaintiff, and upon the Court inquiring what the reason of this enmity was, he, the defendant, used words conveying the meaning that plaintiff's descent was illegitimate, it was held by BRODHURST, J., that under the circumstances the statement complained of had been made by defendant while deposing in the witness-box, and therefore it was privileged. But MAHMOOD, J., took a very contrary view, and he discussed at length the law upon the subject, and held that the [673] statement was not privileged. He expressed the opinion that the law as laid down by the Calcutta High Court was correct, and he showed why the distinction which obtains in the English law between verbal and written slander should not be adopted in this country; and he observed as follows (at page 444 of the report): "The reasons ordinarily employed against this view are that 'abusive, insulting and unmannerly language which affects not a man's liberty or estate are of too indefinite and uncertain a character to be the subject of an action for pecuniary damages. Such injuries, rather affronts to the feelings, are as incapable of definition as they are of admeasurement. They depend upon the rank, situation and condition of the parties, and on circumstances which may be felt but not defined; they may depend on the tone of voice, the gestures, even looks, by which they are accompanied, and in some instances, silence may be more contemptuous and insulting than direct expressions' (Starkie, p. 17). It is submitted that these objections apply equally to almost all personal injuries (such as assault, defamation, false imprisonment, etc.), in which mental suffering is recognized as an element of assessing damages; so much so that there is no fixed rule for estimating damages in such cases, and the matter is usually left to the discretion of the jury with reference to the circumstances of aggravation or mitigation: as the case may be. In India such questions would have to be decided by the Judge, and I can anticipate no impossibility in arriving at a fair assessment of damages in cases of personal insult as distinguished from defamation." Later on (at page 445) he observed: "Unadvanced countries like India present a state of society where personal insult needs more check than in more civilized countries like England." He also said (at page 446): "Another objection, so far as I can gather from the English text books to recognizing personal insult as a distinct tort, is that it would afford far too large a scope for vexatious litigation, and the ordinary intercourse of society would be impeded and fettered by the apprehension of vexatious and harassing suits for trifling causes. The answer to such an argument is, I think, furnished best by the celebrated dictum of Lord HALL in *Ashby v. White*, 1 Smith L. C., (10th Ed.) 231 (268): 'As in an action for slanderous words, though a man does not [674] lose a penny by reason of the speaking them; yet he shall have an action. So, if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little diachylon, yet he shall have this action, for it is a personal injury. And it is no objection to say that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense.'

Against this large array of cases in support of the plaintiff's contention, some cases have been quoted on the other side. In the case of *Komul Chunder Bose v. Nobin Chunder Ghose*, (1868) 10 W. R., 184, where a suit was brought to obtain damages for defamation contained in a letter written and sent by the defendant to plaintiff, and where the only damage alleged was the injury to plaintiff's feelings, it was held that such injury was not in itself

a ground for awarding damages in a civil action. No authority is quoted for the decision, and the earlier rulings of this Court do not seem to have been brought to the notice of the learned Judges. In the case of *Phool-basee Koer v. Parjun Singh*, (1869) 12 W. R., 369, it was held that mere verbal abuse without proof of actual damage is not actionable. Here also no authority is quoted and the earlier cases of this Court do not appear to have been considered. In the case of *Chunder Nath Dhur v. Isurree Dossce*, (1872) 18 W. R., 531, KEMP and GLOVER, JJ., held that though mere verbal abuse without consequent injury would give no claim for damages, yet where a person of some position had been assaulted and grossly abused, and where her reputation must have been injured and her feelings outraged, she was entitled to damages. In the case of *Nil Madhub Mookerjee v. Dookeer-ram Khottah*, (1874) 15 B L.R., 161, where the question was raised whether an action for slander could be brought jointly against several defendants, it was held by PONTIFEX, J., that it could not be so brought, because each person sued for verbal slander was responsible only for what he himself had uttered. And leave was granted to the plaintiff [675] to elect any one of the defendants to sue. The learned Judge, however, seems to have then expressed a doubt whether the words complained of were libellous *per se*; and it was thrown out that unless special damage was proved the Court would be very much reluctant to give any damage. I take it that the question which arises in this case was not really decided then. In the case of *Mahomed Ismail Khan v. Mahomed Tahir*, (1873) 6 N. W. P., H. C., 38, where an action was brought for damage for defamation contained in two letters written and sent by the defendant to the plaintiffs, but where no other publication was alleged and no other injury than the injury to the feelings was caused, TURNER, J., followed the decision in the case of *Komul Chunder Bose v. Nobin Chunder Ghose*, (1868) 10 W. R., 184, and held that the suit was not maintainable. The earlier rulings of the Calcutta High Court do not seem to have been then brought to the learned Judge's notice, and I take it that he considerably modified his opinion when as Chief Justice of the Madras High Court he decided the case of *Parvathi v. Mannar*, (1884) I. L. R., 8 Mad., 175.

I have now referred to all the Indian authorities upon the subject that have been brought to our notice, and I have also referred to what is the common law in this country as expounded by sages; and it seems to me that the balance of authority is decidedly in favour of the proposition that the action does lie.

It may no doubt be said, as it has been said, that it is very difficult to measure the damage caused to a person's feelings by reason of insult offered to him, and that if the view I have expressed be adopted, it would lead to the logical result that an action may be brought for damage if a person defames another's nearest relations in his presence, causing thereby mental pain.

As regards the first mentioned matter, all that I desire to say is that the question of the amount of damage is always left to the judge of facts, and he has to consider with [676] reference to all the circumstances, under which the insult was offered, and the character thereof, whether any and what damage should be awarded.

The Indian Penal Code in section 95 lays down "that nothing is an offence by reason that it causes, or that it is intended to cause, or that is known to be likely to cause any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm." This rule of law may, I think, well be adopted by the Civil Courts in determining suits for damages by reason of an insult offered.

I do not myself apprehend that a judge of facts would be under any real difficulty in assessing damage in any given case. Indeed no such difficulty is said to have been experienced in any of the various cases that I have referred to.

As regards the other matter, it seems to me that in such a given case, an injury would be rather indirect or remote; and for my own part I should hesitate to hold that an action would lie for such an injury, though I find that according to the Roman law an action does lie, and so perhaps according to the Scotch law, as expounded in the case of *Mackenzie v. Read*, (2 Murray's Rep., 149); for there, if there is anything that produces uneasiness of mind, it is actionable. But it is not necessary to express any decisive opinion upon the point in this case, and I should prefer to confine myself to the facts of the case before us. I am bound, however, at the same time to say, having regard to the fact that other systems of law allow actions for verbal abuse, without any proof of special damage, that the contention raised on behalf of the plaintiff in this respect cannot be said to be unreasonable.

As a consideration of public policy, it has been pointed out that section 504 of the Indian Penal Code provides sufficient remedy for conduct such as the defendant's, and that it is not desirable that a party should have, in addition thereto, a remedy in the Civil Court. The Penal Code, however, affords a remedy to a person only where the slanderer intends or knows it to be likely that the insult offered will cause him to break the peace, or commit any other offence. But this does not cover other cases [677] of the kind that may arise, and where the slanderer without any justifiable cause grossly vilifies another. I may add that where the person abused is known to the slanderer to be a person of meek and quiet disposition—one who would not under any circumstance break the peace—he would be left without any remedy, because in that case the wrong-doer could not be punished under section 504 of the Penal Code. And yet this would be a case which stands most in need of remedy. A case like this, as it seems to me, should be decided according to the principle of justice, equity and good conscience (See section 37, Act XII of 1887). And, having this principle in view, I am of opinion that it is but just and right that a person thus vilified should be entitled to maintain an action.

I would answer the question referred to the Full Bench in the affirmative.

S. C. G

Appeal dismissed.

NOTES.

[In (1901) 28 Cal., 452, this was followed.

In (1906) 34 Cal., 48, it was held that the words used there were defamatory and that no special damage was required. See also (1906) 4 C.L.J., 390, *per* MOOKERJEE, J.]

[26 Cal. 677]
APPELLATE CIVIL.

The 17th March, 1899.

PRESENT :

MR. JUSTICE BANERJEE, MR. JUSTICE HILL AND MR. JUSTICE RAMPINI.

Nitayi Behari Saha Paramanick and others.....Plaintiffs
versus
Hari Govinda Saha and others..Defendants.*

Sale for arrears of rent—Sale of right, title and interest, of a registered tenant—Effect of sale of a tenure in execution of a decree for arrears of rent obtained by a co-sharer landlord against the registered tenant alone.

In a suit brought by the plaintiffs to set aside the sale of a *shikmi taluk*, or in the alternative for a declaration that the sale did not affect their rights, on the allegation that defendants Nos. 3 and 4 who were the proprietors of a certain share of the estate under which the said *taluk* was held, having obtained a collusive decree for arrears of rent for the years 1298 and 1299 (B. S.) against defendant No. 1 who was a joint owner of the *taluk* with the plaintiffs, in execution thereof fraudulently caused the disputed property to be sold, and defendant No. 1 purchased it in the *benami* of [678] defendant No. 2, the defence (*inter alia*) was that the sale was not brought about by fraud or collusion, and that the rent suit having been brought against the registered tenant, defendant No. 1, the whole tenure passed by the sale.

Held, by BANERJEE and HILL, JJ. (RAMPINI, J., dissenting) that inasmuch as it appeared that the share sold away stood in the name of defendant No. 1 alone; that the zemindar used to sue defendant No. 1 for rent for the said share; that the defendant No. 1 used to realize a rateable share of costs, road cesses, &c., which he was bound to pay under rent decrees obtained against him, from the plaintiffs sometimes amicably and generally by contribution suits; and that the defendants Nos. 3 and 4 who were the fractional shareholders of the zemindari sued the defendant No. 1 as usual for rent for the years 1298 and 1299 B. S., and obtained a decree, the sale though in terms only a sale of the right, title and interest of the judgment-debtor, really passed the right, title and interest, not only of the registered tenant, but also of the unregistered co-owners whom he represented.

Jeo Lal Singh v. Gunga Pershad, (1884) I. L. R., 10 Cal., 996, followed.

THE facts of the case are shortly these: The plaintiffs and the defendant No. 1 were joint owners of a certain share of a *shikmi taluk*. This share stood in the name of defendant No. 1 alone in the zemindar's *sheristha*. Rent for the years 1298-1299 B. S., having fallen into arrears from defendant No. 1 on account of the share standing in his name, defendants Nos. 3 and 4, two of the landlords, instituted a suit for rent against him, making the other co-sharer landlords *pro forma* defendants, and obtained a decree. The plaintiffs' allegation was that defendants Nos. 3 and 4 in collusion with defendant No. 1 got this decree, executed it, and in execution thereof fraudulently, without getting the sale proclamation properly served, had the said *taluk* sold, and defendant No. 1 purchased it at an inadequate price in the *benami* of his servant defendant No. 2. They further alleged that they knew nothing about the decree,

* Appeal from Appellate Decree No. 1587 of 1897, against the decree of Babu Amrita Lal Pal, Additional Subordinate Judge of Dacca, dated the 7th of August 1897, reversing the decree of Babu Saratchunder Ghose, Munsif at Manickgunge, in that District, dated the 27th of June 1896.

attachment, sale proclamation, sale, or taking possession of the disputed property by defendant No. 2 till October 1895. They, therefore, prayed that the said sale be set aside, or in case the sale could not upon evidence be legally set aside, for a declaration that their right and possession were not affected and injured in any way, and they also prayed for confirmation of possession.

[679] Defendant No. 2, the auction-purchaser, who alone appeared, pleaded (*inter alia*) that the sale was not brought about by fraud or collusion; that he was a *bona fide* purchaser and not a *benamidar* for defendant No. 1; that he having purchased the property at a sale in execution of a decree for arrears of rent his title was complete; that the whole property standing in the name of defendant No. 1 alone having been sold the plaintiffs had no cause of action; and that the plaintiffs, having neglected to register their names in the *sheristha* of the zemindar, and having waived their rights to be parties in all suits for rent for the share standing in the name of defendant No. 1, could not now set up their title against a *bona fide* purchaser.

The Court of First Instance decreed the plaintiffs' suit holding that defendant No. 2 was a *benamidar* for defendant No. 1, and that the sale in execution of the decree passed only the right, title and interest of the judgment-debtor defendant No. 1.

On appeal the Lower Appellate Court reversed the decision of the first Court, and dismissed the suit.

Against this decision the plaintiffs appealed to the High Court.

Dr. Rash Behary Ghose, and Babu Saroda Churn Mitter, for the Appellants.

Babu Srinath Das, Babu Dwarka Nath Chuckerbutty, and Babu Faruck Nath Chakrabarti, for the Respondents.

The High Court (HILL and RAMPINI, JJ.) delivered the following judgments:—

HILL, J.— The question raised by this appeal is one of some importance. It is not, so far as I am aware, met precisely by any direct authority, but its solution depends, as it appears to me, on the application of principles which have been recognized in analogous cases.

The facts are sufficiently simple. The plaintiffs and the first defendant are co-tenants of a 2 annas 13 gundas 1 cowri 1 krant share in a certain *shikmi taluk*, the name of the first defendant alone being registered in respect of the share in the zemindar's *sheristha*. The other shareholders in the *taluk* have opened separate accounts with the zemindar. The third and fourth defendants, who [680] are fractional shareholders in the zemindari, sued the first defendant alone for the entire rent due in respect of the 2 annas 13 gundas 1 cowri 1 krant share of the *taluk* for the years 1298 and 1299, and obtained a decree in execution of which the share in question was brought to sale and purchased by the second defendant on the 11th December 1894. The plaintiffs now sue to set aside this sale, alleging fraud and collusion between the first defendant and the third and fourth defendants, and contending further that all that could, according to law, pass to the purchaser by the sale of the 11th December was the interest in the *taluk* of the first defendant, on which footing they also ask for relief. It is only with the latter contention that we are now concerned, the former having been negatived by the findings of the Courts below, and the sole question for our determination is whether the plaintiffs are entitled to the extent of their own interest in the *taluk* to have the sale in execution set aside.

The suit was dismissed by the Lower Appellate Court, the learned Subordinate Judge being of opinion that the case fell within the principles laid down

by this Court in *Jeo Lal Singh v. Gunga Pershad*, (1884) I. L. R., 10 Cal., 996. He quotes with approval from the judgment of the Munsif the following passage: "The defendant has proved, and it is to a certain extent admitted by the plaintiffs, that the share sold away (*i. e.*, 2 annas 13 gundas 1 cowri 1 krant share) stood in the name of the defendant No. 1 alone; that the zemindar used to sue defendant No. 1 for rent for the share; that the defendant No. 1 used to realize a ratable share of costs, rent, cesses, &c., which he was bound to pay under the rent decree from the plaintiffs sometimes amicably and generally by contribution suits; and that such was the state of affairs for many years." He further finds specifically that it is proved that "the said *taluk* (comprising the 2 annas 13 gundas 1 cowri 1 krant share) was sold and purchased by the defendant No. 2." Under those circumstances, and in view of the consideration that the third and fourth defendants had sued the first defendant as representing the ownership of the whole tenure, he considered that the sale ought to operate as a sale of the plaintiffs' interest as well as of those of the first defendant and he accordingly dismissed the suit.

[681] It may be added that there was no question before us, or, indeed, throughout the suit, but that the plaintiffs were jointly interested with the first defendant in the *taluk* and liable equally with him in respect of the rent. Further, it was admitted that the proceedings in execution under which the second defendant purchased were bad under the provisions of the Code of Civil Procedure. But I may point out with advertence to a consideration to which some weight appears to have been given by GARTH, C.J., in the case of *Jeo Lal Singh v. Gunga Pershad*, (1884) I. L. R., 10 Cal., 996, that the third and fourth defendants being merely fractional shareholders in the zemindari had no option but to proceed with the execution of their decree under that Code. I may say also that after a careful examination of the documents bearing upon the sale of the tenure, I think the Subordinate Judge was right in holding that what was sold was the entirety of 2 annas 13 gundas 1 cowri 1 krant share in the *taluk*. I do not think it necessary in order to support this view to refer now to these documents in detail, more particularly as the finding of the Subordinate Judge on the point was not, as I understood, contested before us. The appellants contented themselves here with the assertion of the principles that a person, who is not a party to a suit, cannot be affected in person or property by anything that is done in the suit, and that a sale in execution of a decree held under the provisions of the Code of Civil Procedure cannot pass anything beyond the right and interest of the judgment-debtor in the property sold. These they relied upon as general and indisputable propositions which needed no authority in support of them; and they also placed reliance in particular upon the cases of *Kristo Chunder Ghose v. Rajkristo Bandyopadhyaya*, (1885) I. L. R., 12 Cal., 24; and *Beni Madhub Roy v. Jaod Ali Sircar*, (1890) I. L. R., 17 Cal., 390, as well as on certain remarks made by the learned Judges who decided the case of *Radha Pershad Singh v. Ram Khelawan Singh*, (1895) I. L. R., 23 Cal., 302.

The first of these cases, however, does not appear to me [682] to help the appellants or to be in point. What happened there was, that one of two shareholders in a zemindari brought a suit for rent against the person recorded as tenure-holder. He obtained a decree, and under the provisions of the Code of Civil Procedure the interest of the judgment-debtor in the tenure was brought to sale. Prior to the institution of the suit, however, the tenure-holder had transferred the tenure to certain persons from whom it devolved upon the plaintiffs. The plaintiffs had frequently sought to compel the landlords to register their names as transferees of the tenure, but without success, and it was decided

under these circumstances, *firstly*, that the plaintiffs might, notwithstanding the non-registration of their names, make a good title to the tenure under the transfer; and *secondly*, that, if in point of fact, the decree under which the sale in execution took place had been obtained by a person who was interested in the zemindari only to the extent of 8 annas, the sale would pass only the rights and interests of the judgment-debtor. That was, it seems to me, a wholly different case from the present. There, if the plaintiffs' case were true, the rights and interests of the judgment-debtor at the time when the sale took place were *nil*, while the plaintiffs were, to the knowledge of the landlord when he brought the suit (for that must be taken to be so), exclusively entitled to the tenure. There was no question of representation in the case, or of any of the equities upon which the decision of the Lower Appellate Court has proceeded in the present case.

Then, the case of *Beni Madhub Roy v. Jaod Ali Sircar*, (1890) I. L. R., 17 Cal., 390, merely affirms the principle which is not disputed, that an attachment of a tenure or holding in execution of a decree obtained by a fractional co-sharer for arrears of rent of his separate share is not such an attachment as is contemplated by section 170 of the Bengal Tenancy Act; and it seems to me to be unnecessary to say anything more about it.

Lastly there is the case of *Radha Pershad Singh v. Ram Khelawan Singh*, (1895) I. L. R., 23 Cal., 302, which, however, I venture to think, is quite as helpful to the case of the respondents as it is to that of [683] the appellants. Briefly stated, the facts there were that the Maharajah of Dumraon granted a *tacca* lease to two persons, Nowrong and Ramanund, of a certain village. These two persons belonged to different families, but Ramanund was a member of a family consisting of several persons. The Maharaja obtained a decree for rent against Nowrong and Ramanund alone, and in execution of his decree he attached certain properties (other than those affected by the lease) which belonged to Ramanund and the other members of his family. Upon this a claim was preferred by the other members of Ramanund's family to the property attached, on the ground that they were separate in estate from Ramanund, and that they were in separate possession of the attached property according to their respective shares. The claim was allowed; and then a suit was brought by the decree-holder to have it declared that the other members of Ramanund's family were joint with him and participated in the benefits of the leasehold property; that they were, therefore, liable to pay the amount covered by the decree for rent; and that the properties which had been attached were consequently liable to be sold in execution of that decree. The first question to which the learned Judges addressed themselves was whether such a suit would lie. That question they answered in the affirmative. They then went on to consider whether the plaintiff was entitled to succeed on the merits and held that he was not. When introducing the discussion of the latter branch of the case it is observed by GHOSE, J.: "The success of the plaintiff's suit depends upon proof that the defendants were members of a joint undivided family with Ramanund, and that the decree was obtained against Ramanund in his representative capacity." The finding of the learned Judge on one of the questions thus proposed, as well as his discussion of the evidence, have unfortunately been left out of the report; but he sums up in these terms: "Upon all these grounds I am unable to say that the decree obtained by the Maharaja against Ramanund was in the latter's representative character, and that for satisfaction of that decree the property of the other defendants is liable to be sold." PRINSEP, J., was, moreover, of opinion that the Subordinate Judge had rightly characterized the evidence brought

[684] to show the existence of a joint Hindu family as "vague, conflicting and unsatisfactory." The remarks of Mr. Justice GHOSE have, however, been seized upon by the appellants as indicating that it is only in the case of members of a joint undivided Hindu family that the doctrine of representation can come in. But I venture to think that they cannot have been intended to convey such a meaning. The suit was based wholly on the assertion of the principle that, in consequence of the fact of Ramanund and the other members of his family constituting a joint undivided family, they, as well as he, were interested in and took the benefits of the lease which stood in his name, and were represented by him, and the only questions, therefore, which arose for decision were whether, in point of fact, the family was joint and was represented by Ramanund. It was only in so far as it bore on the case set up by the plaintiff that it was necessary to lay down the law, and the remarks of the learned Judge must be taken and understood in relation to the facts of the case then before him. It would have been going far beyond the scope of the case to pronounce any opinion upon the general question whether the doctrines of representation are inapplicable in the case of persons who are not members of a joint Hindu family. The judgment of PRINSEP, J., to which also reference was made, appears to me to carry the matter no further than that of GHOSE, J. The case, however, appears to me to be of importance as recognising the principle which, indeed, had often been recognised before, that a decree-holder may sue to have it declared that the interests of third persons may be made liable for the satisfaction of a decree made in a suit to which they were not parties, although the decree was one in execution of which ordinarily the rights and interests of the judgment-debtor alone could be disposed of; and I think that, if such a suit will lie at the instance of a decree-holder, it must be open to the defendant in a suit brought, as in the present case, to impugn a sale in execution, to avail himself in defending the sale, of grounds similar to those upon which a decree holder might rely in the converse case. Indeed, it was laid down by the Privy Council in *Nanomi Babrasin v. Modhun Mohun*, (1885) I. L. R., 13 Cal., 21 : L. R., 13 I. A., 1, that a purchaser [685] at a sale in execution, if he has bought the entirety, may defend his title on any ground which would have justified the sale. That case was no doubt in its facts somewhat different from the present, but the principle is, I think, equally applicable here.

I now pass to the case made by the respondents. It is no part of their case, I may observe, to controvert either of the rules, regarding them as general propositions, upon which, as I have said, the appellants rely; and their case is, in effect, that the appellants were in fact co-sharers with the first defendant in the tenure and were only, as such, interested in the share of the *taluk* which was sold; that they were equally liable with the first defendant for the rent in respect of which the sale took place; that the first defendant, being the only registered tenant, represented the other co-sharers in the tenure; that the landlord was entitled to look to him alone as tenant; that the share of the *taluk* was sold in respect of the entirety of the rent; and that what was sold was the entirety of the share. And they contend that it would be unjust and inequitable, under these circumstances, to allow the sale now to be set aside at the instance of the appellants.

I think that this contention ought to prevail. The cases shew clearly that the fact that a sale in execution has been had under the provisions of the Code of Civil Procedure is not in itself conclusive of the question whether the interests of persons other than the judgment-debtor have passed under the sale. It is sufficient to mention the cases of *Radha Pershad Singh v. Ram Khelawan Singh*, (1895) I. L. R., 23 Cal., 302, and *Jeo Lal Singh v. Gunga Pershad*, (1884)

I. L. R., 10 Cal., 996, to both of which reference has already been made,*and the case of *Jotendro Mohun Tagore v. Jogul Kishore*, (1881) I. L. R., 7 Cal., 357, for the purpose of showing this. In the last mentioned case it is said at p. 364 of the report: "It has been held over and over again, not only in this Court, but by the Privy Council, that the words 'right, title and interest' of the execution-debtor must not be construed strictly, [686] but with reference to the circumstances under which the suit is brought, and the true meaning of the decree under which the sale takes place. And this was the more necessary in the case of sales which took place under the old Civil Procedure Code, because by section 249 of that Code the proclamation in every case was for the sale only of the interests of the execution-debtor. And as a matter of form and practice all sales under that Act were of the right, title and interest of the execution-debtor. It is, therefore, the duty of the Court in each case to ascertain carefully what was intended to be sold," and this I think embodies the rule by which I ought to be guided in the present case.

The case of *Jeo Lal Singh v. Gunga Pershad*, (1884) I. L. R., 10 Cal., 996, was strongly relied upon by the respondents in support of their case generally; and unless it is distinguishable on the ground urged by the appellant it certainly appears to me to be conclusive in their favour. It was a case in which a fractional sharer in a zemindari estate brought a suit against one Gupta Lal, the sole registered tenure-holder, for rent due in respect of the tenure. It appeared that Gupta Lal had two brothers who, along with him, constituted a joint family, and that Gupta Lal being the eldest brother was the manager of the joint property. The tenure was ancestral. The landlord having obtained a decree brought to sale the rights and interests of Gupta Lal in the tenure, and the purchaser having taken possession of the whole tenure, the brothers of Gupta Lal sued to recover their shares on the ground that nothing passed by the sale beyond Gupta Lal's interest. In delivering the judgment of the Court GARTH, C.J., after discussing and distinguishing the cases of *Doolur Chand Sahoo v. Jalla Chabeel Chand*, (1878) L.R., 6 I.A., 47, and *Bissessur Lall Sahoo v. Luchmessur Singh*, (1879) L.R., 6 I.A., 233, deduced from them these two general propositions: (1) "When it is clear from the proceedings that what is sold, and intended to be sold, is the interest of the judgment-debtor only, the sale must be confined to that interest, although the decree-holder might have sold the whole tenure if he had taken proper steps [687] to do so, or although the purchasers may have obtained possession of the whole tenure under the sale: (2) but if, on the other hand, it appears that the judgment-debtor has been sued as *representing the ownership of the whole tenure* and that the sale, though purporting to be of the right and interest of the judgment-debtor only, was intended to be, and in justice and equity ought to operate as, a sale of the tenure, the whole tenure then must be considered as having passed by the sale, and if the question is a doubtful one on the face of the proceedings, or one part of these proceedings may appear inconsistent with another, the Court must look to the substance of the matter and not to the form or language of the proceedings." The latter branch of this proposition, it may be mentioned, is founded on a passage in the judgment of the Privy Council in the case of *Bissessur Lall Sahoo v. Luchmessur Singh*, (1879) L. R., 6 I. A., 233, where it is said "in execution proceedings the Court will look at the substance of the transaction and will not be disposed to set aside an execution on mere technical grounds when they find that it is substantially right." Having laid down these two propositions the learned Chief Justice then proceeds to apply the law to the case before him. He remarks that Gupta Lal was not only the manager but also the sole registered owner of the tenure, and

that the fractional sharer in the zemindari took the ordinary and proper course of suing the tenant who in the zemindar's *sheristha* represented the entire tenure. The judgment then proceeds : "Moreover, when she had obtained her decree, she was unable, as she only owned a share in the zemindari interest, to sell the whole tenure under section 59. She could only obtain her execution in the way she proceeded to enforce it, namely, by selling the right and interest of the judgment-debtor under section 64. But as between her and the persons interested in the tenure she had a right to treat Gupta Lal as the sole owner of the tenure, and when she sold his right and interest for the rent due she was in our opinion selling the tenure itself. As his name was registered as the sole owner of the tenure he represented his brothers' interest in it as well as his own. The rent was due [688] from them all, though he alone was sued for it, and as they were equitably liable to pay the amount of the decree it was only just that their interest as well as his should be sold to satisfy it."

Now with the one exception, that the first defendant in the present case was not the manager of a joint Hindu family, it appears to me that it is incapable of being distinguished from the case before GARTH, C.J. But it is said that that fact in itself involves a vital distinction. I confess I am unable, on a very careful consideration of Sir RICHARD GARTH'S judgment, to discover that he laid any particular stress upon that consideration. It is certainly not referred to in the second of the two general propositions quoted above—the particular proposition which he thought applicable to the case before him ; and it is only referred to once in the latter part of the judgment where, so far as I am able to perceive, it occupies a very subordinate place. What the learned Chief Justice does appear to me to insist upon are the considerations that Gupta Lal was properly sued as the registered tenant ; that the person who sued him was incapable of obtaining relief otherwise than by selling the right and interest of Gupta Lal ; that she was entitled as between herself and the persons interested in the tenure to treat Gupta Lal as the sole owner of the tenure ; that by virtue of his being the sole registered owner he represented the interests of his brothers : and that as the latter were equitably liable to pay the amount of the decree it was only just that their interests as well as those of Gupta Lal should be sold to satisfy it. All these considerations are directly applicable to the state of things existing in the case now before us, and are in my opinion sufficient to dispose of it.

Is there, however, the vital distinction contended for between the case of the members of a joint Hindu family who have put forward or allowed one of their members to represent them, and that of a group of joint tenants who not being so connected have done the same ? Without entering upon the question of the position and authority of the manager of a joint Hindu family, it would seem that the ultimate ground upon which the property of the remaining co-sharers may be made available for [689] the satisfaction of a decree obtained against him alone is simply their liability for the debt upon which the decree is founded, and that liability arises in the case of a lease from the fact that they as well as the manager are interested in and take the benefit of the lease. GARTH, C.J., in the case of *Jeo Lal Singh v. Gunga Pershad* held that the fact of the eldest brother alone being registered as tenant was sufficient to establish his representative character, there being in that case no question of the interest of the remaining brothers in the tenure, which was ancestral. In *Radha Pershad Singh v. Ram Khelawan Singh*, GHOSE, J., held that it lay on the plaintiff only to show that the defendants were members of a joint undivided family with Ramanund, for the purpose presumably of establishing the necessary community of interest ; and that Ramanund was sued

in his representative capacity. Given, in other words, the community of interest and the necessary representation, and that is all that is required. These principles do not appear to me to be peculiar to the Hindu law or to be restricted in their application to cases in which one has to do with a joint undivided Hindu family. It seems to me that any group of persons might by their action place themselves in such a situation as to bring themselves within the sphere of their application. Thus in *Nobin Chandra Roy v. Magantara Dassya*, (1884) I. L. R., 10 Cal., 924, for example, GARTH, C.J., said: "It is clear that if two out of three partners are sued for a debt due from the partnership and a decree is obtained against those two and execution issues against the partnership property, if the third partner should apply successfully in the execution proceedings to have his share in the property released, the plaintiff's only remedy would be a regular suit, not for the purpose of making the third partner personally liable for the debts, but for the purpose of making the share of the third partner available to satisfy the decree." This was said not with advertence to any doctrine peculiar to Hindu law, but, as I understand it, generally; and if a decree-holder may in such a case show that the property of the third partner is available for the satisfaction of the decree then, on the principle to which I have referred in an earlier part of my judgment, when [690] the sale has actually taken place, the purchaser at an execution sale, if he be sued by the third partner, may defend his title on similar grounds.

As to the equities, I am unable to perceive any material distinction between the case of persons subject to the Hindu law and of those who are not; or why if the property of a Hindu may be made available under the circumstances now in contemplation that of other persons should be exempt. Now in the present case the liability of the plaintiffs for the rent of the share of the tenure in question, as a consequence of their community of interest in it with the first defendant, is not disputed, and the learned Subordinate Judge has found for the same reason as that upon which GARTH, C.J., proceeded in *Jeo Lal Singh v. Gunga Pershad* that the appellants were represented as between them and the landlord by the first defendant. In this I certainly consider that he was right. He has not, it is true, found in specific terms that the first defendant was sued in a representative capacity. But I take it he intended so to find, and looking at the substance of the matter I myself entertain no doubt on the question. The first defendant was to the landlord the sole representative of the tenure, and as such was sued in respect of the entire rent; and it is found as a fact that on previous occasions "the zemindars used to sue defendant No. 1 for rent for the share," and that he was in the habit of afterwards realizing their proportion of what he was compelled to pay from the plaintiffs, sometimes amicably, but generally by means of contribution suits—a state of things which had gone on for many years." In no case does it appear that the plaintiffs disputed, at all events successfully, their liability along with the first defendant for the sums recovered as against him alone as the person representing the tenuro; and it is only now when the sale of the tenure has been brought about, that they seek to repudiate him as their representative. It certainly appears to me that there are ample grounds here for holding that the first defendant was treated by his co-sharers as their representative, and that he was sued in that character, and it appears to me that one of the primary objects which the rules in relation to the registration of tenants is intended to subserve, which is, I think, to protect landlords from difficulties of the kind [691] raised by the plaintiffs in this suit, would be defeated if it were to be held otherwise. In the case of *Bissessur Lall Sahoo v. Luchmessur Singh*, (1879) L. R., 6 I. A., 233, the Privy Council "assumed" the representative

character of the defendant, although there was nothing to show that he was the "manager" of the family which he was held to represent,—at least no reference is made by the Privy Council to that consideration; and it was in that case that their Lordships laid down the principle to which I have already referred that "in execution proceedings the Court will look at the substance of the transaction and will not be disposed to set aside an execution upon merely technical grounds when they find that it is substantially right."

Having regard to all the facts and circumstances of the case, I think it would be inequitable and would work manifest injustice if we were now to set aside the sale in question at the suit of persons who admittedly were liable for the rent decreed against the first defendant, and who, as it appears to me, were duly represented as between themselves and their landlord by the first defendant, not only *qua* the lease, but also in all the proceedings taken by the landlord to secure the recovery of the rent—persons, moreover, who make no offer, but take their stand simply on what they assert to be their legal right.

The further question was raised whether the Subordinate Judge was right in his finding that the purchase by the second defendant was not *benami* for the first defendant. But I see no reason for differing from the learned Subordinate Judge on this point. I have not thought it necessary, I may add, to say anything specifically as regards the position of the second defendant as a *bona fide* purchaser without notice, as the case was placed before us simply on the grounds indicated above.

I would dismiss the appeal; but as my brother RAMPINI differs from me in this respect, the case must be submitted to the Chief Justice in order that he may appoint a Judge to decide it. Our difference of opinion, as I understand, relates to the effect to be given to the documents of sale—a matter which, for [692] reasons that I have already indicated, I do not, however, regard as conclusive of the case, and to the representation of the plaintiff by the first defendant.

Let the case be laid before the Chief Justice for orders.

Rampini, J.—In this suit the plaintiffs sue to have the sale of a certain *shikmi taluk*, in which they have a share, set aside so far as they are concerned, and to have it declared that the sale in question did not affect their interests in the *taluk*. The plaintiffs and the defendant No. 1 are admittedly the owners of this *shikmi taluk*. It was sold on the 11th December 1894 in execution of a decree for rent obtained by the defendants Nos. 3 and 4, who are fractional shareholders of the zemindari, against the defendant No. 1. The *taluk* was purchased at the sale by the defendant No. 2, who contends that he purchased the whole *taluk*, and that the right of the plaintiffs as well as of the defendant No. 1 passed to him at this sale. The Subordinate Judge found against the plaintiffs and dismissed their suit. They now appeal and contend on various grounds that his judgment is wrong.

It is sufficient, I think, for the purposes of this appeal to confine our attention to the question whether the right of the plaintiffs can be regarded as having passed at the sale held in execution of a decree given in a suit to which they were no parties, and in my opinion this question must be answered in the negative. The Subordinate Judge admits that the sale having taken place in execution of a decree obtained by fractional shareholders in the zemindari cannot be regarded as a sale under the provisions of the Bengal Tenancy Act. It must have been, he admits, a sale held under the provisions of the Civil Procedure Code. This is also conceded by the learned pleader for the respondents in this case. The learned Subordinate Judge, however, considers on the

authority of the case of *Jeo Lal Singh v. Gunga Pershad*, (1884) I. L. R., 10 Cal., 996, that the defendant No. 1, who was the only tenant of the *shikmi taluk* recognized by the landlord, must be held to have represented the plaintiffs to the [693] zemindar, and that being so, that their rights must be considered to have been affected by the decree in the suit against the defendant No. 1, and the sale held in execution of the decree. The learned pleader for the respondents adopts the same line of argument, and in support of the view taken by the Lower Appellate Court, the following cases have been cited, viz., *Jotendro Mohun Tagore v. Jogul Kishore*, (1881) I. L. R., 7 Cal., 357; *Daulat Ram v. Mehr Chand*, (1887) I. L. R., 15 Cal., 70; L. R., 14 I. A., 187; *Hari Saran Moitra v. Bhubaneswari Debi*, (1888) I. L. R., 16 Cal., 40; L. R., 15 I. A., 195; *Radha Pershad Singh v. Ram Khelawan Singh*, (1895) I.L.R., 23 Cal., 302, and *Hari Vithal v. Jairam Vithal*, (1890) I.L.R., 14 Bom., 597. In all these cases, however, the registered tenant or person held to represent the unregistered tenants or others were held to represent the others under some doctrine of Hindu law. Thus, in the case of *Jeo Lal Singh v. Gunga Pershad*, (1884) I.L.R., 10 Cal., 996, the joint holders of the tenure were all members of a joint Hindu family, governed by the Mitakshara law, and the registered tenant, who was held to represent the others, was the managing member of the family. This was pointed out by GHOSE, J., in the case of *Radha Pershad Singh v. Ram Khelawan Singh*, (1895) I.L.R., 23 Cal., 302, at p. 317 of the report. In that case, i.e., *Radha Pershad Singh v. Ram Khelawan Singh*, the persons interested in the lease were also members of a joint Hindu family governed by the Mitakshara law, but as it was held that the ostensible lessee was not sued in his representative capacity, the other persons interested in the lease were not found to be bound by the sale which took place in execution of the decree obtained against him. The facts of *Daulat Ram v. Mehr Chand*, (1887) I.L.R., 15 Cal., 70; L. R., 14 I. A., 187, are similar. In the cases of *Jotendro Mohun Tagore v. Jogul Kishore*, (1881) I. L. R., 7 Cal., 357, and *Hari Saran Moitra v. Bhubaneswari Debi*, (1888) I. L. R., 16 Cal., 40; L. R., 15 I. A., 195, the defendant was a Hindu widow, who was on this ground held to represent the others interested in the property.

But these cases seem to me to be no authority for holding that [694] the plaintiffs in this case are bound by the sale held in execution of the decree obtained against the defendant No. 1, for (1) it does not appear that the plaintiffs and the defendant No. 1 are members of a joint Hindu family; (2) they are not said to be governed by the Mitakshara law; (3) there is nothing to lead to the conclusion that the defendant No. 1 was sued as representing them; and (4) it does not appear that what was sold was the *shikmi taluk*. On the contrary, from the proclamation of sale (Exhibit C), the sale certificate (Exhibit D), and the order confirming the sale (Exhibit 15), it is clear, I consider, that the sale which took place under section 316 of the Code of Civil Procedure purported to convey only the right, title and interest of the judgment-debtor, defendant No. 1, in the *shikmi taluk*. A consideration of these documents in detail seems to me to put this matter beyond a doubt. The first of them, the proclamation of sale (Exhibit C) issued under section 287 of the Code of Civil Procedure proclaims that "the property of the aforesaid judgment-debtor" (i.e., defendant No. 1) "as mentioned in the following Schedule shall be sold." The sale certificate (Exhibit D), declares that what was sold was "the judgment-debtor's right to the 2 annas 13 gandas 1 cowri 1 krant share in the said taluk." The order confirming the sale, (Exhibit 15), commences with the preamble that "whereas the following title, ownership and interest were on the 11th day of December 1894 sold by the Nazir," and concludes by certifying that "the sale proceeds

of the *judgment-debtor's right* to the 2 annas 13 gandas 1 cowri 1 krant share in the *taluk* amounted to Rs. 160."

Further, both the lower Courts have, I think, found as a fact that what was sold was the right, title and interest of the judgment-debtor, defendant No. 1. Thus, the Munsif at page 11 of the paper book says: "It appears, moreover, from Exhibit C, Exhibit D, Exhibit 12, and Exhibit 15, that the interest only of defendant No. 1 in the property purchased in the name of the defendant No. 2 was sold at the execution of the rent decree. Consequently, on that ground also the sale does not and did not affect the right and interest of the plaintiffs in the property sold and purchased in the name of the defendant No. 2 by defendant No. 1." The Subordinate Judge does not displace [696] this finding of fact of the Munsif. On the contrary, he seems to accept it, for at page 16 he says: "It was contended that in the sale notification, the right, title and interest of the judgment-debtor was advertised for sale. But that does not confine the property to be sold to the interest of the defendant No. 1 alone. *By right, title and interest of the judgment-debtor it means* the right, title and interest of all the co-sharers of the *taluk*, i.e., plaintiffs and defendant No. 1, the former being as much judgment-debtors of the decree as the latter who had been sued as representing all the holders of the *shikmi taluk*." I cannot, however, agree to the interpretation put by the Subordinate Judge on the terms of the proclamation of sale, there being nothing, as already said, on the record, as far as I can see, to show why the defendant No. 1 should or could represent the plaintiffs in the rent suit, or that he did do so, and therefore I can see no reason why the plaintiffs' property should be held to have passed at the sale of the right, title and interest of the judgment-debtor, defendant No. 1, in the *taluk*—a sale held in execution of a decree obtained in a suit in which they were not parties. This sale was certainly not one under the Bengal Tenancy Act, and the purchaser, defendant No. 2, cannot have purchased the whole tenure, nor can the plaintiffs' right be affected by it. In support of this view, I would cite the cases of *Kristo Chunder Ghose v. Raj Kristo Bandyopadhyaya*, (1885) I. L. R., 12 Cal., 24; *Beni Madhub Roy v. Jaod Ali Sircar*, (1890) I. L. R., 17 Cal., 390, and *Jagan Nath Goral v. Watson & Co.*, (1892) I. L. R., 19 Cal., 341. These cases seem to me to be ample authority for the view taken by me. It would indeed be impossible, I think, for defendants Nos. 3 and 4, by suing under the Civil Procedure Code, to proceed to attach and sell the property of persons not parties to the suit brought by them and in no way shown to have been represented in it.

I would accordingly set aside the judgment of the Subordinate Judge and restore that of the Munsif.

There being a difference of opinion between the two learned Judges, the case was referred, under section 575 of the Civil [696] Procedure Code, to Mr. Justice BANERJEE, who delivered the following judgment:—

Banerjee, J.—This appeal arises out of a suit which, after the amendment of the plaint allowed by the first Court, must be taken to have been brought by the plaintiffs, appellants, for setting aside the sale of a *shikmi taluk* sold in execution of a decree as fraudulent and collusive, or in the alternative, for obtaining a declaration that the sale did not affect the rights of the plaintiffs; and for recovering possession of the plaintiffs' shares in the *shikmi taluk*.

The main allegations upon which the suit was brought were, that the plaintiffs and defendant No. 1 were owners of a 2 annas 13 gandas 1 cowrie 1 krant share, bearing a separate rent, of a *shikmi taluk* named Kanai Balai; that defendants Nos. 3 and 4, the proprietors of a certain share of the estate under which the *shikmi taluk* was held, brought a suit for arrears

of rent due to them in respect of that share of the *shikmi taluk* and obtained a collusive decree; and in execution of that decree the defendants 3 and 4 fraudulently suppressing the usual sale proclamation brought about a sale, at which defendant No. 1 purchased the said share of the *taluk benami* in the name of defendant No. 2.

The defendant No. 2, who alone contested the suit, denied the allegations of collusion, fraud and *benami*, and urged that the rent suit had been rightly brought against defendant No. 1, who was the sole person registered in the landlord's *sheristha* as the holder of the share of the *taluk* in question; that the sale in execution of the rent decree was properly held; and that he was a *bona fide* purchaser of the *shikmi taluk* on his own behalf and not as *benamdar* for any one.

The first Court held that defendant No. 2 had purchased *benami* for defendant No. 1, and that the sale in execution of the decree passed only the the right, title and interest of the judgment-debtor, defendant No. 1 and it accordingly gave the plaintiffs a decree.

On appeal, the Lower Appellate Court has reversed that decree and dismissed the suit, holding that the allegation of fraud was not [697] made out; that defendant No. 2 had purchased on his own behalf, and that defendant No. 1 being the only person registered in the zemindar's *sheristha* in respect of the share of the *shikmi taluk* in question, the sale in execution of the decree for rent against him passed not only his own share but that of the plaintiffs as well.

Against that decision the plaintiffs have preferred this appeal on the ground that the sale in question could not pass anything more than the share of defendant No. 1. And as the two learned Judges before whom the appeal was heard have differed in opinion, the case has been referred to me under section 575 of the Code of Civil Procedure.

The contention on behalf of the appellants is that a sale in execution of a decree cannot affect the interest of any person who is not a party to the suit, and that the case of *Jeo Lal Singh v. Gunga Pershad*, (1884) I. L. R., 10 Cal., 996, upon the authority of which the Lower Appellate Court has dismissed this suit, is distinguishable from the present case, as the decree in that case was against a person who was not only the registered tenant in respect of the tenure for which the rent was claimed, but was also the managing member of a joint Hindu family governed by the Mitakshara law, and was therefore rightly held to represent the other members of the family who brought the suit for reversal of the execution sale. On the other hand, it is contended for the respondents that, though the person against whom the rent decree was passed in the case of *Jeo Lal Singh v. Gunga Pershad* was a managing member of a Hindu family, the decision of this Court is based, not upon that fact, but upon the fact of his having been the registered tenant in respect of the tenure for which rent was claimed.

Mr. Justice RAMPINI accepts the appellants' contention as correct, while Mr. Justice HILL takes the view contended for on the other side.

After considering the arguments on both sides, I agree with Mr. Justice HILL in thinking that this case must be governed by that of *Jeo Lal Singh v. Gunga Pershad*, (1884) I. L. R., 10 Cal., 996, and that the decision of the Lower Appellate Court is correct.

[698] The general rule, no doubt, is that a sale in execution of a decree cannot affect the interest of any one who is not a party to the decree. But the rule is subject to certain exceptions; and upon the facts found by the Lower Appellate Court the present case comes under one of these exceptions, namely,

the one enunciated by GARTH, C.J., in *Jeo Lal Singh v. Gunga Pershad* in the following manner: "But if on the other hand it appears that the judgment-debtor has been sued as representing the ownership of the whole tenure, and that the sale, although purporting to be of the right and interest of the judgment-debtor only, was intended to be, and in justice and equity ought to operate as, a sale of the tenure, the whole tenure then must be considered as having passed by the sale. And if the question is a doubtful one on the face of the proceedings, or one part of those proceedings may appear inconsistent with another, the Court must look to the substance of the matter and not the form or language of the proceedings."

And a little further on Sir RICHARD GARTH adds: "Now in the present case, Gupta Lal, the defendant No. 4, was not only the manager but the sole registered owner of the tenure, and Adhikari Koer in claiming against him the entirety of her share of the rent, took the ordinary and proper course of suing the tenant who in the zemindar's *sheristha* represented the entire tenure."

The facts found in the present case are, "that the share sold away (that is 2 annas 13 gandas 1 cowri 1 krant share) stood in the name of defendant No. 1 alone; that the zemindars used to sue defendant No. 1 for rent for the share; that the defendant No. 1 used to realise a rateable share of costs, road cesses, etc., which he was bound to pay under the rent decree from the plaintiffs, sometimes amicably and generally by contribution suits, and that such was the state of affairs for many years," and "that the defendants Nos. 3 and 4, who are fractional shareholders of the zemindari, sued the defendant No. 1 as usual, for rent of 1298 and 1299 and obtained a decree in execution of which the said *taluk* (comprising the 2 annas 13 gandas 1 cowri 1 krant share) was sold and purchased by defendant No. 2 on 11th December 1894."

[699] It is clear, therefore, that here, as in the case of *Jeo Lal v. Gunga Pershad*, (1884) I. L. R., 10 Cal., 996, the person sued for rent was the sole registered holder of the tenure in question, and that the persons who brought the rent suit and caused the sale of right, title and interest of the judgment-debtor in the tenure were some of the shareholders in the zemindari and sued the registered tenant as usual. It is true that in the case cited, the person sued for rent was also the manager of the joint family that owned the tenure, but that circumstance is only incidentally noticed, and does not form any ground for the decision arrived at.

The reason for the decision is that, as the law required tenants to register their names in the landlord's office, unregistered co-owners of a tenure by their omitting to have their names registered, must be taken to have acquiesced in the registered tenant representing them in their dealings with the landlord; that in a suit for rent against the registered tenant, he must be taken to have been sued as representing the ownership of the whole tenure; and that a sale in execution of the decree obtained in such a suit, though in terms only a sale of the right, title and interest of the judgment-debtor, must be held really to pass the right, title and interest, not only of the registered tenant, but also of the unregistered co-owners whom he represents; and that reason holds good quite as much in this case as in the case relied upon.

The principle enunciated by Sir RICHARD GARTH in the case of *Jeo Lal Singh v. Gunga Pershad*, (1884) I. L. R., 10 Cal., 996, in the passage quoted above, no doubt contains an important condition which must be satisfied, namely, that the sale in question must be one which "in justice and equity ought to operate as a sale of the tenure." Having regard to the facts found in this case, namely, that the position of affairs for many years was for the defendants 3 and 4 to sue defendant No. 1 alone for the rent and for defendant

No. 1 to realise from the plaintiffs the amount payable by them; that the amount covered by the decree in execution of which the sale took place, was really due, and that the plaintiffs took no steps to pay [700] the amount of rent due in respect of their share, I think the above condition is fully satisfied.

It was contended by the learned Vakil for the appellants that as the plaintiff in the rent suit brought against defendant No. 1 did not state that he was the sole registered tenant, there was nothing on the face of the execution proceedings to show that the decree was made against defendant No. 1 as representing the ownership of the whole tenure, and so defendant No. 2 could not have bid for and purchased anything more than the share of defendant No. 1. I do not consider this contention valid. The defendant No. 1 was sued as the person representing the ownership of the whole tenure for the whole rent due on account of the same in respect of the shares of defendants Nos. 3 and 4; and intending purchasers could, and in all likelihood did, ascertain what was the fact, namely, that the defendant No. 1 was the sole registered tenant in respect of that tenure.

It was then contended for the appellants that the Lower Appellate Court was wrong in dismissing the suit without coming to any finding upon the question of value which had an important bearing upon the question whether the sale was intended to be, and ought in justice and equity to operate as, a sale of the whole tenure and not merely of the right, title and interest of defendant No. 1. The question of value may have some bearing upon the last mentioned question; but the plaintiffs do not appear to have raised the question in that form in either of the Courts below. It is true they said in their plaint (paragraph 4) that the property was sold for an inadequate price; but they said so only to support the allegation that the sale was fraudulently brought about by suppressing the issue of the sale proclamation, and their allegation of fraud has been found by the Lower Appellate Court not established.

As for the cases of *Kristo Chunder Ghose v. Raj Kristo Bandyopadhyaya*, (1885) I. L. R., 12 Cal., 24; *Beni Madhub Roy v. Jaod Ali Sircar*, (1890) I. L. R., 17 Cal., 390, and *Radha [701] Pershad Singh v. Ram Khelawan Singh*, (1895) I. L. R., 23 Cal., 302, relied upon in support of the appeal, I think they are quite distinguishable from the present case as Mr. Justice HILL has shown.

I, therefore, agree with Mr. Justice HILL in thinking that the decision of the Lower Appellate Court is right, and that this appeal ought to be dismissed with costs.

S. C. G.

Appeal dismissed.

NOTES.

[The registered tenant might be regarded as representative of the unregistered tenants, at least of those who could show no sufficient cause for not registering their names:—27 Cal., 545; 27 Cal., 407; 7 C.W.N., 170; (1914) 29 Cal., 813; 24 I.C., 259 (Cal.); (1902) 25 All., 57.]

The question of the representative character is one of fact.—17 C.W.N., 833; 14 C.L.J. 180; 37 Cal., 75; 13 C.W.N., 1110; 10 C.W.N., 176; 6 C.W.N., 302.

Where the law does not require registration, the unrecorded tenant is not affected:—9 C.W.N., 843; 10 C.W.N., 176; 10 C.W.N., 1042.

A sale held at the instance of an assignee of rent-decree who is not also an assignee of the landlord's interest in the land does not pass the interest of the unrecorded tenants.—(1904) 1 C.L.J. 500. Likewise, a sale in execution of a certificate under the Public Demands Recovery Act, VII of 1880 B.C.:—(1902) 6 C.W.N., 302.]

[26 Cal. 701]
PRIVY COUNCIL.

The 15th November and 10th December, 1896.

PRESENT :

LORDS ASHBOURNE, HOBHOUSE AND MACNAGHTEN, AND
SIR R. COUCH.

Ram Pertab and others.....Plaintiffs
versus

G. Marshall.....Defendant.

[On appeal from the High Court at Fort William in Bengal.]

*Principal and Agent—Holding out, by the principal, of the
agent's authority.*

The right of a third party against the principal on the contract of his agent, though made in excess of the agent's actual authority, was nevertheless enforced where the evidence showed that the contracting party had been led into an honest belief in the existence of the authority to the extent apparent to him.

APPEAL from a decree (16th April 1896) of the High Court, reversing a decree (14th December 1893) of the Subordinate Judge at Mozufferpur.

The appellant was the son and representative of Girdhari Lal, whose firm, styled Jit Mal Girdhari Lal, carried on a Bank at Mozufferpur, and who commenced this suit on the 27th May 1892 against Mr. G. Marshall, proprietor of the Meah Chapra Indigo Factory, the Honourable F. R. Byng, and Mr. C. Amman. The two last-named were defendants only in the Court of First Instance, where a decree was made against Mr. Marshall alone.

In 1890 Mr. Marshall purchased the interest of Mr. Byng in the factory, who till then managed it on his account, and continued to manage it on behalf of the new proprietor from the 1st November 1890, when the indigo season, 1890-91, [702] commenced, till March 1891, when he left and was succeeded in the management by Mr. Amman.

The plaintiffs' firm, after the transfer, continued to supply cash for the management upon the manager's order. From time to time in payment of advances, *hundis* were drawn by him on a Calcutta firm, which financed the indigo concern, and were handed over by him to the Bank. Copies of the accounts were interchanged between the Bank and the manager.

This suit was for the balance alleged to be due to the Bank on the accounts as they stood at the end of the indigo season on the 31st October 1891. That debit balance on that date against the factory was alleged by the defendant to have been increased unduly by a debit which had been carried into the accounts of November and December 1890, and which had been paid off in January 1891 by *hundis* delivered to the Bank in the course of business as above stated. The Bank's right to appropriate the payment in this latter month to a debt not incurred by the defendant was disputed as unauthorized.

The facts are stated in their Lordships' judgment.

The question in the suit now raised on this appeal was whether the Bank was justified in appropriating the money which they received in January 1891 to payment of the advance which had been antecedent to the transfer of the factory. On this the Courts below had differed.

The Subordinate Judge upheld that appropriation. He considered that the mode in which the business was conducted justified the Bank in believing that the defendant, Mr. Marshall, merely stepped into the place of his predecessor, Mr. Byng. The plaintiffs' claim was accordingly decreed against Mr. Marshall, and dismissed as against the other defendants.

The High Court reversed that decree.

The Judges were of opinion that there was no evidence to show that Mr. Marshall had agreed to take over the liabilities of the factory as they stood on the 31st October 1890; and no evidence that Mr. Byng, as manager for Mr. Marshall, had authority to consent to the appropriation of payment made by the Bank in January 1891.

[703] On the defendant's appeal,—

Mr. *H. H. Asquith*, and Mr. *W. Whateley* for the Appellant.—The Bank took the *hundis* in January 1891 in good faith, believing the payment to be made by a manager having authority to allow the amount to be credited against the debit then existing. The transfer of the ownership of the factory was not even known to the Bank till the latter days of December. The error of the High Court was in taking the question between the parties to be one of the actual authority of the manager; while the real point was whether or not the Bank had reasonable grounds for believing, and in good faith believed, that he had authority.

That the accounts had remained at the disposal of the defendant to examine, was referred to; and it was argued that the accounts had virtually been settled, and that no sufficient ground for re-opening them had been shown. *The London Joint Stock Bank v. Simmons*, (1892) L. R., A. C., 201, was referred to.

Mr. *A. Cohen*, Q.C., and Mr. *J. H. A. Branson*, for the Respondents.—The High Court had rightly held that the appellants were not authorized to make appropriation of the payment in January to a debt owed by the proprietor at a date anterior to the transfer. There had been no such course of dealing as would preclude the principal from showing that his agent had exceeded his authority, as, in fact, he had. The payment made in July by the defendant would have been sufficient to cover any balance on the present accounts if the unauthorized appropriation in January had not been made.

Counsel for the appellant was not called upon to reply.

On a subsequent day, 10th December 1898, their Lordships' judgment was delivered by

Sir R. Couch.—The appellant, Ram Pertab, is the son and legal representative of Babu Girdhari Lal, a banker, deceased, carrying on business at Mozufferpur in Behar. In January 1890 Girdhari Lal began to act as banker to the Mesh Chapra Indigo Factory in Tirhoot. In the accounts it is called Indigo Concern. At that time the Honourable Francis Russell Byng was the proprietor and manager of the factory, having an absolute right [704] to a half-share in it, and being the lessee of the remaining half-share. The respondent, Mr. Marshall, is the brother-in-law of Mr. Byng, and he held a mortgage of the half-share of which Mr. Byng was the owner. From the 7th January 1890 to the 31st October 1891 Girdhari Lal, whom it will be convenient to call the Bank, supplied funds for carrying on the factory upon *tankhas* (orders) drawn by the manager on the Bank. The concern was financed by Messrs. Gisborne & Co., Calcutta. Mr. Byng used to draw *hundis* upon them, and these were made over to the Bank, which obtained the proceeds of them and credited them in the account with the concern. Monthly accounts of receipts and disbursements used to be sent by the Bank to the indigo factory in duplicate.

One of these used to be signed by the *gomastha* of the Bank; this used to be retained in the factory, and the other, sent without any signature, used to be signed by the manager and sent back to the Bank. These accounts were put in evidence. The first relied on at the hearing of the appeal is for February 1890 and is headed "*Jumma-kuruch* account of money of the Meah Chapra Concern, pergunnah Bisara, as per *tankhas* signed by Mr. Francis Russell Byng, manager and proprietor of the said concern through the banking firm of Babus Jit Mal and Girdhari Lal, mahajuns of Mozufferpur." It shows a balance due from the concern to the Bank of Rs. 11,395-12-6, and at the end there is a statement signed by Mr. Byng that this is correct. Their Lordships observe that the account begins with a balance of Rs. 7,975-5 due to the Bank on an account for January 1890, headed in the same manner, but not signed by Mr. Byng as correct. For this reason apparently, their attention was not called to it in the argument. The accounts continued to be headed and attested by Mr. Byng in this way up to and including that for December 1890. The headings of the accounts for January, February and March 1891 are altered, Mr. Byng being no longer called proprietor, but only manager of the Meah Chapra Concern. He ceased to be the manager about the end of March 1891, and Mr. Amman became the manager, his name appearing in the accounts, which were attested by him down to and including October 1891.

[705] Mr. Marshall was examined upon interrogatories under a commission, and in answer to the 7th interrogatory he said: "My connection with the concern after the 1st November 1890 was that of proprietor of Mr. Byng's 8 annas (half share), and I leased the other 8 annas . . . I acquired Byng's 8 annas through an agreement made on my behalf by Messrs. Gisborne & Co. of Calcutta . . . The agreement was made in January 1891 and dated back to 1st November 1890. By the same agreement I became lessee of the other 8 annas." In his answer to another interrogatory he said that he acquired Byng's 8 annas by obtaining a release of his equity of redemption under the mortgage to him. Gisborne & Co., who held a second mortgage, joined in the deed for the purpose of completing his title.

The first debit item in the account for January 1891, in which Mr. Byng is for the first time only described as manager, is a balance of Rs. 19,897-15-9, brought forward from the account for December 1890. On the credit side there is, under the date 10th January 1891, "five *hundis* for Rs. 25,000 drawn on Gisborne & Co. by Mr. Byng in favour of the bank." As to this entry Ram Sahai said that the *munib-gomastha* (principal clerk) of the Bank deposed that he applied about the account to Mr. Byng, personally and by letters. Mr. Byng replied that arrangements were being made for the outlay of the year following, and that the Bank's money would be repaid when the arrangements were completed; that on the 7th January 1891 he got five *hundis* for Rs. 25,000 from Rusdhari Lal, a clerk of the factory, who gave them, saying "Mr. Byng has given these *hundis* to you, saying, *mahajun* was getting alarmed. Now there will be a balance in my favour." Rusdhari Lal deposed that he was a clerk in the Meah Chapra Indigo Factory from 1883 to 16th September 1893; that in January 1891, he took *hundis* for Rs. 25,000 from the factory by order of Mr. Byng and gave them to Ram Sahai; that Ram Sahai asked for what these *hundis* had been given, and he said: "You have old balance due to you; deduct it and give me what I want." Mr. Byng had directed him to say he wanted Rs. 8,000. Ram Sahai gave him that sum, and he took it to the factory. The money was mostly required to pay rent to the maliks, also for [706] other expenses. Mr. Byng, who was examined by interrogatories, deposed that he did not give authority to the Bank to take any of the proceeds

of the *hundis* for Rs. 25,000 in payment of any money due by him in respect of prior season's operations or borrowings by him on account of working previous to 31st October 1890.

The account for October 1891 showed a balance due to the Bank for principal and interest of Rs. 25,058-11-1½, and on the 27th May 1892 Girdhari Lal brought a suit against Mr. Marshall to recover Rs. 19,179-8-0, the balance after giving credit for Rs. 7,348-3-7½ received on the 1st May 1892. The defence was that the Rs. 7,385-2-4½ was the balance due on account of the concern for advances and payments from 31st October 1890 to 31st October 1891, and the defendants had paid that on the 1st May 1892; that the plaintiff had wrongfully appropriated part of the Rs. 25,000 to the payment and satisfaction of the balance of Rs. 17,673-8-9; and that Byng had no authority from the defendant to permit the plaintiff to make that appropriation.

Now the real case is not, as is said in the defendant's written statement, that the claim in the suit is in fact for that balance. It is for the sum due on the whole account from February 1890, and the defendant is seeking to set aside the appropriation and to apply the amount of that balance in satisfaction of what would be due on the accounts from 31st October 1890 after the payment of the Rs. 7,385-2-4½. If the Bank was not entitled to make the appropriation, the Rs. 17,673-8-9 remained the money of Marshall, and should be applied towards payment of what was due from him on the accounts from October 1890. If nothing had been due on those accounts he would have had to sue to recover back the money. This may be important in considering the evidence in the case. It was admitted that the *munub-gomastha*, who conducted the business of the Bank, acted in good faith. He might honestly and reasonably have believed from the previous transactions that the Rs. 25,000 were intended to be applied in the same manner as the payments had been applied in the previous accounts. The course of business was rather between the Bank and the indigo [707] factory than between it and the actual proprietor. It was not proved that the Bank had any intimation of the change of the proprietorship, except what appeared in the heading of the accounts. Nor was there any evidence of the terms of the agreement under which Marshall became the proprietor. There may have been, probably was, some notice of the debts or liabilities of the concern. Their Lordships cannot agree with the High Court when they say that the burden was on the plaintiff to prove this agreement by obtaining discovery and inspection of documents. If Mr. Byng was careless, as he said in his evidence he was, in signing the accounts as correct, and Mr. Marshall was negligent in not examining the accounts, copies of which were at the factory, the loss ought not to fall on the Bank. Having regard to the nature of the transactions between the Bank and the indigo factory, and to the only information which the Bank had of the change of proprietorship (Mr. Byng continuing to be manager) their Lordships think the *munub-gomastha* might reasonably suppose that Mr. Byng had authority, and that in the honest belief of that fact he continued to make the advances. They will humbly advise Her Majesty to reverse the decree of the High Court, to dismiss the appeal to the High Court with costs, and to affirm the decree of the first Court. The respondent will pay the costs of the appeal.

Appeal allowed.

Solicitors for the Appellants : Messrs. *Rooper and Whateley*.

Solicitors for the Respondents : Messrs. *Sanderson, Adkin & Lee*.

C. B.

The 15th February and 11th March, 1899.

PRESENT :

LORDS WATSON, HOBHOUSE, AND MACNAGHTEN, AND SIR R. COUCH.

Tika Ram.....Plaintiff

versus

The Deputy Commissioner of Bara Banki.....Defendant.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Hindu law, Alienation—Alienation by widow—Mortgage taken from Hindu widow—Unpaid interest claimed on her deceased husband's mortgages—Will, Construction of.

A *pardanashin* widow executed a mortgage of part of the family estate to secure payment of the balance of interest alleged to be due on three [708] previous mortgages, which had been executed by her husband in his lifetime. Justifying necessity for her to encumber was not shown, nor enquiry by the mortgagee as to her authority. Even if the transaction had been properly explained to her, as a Hindu widow she would have exceeded her powers.

By his will her husband had declared that his widow should have full powers, but that, during the life of his minor son, she should not have power to transfer without legal necessity ; and that she should have power to mortgage to pay revenue and other debts.

Held, that the will conferred on her no greater power of alienating the family estate than she had under the Hindu law ; and that, under the circumstances, the mortgage executed by her was invalid.

Notes promising to pay interest, additional to that contracted for in the mortgages had been signed by the husband, which it was held could not affect the right to redeem, being unregistered.

APPEAL from a decree (25th February 1895) of the Court of the Judicial Commissioner, modifying a decree (11th April 1892) of the District Judge of Fyzabad.

The plaintiff, appellant, claimed on the liabilities alleged to arise upon the execution of four registered mortgage bonds, of which three were executed by Raja Mehpel Singh, *talukdar* of Surajpur, who died on the 8th October 1892. He left a widow Rani Chabraj Kunwar, the first defendant, who had executed on the 18th March 1885, the fourth mortgage. This widow mortgaged a village in the estate to secure Rs. 8,000 alleged to be due for interest on the three previous mortgages.

The defendant, now respondent, was the Deputy Commissioner of Bara Banki, the agent of the Court of Wards, who defended on behalf of the minor son of the deceased Raja.

The claim, filed on the 22nd October 1889, was for Rs. 14,336. An addition had been made to the interest originally fixed in the Raja's mortgages, by unregistered *rukkas*, or notes, signed by the Raja, one of which followed upon each of these mortgages.

The principal issue, and the only question now material was whether the widow's charge on the family estate was, under the circumstances, binding thereon.

The facts of the case, including a provision made in the Raja's will, dated 27th April 1882, which purported to declare the [709] authority of the widow in the matter of her alienation of the estate, are stated in their Lordships' judgment.

The District Judge decreed the claim. On appeal the Judicial Commissioner, and the Additional Commissioner, concluded that the mortgage by the widow had been beyond her powers, and was invalid; and that so much only of the claim as consisted of a sum of unpaid principal, Rs. 2,000, due on the Raja's mortgages with interest thereon at the rate agreed upon in his registered deeds should have been decreed; but not upon the widow's mortgage.

On the plaintiff's appeal,—

Mr. C. W. Arathoon appeared for the Appellant.

Mr. A. Cohen, Q.C., and Mr. J. H. A. Branson, for the Respondent.

Their Lordships' judgment was afterwards, on the 11th March, delivered by **Lord Macnaghten**.—This is an appeal against a decree of the Court of the Judicial Commissioner of Oudh varying an order of the District Judge of Fyzabad. The suit in which the decree was pronounced was brought to enforce a claim under four deeds of mortgage, three of which were executed by the late Raja Mehpal Singh, *talukdar* of Surajpur, and one by the Rani his widow after his death. The appellant Tika Ram, who represents the mortgagee, was plaintiff. The defendant in the suit was the present respondent, the Deputy Commissioner of Bara Banki, who is now, under the Court of Wards, manager of the Surajpur estate on behalf of the minor son of the late Raja.

The only question argued at the Bar which, in their Lordships' opinion it was competent for the appellant to raise was, whether the circumstances under which the fourth mortgage was executed by the Rani were such as to make it binding on the minor's estate.

The three mortgages executed by the Raja were—

(1) A mortgage of the village of Baghora to secure Rs. 10,000, dated 15th January 1880.

[710] (2) A mortgage of the village of Mau to secure Rs. 6,000, dated 30th November 1880.

(3) A further charge by way of mortgage on the village of Mau to secure Rs. 8,000, dated 30th May 1882.

The rate of interest specified in each of these mortgages was 15 per cent. per annum, but with each mortgage the borrower gave the lender a *rukka* or written promise to pay 6 per cent. more bringing the rate of interest in respect of each mortgage up to 21 per cent. per annum. These *rukkas* were not registered, and it seems to have been the intention of the parties that they should be kept off the Register.

On the 8th of October 1882 the Raja died. By his will he declared that the Rani should have full powers, but that during the life-time of his son, the minor on whose behalf the respondent is manager, the Rani should not have power to transfer without any legal necessity any portion of his property; but that to pay off the Government revenue and to liquidate other debts payable by him, the Rani should have power to mortgage the property. It was held by the Court of the Judicial Commissioner, and as their Lordships think rightly held, that this will "conferred on the Rani no greater power of alienating her minor son's estate than she had under Hindu law" as its manager on her minor son's behalf."

The circumstances under which the fourth mortgage was executed are not in dispute. In March 1885, two years and a half after the Raja's death and before the Court of Wards assumed the management of the estate, one Beni Ram, an accountant acting on behalf of Tika Ram, settled up accounts with the *karinda* of the Rani. The balance due for interest calculated at 21 per cent. per annum was found to be Rs. 9,228-14-3. It was arranged that a mortgage should be given for Rs. 8,000 and that the balance should be paid in cash.

The arrangement was carried out by the payment of Rs. 1,228-14-3 in cash and the execution of the fourth mortgage on the 18th of March 1885.

Their Lordships agree with the Judicial Commissioner's Court in thinking that the mortgage cannot stand. It seems to be open to every possible objection. It turned interest into principal [711] without any apparent reason. No enquiry was made into the means and circumstances of the widow. The widow, who was a *pardanashin* lady, stated in her deposition taken by commission that the account had never been put before her or settled by her, and that she did not know the mortgage was on account of interest—a statement not improbable in itself and certainly not contradicted by any evidence, while there is evidence to the effect that on the 18th of March 1885 there was a cash balance to the credit of the estate of Rs. 14,000.

Mr. *Arathoon* who argued the case strenuously on behalf of his client insisted that their Lordships ought to infer that extreme pressure was being put on the Rani, that the estate was in immediate peril of being sold up unless the Rani submitted to the mortgagee's demands, while by submission she gained the advantage of extension of time and reduction of the rate of interest from 21 per cent. per annum to 15 per cent. in future. It is enough to say that there is no evidence whatever in support of any one of these suggestions. Neither in the fourth mortgage deed nor in any other document, nor even in the oral evidence is there any trace of any agreement or any understanding that there should be any time given or any reduction of interest allowed. It was as much open to the mortgagee immediately after the execution of the fourth mortgage, as it was before, to enforce his rights without forbearance or allowance of any kind.

One proposition was advanced in the course of the argument which perhaps ought to be noticed. It was urged that the *rukkās*, though not registered, fettered the equity of redemption. The learned District Judge was of that opinion clearly. But their Lordships have a difficulty in understanding how an unregistered instrument, which the statute declares is not to affect the mortgaged property, can fetter the equity of redemption in that property. It seems to be a contradiction in terms.

Their Lordships were asked to give the appellant a decree against the estate of the deceased Raja based on his personal liability under the *rukkās*. The learned Commissioners expressed their opinion on the matter as if it were properly before them. But the truth is that this question was not raised in the [712] plaint or referred to in the pleadings or issues. In their Lordships' opinion it was not competent for the Court in this suit to deal with it.

The result is that the appeal fails, and their Lordships will humbly advise Her Majesty that it ought to be dismissed.

The appellant will pay the costs of the appeal. *Appeal dismissed.*

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitor for the Respondent: The *Solicitor, India Office.*

NOTES.

[As regards the validity of such collateral agreements, see also (1909) 10 C.L.J., 570 at 578.]

[26 Cal. 712]

APPELLATE CIVIL.

The 15th March, 1899.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE STEVENS.

Abul Khair.....Plaintiff

versus

Meher Ali.....Defendant.*

Land Registration Act (Bengal Act VII of 1876), sections 78, 79—Bengal Tenancy Act (VIII of 1885), section 60—Suit for rent—Unregistered proprietor.

There is nothing in section 60 of the Bengal Tenancy Act to render a suit for rent by an unregistered proprietor unmaintainable, it being sufficient, if during the pendency of the suit and prior to decree, his name is registered.

Dhoronidhur Sen v. Wajidunnissa Khatoon, (1888) I. L. R., 16 Cal., 708, dissented from.

Alimuddin Khan v. Hira Lall Sen, (1895) I. L. R., 23 Cal., 87, explained and followed.

Belchambers v. Hussan Alli Mirza Bahadur, (1898) 2 C. W. N., 498, followed.

THE plaintiff, Moulvie Abul Khair, was originally the *malik* of *taluk* Ram Dass No. 6662 of the *noabadi mehal* of Mouza Baraduara, Chaklay Satkania, in the District of Chittagong, and had his name registered as proprietor under Bengal Act VII of 1876. The defendant, Meher Ali, held an *et mam* under [713] the plaintiff in the said *taluk*. After some rapid changes of hand, brought about by a revenue sale, the said *taluk* came back to the plaintiff, who purchased it in the *benami* of one Mahomed Ismail, whose name was registered as proprietor. A suit brought for possession by Mahomed Ismail against the present defendant was dismissed on the ground that Mahomed Ismail was a *benamdar* for the plaintiff. Thereupon the plaintiff brought the present suit for rent.

The defendant contended, among other things, that the name of the plaintiff not having been registered under Bengal Act VII of 1876, he was not competent to bring the suit, under section 78 of the said Act, and that the defendant was not bound to pay the rent to the plaintiff. The plaintiff got his name registered during the pendency of the suit, but subsequent to its institution.

The Munsif decreed the suit, but on appeal the Subordinate Judge reversed the decision, and dismissed the suit on the ground that the suit was not maintainable by the plaintiff, who was not the registered proprietor at the time when the suit was brought.

The plaintiff appealed to the High Court.

Moulvie *Sirajul Islam*, for the Appellant.

Babu *Jatra Mohan Sen*, for the Respondent.

The judgment of the High Court (Macpherson and Stevens, JJ.) was as follows :—

* Appeal from Appellate Decree No. 2325 of 1897, against the decree of Babu Jadu Nath Dass, Subordinate Judge of Chittagong, dated the 14th of September 1897, reversing the decree of Babu Pankaja Kumar Chatterjee, Munsif of Satkania, dated the 4th of January 1897.

„ The Subordinate Judge has reversed the decree of the Munsif and dismissed the plaintiff's suit on the sole ground that the plaintiff's name not having been registered as proprietor at the time when the suit was brought, although it was registered while the suit was pending, the plaintiff, under the provisions of section 78 of the Land Registration Act and section 60 of the Bengal Tenancy Act, could not maintain a suit for arrears of rent. In so deciding the Subordinate Judge has cited the decisions in the cases of *Dhoronidhur Sen v. Wajidunnissa*, (1888) I. L. R., 16 Cal., 708, and *Surja Kant Acharya Bahadur v. Hemant Kumari Devi*, (1889) I. L. R., 16 Cal., 706. He considered that the decision in the case of *Dhoronidhur Sen v. Wajidunnissa*, so far [714] from being overruled, was considered to be correct by a majority of the Judges of the Full Bench in the case of *Alimuddin Khan v. Hira Lall Sen*, (1895) I. L. R., 23 Cal., 87.

We are unable to adopt this view. In the Full Bench case it was decided that sections 78 and 79 of the Registration Act, Bengal Act VII of 1876, offered no bar to a person whose name was not registered, as proprietor or manager, bringing a suit for arrears of rent, and that it was sufficient if, during the pendency of the suit and prior to decree, his name was registered. That was a suit instituted in the Small Cause Court in Calcutta, and the majority of the Judges, who took the view expressed above, thought it was unnecessary to consider whether or not the case of *Dhoronidhur v. Wajidunnissa* was rightly decided, as it might have been affected by the provisions of section 60 of the Bengal Tenancy Act. NORRIS, J., one of the Judges who formed the majority, alone said that he thought the case of *Dhoronidhur v. Wajidunnissa* was wrongly decided. Certainly the Subordinate Judge is not right in saying that the case of *Dhoronidhur v. Wajidunnissa* was approved of. The most that can be said is that it was distinguished from the case before the Full Bench, and that the majority of the Judges thought it unnecessary to say whether the decision was or was not right. The effect of the decision of the majority of the Judges was, we think, clearly this : that apart from the provisions of section 60 of the Bengal Tenancy Act, sections 78 and 79 of the Land Registration Act did not prevent an unregistered proprietor from bringing a suit for arrears of rent. What we have, therefore, to consider in the present case is whether the provisions of section 60 of the Bengal Tenancy Act render a suit by an unregistered proprietor unmaintainable. It seems to us that that section has no such effect. It provides that when rent is due to the proprietor, manager, or mortgagee of an estate, the receipt of the person registered as proprietor, manager or mortgagee of that estate, shall be a sufficient discharge for the rent, and that the person liable for the rent shall not be entitled to plead in defence to a claim by the person so registered that the rent is due to any third person. It follows that the receipt of an [715] unregistered proprietor would not prevail against the claim of the registered proprietor ; nor would it do so under the provisions of section 79, Bengal Act VII of 1876. If the suit is maintainable, notwithstanding the provisions of sections 78 and 79 of Bengal Act VII of 1876, we do not see anything in the provisions of section 60 which renders it unmaintainable ; and although the case of *Dhoronidhur v. Wajidunnissa* is not expressly overruled by the decision of the Full Bench to which I have referred, we think we must apply the principle on which the majority of the Judges acted, and following that principle, we think the Subordinate Judge was wrong.

. I would also point out that in the case of *Belchambers v. Hussan Alli Mirza Bahadur*, (1898) 2 C. W. N., 493, it was held that the mere non-registration of the name of the plaintiff at the time that the rent suit was instituted, furnished no ground for the dismissal of the suit.

The decree of the Subordinate Judge is set aside, and the case must be sent back in order that any questions arising in the appeal may be disposed of. The appellant will get his costs in this Court.

M. N. R.

Appeal decreed ; case remanded.

NOTES.

[See also (1906) 8 C.L.J., 299.]

[26 Cal. 715]

ORIGINAL CIVIL.

The 15th May, 1899.

PRESENT :

MR. JUSTICE STANLEY.

W. R. Fink

versus

Buldeo Dass and others.*

Jurisdiction—Evidence as to jurisdiction at hearing—Letters Patent, High Court, clause 12—Agreement to pay as per account—Acknowledgment of debt—Limitation Act (XV of 1877), section 19—Agency, Termination of—Accounting agents—Limitation Act (XV of 1877), schedule II, article 89—Contract Act (IX of 1872), sections 201 and 216.

The plaintiff as Receiver to the estate of S instituted a suit on the 11th July 1898 against the defendants to recover the sum of Rs. 2,808-13-2, a portion of the said sum being the rent of a house occupied by the [716] defendants at Mandalay since January 1894 till the 11th July 1898, the remaining portion being the price of goods sold by the defendants as agents of S. The plaintiff at the institution of the suit obtained leave under clause 12 of the Charter. The defendant contended that the Court had no jurisdiction, inasmuch as the plaint on its face did not shew that the cause of action or any part of it arose in Calcutta ; that the cause title alone represented the defendants as carrying on business in Calcutta, and that portion

* Original Civil Suit No. 522 of 1898.

of the plaint was not verified; nor could the plaintiff give evidence to prove that his cause of action arose in Calcutta, as it would be varying the cause of action, and that fresh leave would have to be granted, which could not be done in this suit. *Held*, that the Court had jurisdiction, and the plaintiff was entitled to give evidence at the hearing to show that his cause of action arose in Calcutta. To admit evidence of that fact, and if necessary amend the plaint by adding a statement that part of the cause of action did arise in Calcutta, does not cause a variance in the original cause of action. It is sufficient to show that the cause of action or part of it arises in Calcutta when the suit comes on for hearing.

It was also contended by the defendants that the plaintiff's claim to rent prior to July 1894 was barred, and that as the sale of the piece-goods was completed by the defendants in June 1894, that claim was also barred. The plaintiff submitted that the letters written by the defendants to the plaintiff within three years of the institution of the suit agreeing to pay as per account enclosed by them to the plaintiff was a sufficient acknowledgment to save the claim for rent from being barred. Further, that although the sale of the goods was completed in June 1894, the defendants did not cease to be the plaintiff's agents until they had accounted to him for the price of the goods which had not yet been done.

Held, that the plaintiff's claim for the portion of rent claimed beyond three years was not barred; the defendant's letters were a sufficient acknowledgment to save limitation; there being an admission that there was an open account between the parties, and that there was a right to have it taken, implied a promise to pay. *Prance v. Sympson*, (1854) 1 Kay., 678 and *Banner v. Berridge*, (1881) L. R., 18 Ch. D., 254, referred to.

Held, also, that the defendants were liable to the plaintiff as agents until they had accounted to him, and therefore his claim as to the piece goods was not barred. *Babu Ram v. Ram Dayal*, (1890) 1 L. R., 12 All., 541, followed.

THIS was a suit brought by the plaintiff as Receiver to the estate of Sewbux Sureka against the defendants to recover the sum of Rs. 2,808-13-2.

[717] The plaintiff alleged that the defendants were partners in a business which was carried on at Mandalay on behalf of the estate of Sewbux Sureka under the name and style of Sewbux Soorujmull, and in Rangoon and Calcutta under the name and style of Buldeo Dass Jowala Persaud, and as such partners were in occupation of a house in the Chane Thazan quarter in Mandalay belonging to the said estate. The business at Mandalay having come to an end the defendants entered into a written agreement which was signed by Buldeo Dass, the first defendant, to vacate the house on or before the 21st January 1894, and if they failed to do so to pay rent at the rate of Rs. 35 per month. The defendants failed to vacate the house, and a sum of Rs. 2,047-14-4 became due from them to the said estate as rent up to the 30th June 1898. There was also a sum of Rs. 587-8 due by the defendants to the said estate on account of piece goods sold by them in Rangoon. The plaintiff also claimed interest on the above sums. On 1st April 1897 the plaintiff as Receiver wrote to the first defendant demanding payment of the said amount. On the 17th April 1897 the defendants caused their attorneys, Messrs. Cowasjee and Cowasjee, to write the following letter to the plaintiff admitting the defendants' liability to the estate of the deceased in the sum of Rs. 320-13 and enclosing an account in the hand-writing of the first defendant.

"Our client Buldeo Dass has put into our hands your two letters addressed to him and dated the 1st instant, with his instruction to reply that the accounts closed in your letter under reply are not correct. We hereby furnish you with copies of our client's accounts which show that our client is indebted to the estate of the said deceased in the sum of Rs. 320-13 only; our client denies his liability to pay interest. You have evidently failed to give credit to ours for the various items shown in our client's accounts. Our client is willing to furnish you with further particulars that you may deem necessary."

The plaintiff relied upon this and two other letters as an acknowledgment under section 19 of the Limitation Act, which prevented his claim as to the rent from January to June 30th, 1894, from being barred by lapse of time. The other letters were one of the 5th April 1896 from Buldeo Jowala Persaud as follows :—

“ You have written to this effect ; you said at the time of your departure [718] that, after looking into our rent account, you would send us hundi *Bhaiji*, that is right. We will make no objection with regard to what may be found as per account, to be receivable by and due to you for rent,”

and another dated 8th September 1897 written by Buldeo Jowala Persaud in which he said :—

“ We have been earning our livelihood honestly ; we have not committed any act of dishonesty towards Sewbuksh Ji Soorujnull ; nor have we misappropriated any money belonging to Sewbuksh Ji Soorujnull. We will not at all deviate from what you may say with regard to anything that may be (found) receivable and payable as per account. We will not in any way refuse to accept what may be (found) receivable and payable as per account. But for the last twelve months or two years, our business is not going on (well), in consequence of which we have been in difficulties, and we have not been able to make any profit, hence the delay.”

The defendants having failed to pay the amount claimed the plaintiff brought this suit, having obtained leave under clause 12 of the Charter and under section 44 Rule A of the Civil Procedure Code, to institute it.

The defendants pleaded want of jurisdiction and denied that they ever resided or carried on business in Calcutta, and alleged that the second defendant was not a partner in the business carried on at Mandalay. They also stated that there was no agreement that the rent should be payable at Calcutta, and that the plaintiff could only claim rent for a period of three years prior to the filing of the suit which was on the 11th July 1898, and not as alleged by them from the 21st January 1894. The defendants further stated that the sale of the piece goods was completed by June 1894, and that the plaintiff's claim thereto was barred.

Mr. Dunne, and Mr. J. G. Woodroffe, for the Plaintiff.

Mr. Mitter, and Mr. Chowdhry, for the first Defendant.

Mr. Sinha, and Mr. Monnier, for the second Defendant.

Mr. Chowdhry.—I submit the Court has no jurisdiction to try this case. There is nothing on the face of the plaint to show that the cause of action arose in Calcutta ; the cause title alone represents the defendants as carrying on business in Calcutta, but that portion of the plaint is not verified ; that allegation is also denied by the defendants. It must be shewn that [719] the defendants do in fact carry on business in Calcutta. As to carrying on business see *Subbaraya Mudali v. The Government*, (1863) 1 Mad. H. C., 286 ; *Emrit Lall v. Kidd*, (1864) 2 Hyde, 117, *Chinnammal v. Tulukannatammal*, (1866) 3 Mad. H. C., 146. It is not sufficient that one of the defendants should carry on business in Calcutta. The word “ defendants ” in clause 12 of the Charter means all the defendants—*Ismail Hadjee Hubbeeb v. Mahomed Hadjee Joosub*, (1874) 13 B. L. R., 91.

The grant of leave under clause 12 of the Charter must be held to relate only to the cause of action contained in the plaint as presented to the Court at the time of the grant. To allow the defendants to give evidence that the agreements were signed in Calcutta is a variance of the original cause of action, and leave as to that varied cause of action cannot be granted after the institution of the suit—*Rampurtab Samruthroy v. Preamsukh Chandamal*, (1890) I. L. R., 15 Bom., 93. The defendants owe the plaintiff rent for three years

prior to the institution of the suit in July 1898, that is, from July 1894 and not from January 1894; the claim for rent from January to July 1894 is barred. The sale of the piece goods was completed by the defendants in June 1894, and their agency must be taken to have terminated then, and therefore the plaintiff's claim to that is also barred.

Mr. Dunne, contra.—The Court, I submit, has jurisdiction. The plaintiff clearly states in the cause title that the defendants carry on business in Calcutta. If the plaintiff is permitted to give evidence on that point it cannot be said that it would be a variance of the cause of action. The cause of action remains the same. There is no additional cause of action disclosed for the first time.

Nor is any portion of the rent claimed by the plaintiff barred. The letters written by the defendants to the plaintiff are a sufficient acknowledgment under section 19 of the Limitation Act. They send the plaintiff accounts and agree to pay what should be found due to him as per the accounts. It has been [720] held that where there was an admission of the existence of an open account between the parties an undertaking to pay was thereby implied—*Prance v. Simpson*, (1854) 1 Kay, 678. I further submit that the claim to the price of piece goods sold for the plaintiff by the defendants is not barred. Taking it that the sale of the goods was completed in June 1894 that does not terminate the agency which continues until the defendants have fully accounted to the plaintiff—*Babu Ram v. Ram Dayal*, (1890) I. L. R., 12 All., 541.

Stanley, J.—The action was brought in this case by Mr. Fink as Receiver of the estate of Sewbux Sureka, deceased, against the two defendants carrying on business in co-partnership as merchants at Mandalay, Rangoon and Calcutta, and at the time the writ was issued, in Rangoon and Calcutta, under the name and style of Buldeo Dass Jowala Persaud, for the recovery of a sum of Rs. 1,780-4-2 in respect of the rent of a house in Mandalay, and for recovery of a sum of Rs. 587-8, being the price of goods sold by the defendants for Sewbux Sureka and also for interest on these respective sums.

Neither of the defendants has appeared to give evidence, but in their statement of defence they rely upon the Statute of Limitation, and they also say that this Court has no jurisdiction to entertain the suit on the ground which I shall presently refer to. The defendant Jowala Persaud, who is a son of the defendant Buldeo Dass, also alleges in his statement of defence that he is not and never was a partner with Buldeo Dass in any business in Calcutta.

The first question for determination is the question of jurisdiction. In the statement of claim there is no averment that the agreements, in respect of which the action is brought, or either of them, was executed in Calcutta, and there is nothing otherwise to show jurisdiction save it be in the title of the action in which the defendants are represented as carrying on business in Calcutta.

The learned Judge before whom the application for admission of the plaint was made was satisfied that there was jurisdiction, [721] and he allowed the writ to be issued under clause 12 of the Charter. Now, it has been proved that the contracts sued upon were as a matter of fact executed in Calcutta. I am asked to hold that, allowing proof of the signing of the agreements in Calcutta is a variance of the original cause of action, and that consequently it would be necessary to have the leave of the Court before I could make such an amendment or allow the action to proceed, and therefore I am asked to hold that the Court has no jurisdiction to entertain this suit. If I did so hold, the result would be that I should have to dismiss the action, and the following

day an application might be made to me for liberty to issue a writ in respect of the very same cause of action, the only difference being that in the statement of claim it would appear that the agreements were entered into in Calcutta. I am of opinion that it does not in any way cause a variance in the cause of action to admit evidence of the fact, and if necessary amend the plaint by adding a statement, that the contracts were entered into in Calcutta; and moreover I am of opinion that it is quite sufficient if, upon the hearing of the action, it is established to the satisfaction of the Court that the cause of action or part of the cause of action did arise in Calcutta. The authorities to which I have been referred do not seem to me to carry the defendant's contention far enough. They only establish that where there is an additional cause of action for the first time brought to light at the trial, the Court has no jurisdiction to entertain the suit, inasmuch as it is a materially different cause of action from that originally sued on. This applies to the case of both defendants.

The next defence is a defence under the Statute of Limitation, and is common to both statements of defence. I deal with it treating both defendants as being partners. The rent claimed is rent which accrued from the 21st January 1894 to the 30th June 1898 under an agreement of the 7th December 1893. In that agreement, which is signed by the defendant Buldeo Dass, he states that Sowbux Sureka has a house in Mandalay in which he has been living, and he says as follows:—

"I shall vacate the same to you on or before the 15th daylight side in Pous. If I make delay (in doing so) I shall pay [722] you rent (at) Rs. 35, in letters thirty-five, per month for the upper and lower (storey). I shall pay, if I occupy (the same), otherwise not."

Now it appears that he did occupy the house and is occupying it up to the present time, and the rent sought to be recovered is the rent due up to the 30th June 1898. There was an agreement that the rates and taxes and repairs were to be defrayed by the landlord, and as a matter of fact an allowance has been made by the plaintiff in respect of all rates, taxes and repairs which have been proved to have been paid by the defendants, and the sum of Rs. 1,780-4-2 sued for represents the balance.

The plaintiff relies upon an acknowledgment as taking the case out of the Statute of Limitation, namely, a letter of the 8th September 1897 written by Buldeo Dass Jowala Persaud, as follows:—(reads letter of 8th September, *ante* p. 718).

The account referred to in this letter included the rent of the house at Mandalay.

In addition to this there is a letter of the 5th April 1896 from Buldeo Dass Jowala Persaud, as follows:—(reads letter of 5th April 1896, *ante* p. 717).

This is a clear admission by Buldeo Dass Jowala Persaud, whoever were the members of that firm, that they would pay this rent as per account, and the account rendered by both defendants sets forth accurately the rent claimed. There is also a letter from the defendant Buldeo Dass' solicitors, dated the 17th April 1897, in which they state to the effect that the defendant Buldeo Dass does not dispute the amount of the rent due, but they say that he claims to set-off certain items as against it which would reduce the amount due:—(reads letter of 17th April 1897, *ante* p. 717).

These letters constitute in my opinion a sufficient acknowledgment of the debt to take the case out of the statute.

Mr. *Dunne* referred to the old case of *Prance v. Sympson*, (1854) 1 Kay, 678, in which it was held that where there was an admission that there was an open account between parties an undertaking to pay was to be implied. I find that the case is commented upon in a [723] more recent case by Mr. Justice KAY, viz., in the case of *Banner v. Berridge*, (1881) L. R., 18 Ch. D., 254. Mr. Justice KAY refers to *Prance v. Sympson*, (1854) 1 Kay, 678, and at page 273 he says: "But be that as it may, *Mitchell's Claim*, (1871) L. R., 6 Ch., 822, certainly shews in the plainest possible manner that it was Lord Justice MELLISH's opinion that if there was an admission that an account must be taken, and that there was a right to have it taken, it would be consistent with principle, and with the previously decided cases, that you must infer from that a promise to pay. If I may venture to express my own opinion upon the subject, that seems to me to be quite reasonable. I suppose there is no doubt at all about the law that, if there be an unqualified admission of a debt, that acknowledgment implies a promise to pay; and surely it seems quite as reasonable that if there is an unqualified admission that there is a pending account between two parties which has to be examined, that is, pending in the sense that it is not a settled account binding upon them, but is an account which either party is at liberty to examine, surely it is reasonable to say that the admission that there was such a pending account is an admission from which you may infer a promise that when the account is settled the balance shall be paid." It seems to me that here the principle is carried a little further than in the case of *Prance v. Sympson*, (1854) 1 Kay, 678.

These letters satisfy me that there was a sufficient acknowledgment of this debt in respect of rent to take the case out of the statute.

Now I come to the question of the Statute of Limitation in regard to the sale of the goods. In this case the statement of claim inaccurately describes the cause of action as for the price of goods sold by the plaintiff to the defendants, but the parties understood perfectly well that it was in respect of the goods entrusted to the defendants for sale that the action was brought. The error in the claim is trivial, and may properly I think be rectified. The goods being entrusted to [724] the defendants for sale on behalf of Sewbux Sureka they became the agents of Sewbux Sureka for the sale of the goods and liable to account as such. That being so, the contention of Mr. *Chowdhry* that the Statute of Limitation would run the moment any particular item of the goods was sold is unsustainable. The law is very clearly laid down in the case of *Babu Ram v. Ram Dayal*, (1890) 1 L. R., 12 All., 541, and it seems to me that that case governs the present. In that case the plaintiffs were merchants trading at Agra and they consigned at different dates in 1881, 152 bags of jeera or cummin seeds to the defendants on commission sale. On the 8th December 1881, the defendants sent the plaintiffs an account of 119 out of the 152 bags. No account was ever rendered of the 33 bags which were sold in January 1882, and the plaintiffs made no inquiry and took no action regarding these bags until the 27th December 1886, when they demanded from the defendants the price realised on sale of the 33 bags, the demand being refused. The suit was instituted, and in the Munsif's Court, as also in the Court of the District Judge, who agreed with the Munsif, the action was dismissed on the ground that it was barred by the Statute of Limitation, the Court holding that on the sale of each bag of the cummin seed the statute began to run, and also on the ground that the plaintiffs were guilty of laches and delay in not prosecuting their claim until after the lapse of six years.

On appeal, the decision of the Lower Appellate Court was reversed by Mr. Justice BRODHURST and Mr. Justice TYRRELL, and at page 545 they say as

follows: "It was argued with much ingenuity that under section 201 of the Contract Act the agency had terminated immediately on the sale of the goods by the business of the agency being completed. But section 218 of the same statute provides that an agent is bound to pay to his principal all sums received on his account. Clearly then the business does not terminate on receipt of the money by the agent, inasmuch as there is a subsequent obligation to account for the sums and to pay them. Moreover, there was no allegation that their business relation had terminated when the action was brought in the Court [725] below, and there was no justification in law or in fact for holding that the agency terminated as soon as the defendants sold the property. Applying, therefore, article 89 of the Limitation Act, the suit is not barred and the case must go back to the Court of First Instance." The headnote of the case is as follows: "Where an agent for the sale of goods receives the price thereof, the agency does not terminate, with reference to sections 201 and 218 of the Contract Act (IX of 1872), until he has paid the price to the principal; and a demand made by the principal for an account of the price is made 'during the continuance of the agency' within the meaning of Schedule II, article 89 of the Limitation Act (XV of 1877); and a suit by the principal to recover the price is, therefore, within time if brought within three years from the date of such demand. The agency does not terminate immediately on the sale of the goods. It does not terminate at the time when the plaintiff obtained knowledge of the defendants' breach of duty."

That decision seems to me to govern the present case; according to it the Statute of Limitation will not begin to run until the agency is determined. As a matter of fact the agency does not appear to be determined in this case as yet, because until the defendants have fully accounted the agency is still subsisting.

This being so it is unnecessary for me to refer to the letters which have been relied upon by the plaintiff as in any case taking the case out of the statute as amounting to acknowledgment in writing, signed by the defendants, or their agent, of the existence of this agency debt.

The only other point in the case is that raised by Mr. *Sinha* on behalf of his client, namely, that he never was a partner in the firm of Buldeo Dass Jowala Persaud. The evidence is altogether one way. Jowala Persaud has not come forward to give evidence and to deny that he was a partner in this firm. The clearest evidence is given by Heera Lall that Jowala Persaud carried on business here in Calcutta, that he paid money for the firm, that he attended to the business and wrote letters in reference to the business, and I see no reason to doubt that that evidence is truthful. I do not think he took as prominent a part [726] in the Calcutta business as Buldeo Dass, but the evidence satisfies me that he did take a part as a partner, and held himself out to the public as being a partner with Buldeo Dass his father. But if there were any doubt as to the truth of the oral evidence which has been given, it seems to me that the letters which were written by Jowala Persaud himself would clear away such doubt. Amongst others there is a letter, exhibit IV, written by Jowala Persaud, in which towards the end he refers to certain rubies which were in the custody of the present plaintiff and he says as regards these particular rubies: "The rubies belonging to you and ourselves in partnership must be sold either at a high or a low price." Jowala Persaud treats himself in this letter as being a partner with his father Buldeo Dass, and refers to these rubies as being property belonging to himself and his father as partners. Again in the letter, exhibit K, which letter is signed by Buldeo Dass Jowala Persaud, and in the letter, exhibit M, which is written by Buldeo Dass Jowala Persaud, there is an acknowledgment that there is an account outstanding between the plaintiff and

defendants; in the letter, exhibit O, written by Buldeo Dass Jowala Persaud the defendants refer to this account as an account for which they were both liable.

Upon this evidence I can only come to one conclusion, and that is that Jowala Persaud was a partner in this firm, and on all grounds, therefore, I decide in favour of the plaintiff for the amount of principal proved to be due namely, in respect of rent Rs. 1,780-4-2 and in respect of the goods Rs. 587-8-0. The interest I disallow because the custom to pay interest which is alleged by the plaintiff has not been established. I may state as regards the rates and taxes which I was asked at all events to set off against this debt, that there is no evidence whatever that any rates and taxes have been paid by the defendants, except a sum of Rs. 86 and some annas which had been allowed, and is credited in the accounts of the plaintiff. If additional rates and taxes have been paid the defendants will have an opportunity of setting off the sum paid against the rent which has accrued since this action was instituted. I decree, therefore, the amounts I have mentioned with costs on scale No. 2.

[727] Attorneys for the Plaintiff: Messrs. Kally Nath Mitter & Sarbadhucary.

Attorney for the first Defendant: Babu A. N. Ghose.

Attorney for the second Defendant: Babu A. C. Bose.

D. S.

NOTES.

[I In *Maniram Seth v. Seth Tugchand*, (1906) 33 Cal., 1047 P.C., the Privy Council held that an acknowledgment of liability if the balance on investigation should turn out to be against the person making the acknowledgment was sufficient.

See also (1903) 30 Cal., 699, (1903) 31 Cal., 195; (1908) 13 C.W.N., 212, the requirement in these cases that the acknowledgment should be unconditional cannot be supported after the Privy Council's discussion of the question in 33 Cal., 1047, at 1049.

II. As regards Receivers, see also 34 Cal., 305. 5 C.L.J., 270.]

[26 Cal. 727]

APPELLATE CIVIL.

The 19th April, 1899.

PRESENT:

MR. JUSTICE GHOSE AND MR. JUSTICE BANERJEE.

Durga Charan Mandal and another.....Judgment-Debtors

versus

Kali Prasanna Sarkar and another.....Decree-holders and

Auction-purchasers.*

Civil Procedure Code (Act XIV of 1882), sections 244, 266 and 318

—Questions for Court executing decree—Sale of an occupancy

holding not transferable by custom in execution of a decree

for arrears of rent obtained by a co-sharer landlord

—Effect of such a sale—Bengal Tenancy Act

(VIII of 1885), sections 22, 65, 73 and 168.

A decree for rent obtained by some of certain co-sharer landlords and not by the whole body of them, is not a decree under the Bengal Tenancy Act.

* Appeal from Order No. 447 of 1898, against the order of Babu Debendra Lal Shome, Subordinate Judge of Backergunge, dated the 29th of September 1898, reversing the order of Babu Govinda (Gopal) Gupta, Munsif of Perozepur, dated the 27th of May 1898.

Prem Chand Nusker v. Mokshoda Debi, (1887) I. L. R., 14 Cal., 201, and *Jugobundhu Pattuck v. Judu Ghose Alkushi*, (1887) I. L. R., 15 Cal., 47, referred to.

An occupancy holding which is not transferable by custom, as also the interest of the judgment-debtor in the said holding, are not saleable in execution of such a decree.

Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha, (1897) I.L.R., 24 Cal., 355, referred to.

A judgment-debtor, whose occupancy holding, which was not transferable by custom, had been sold in execution of a decree for rent obtained by some of the co-sharer landlords, objected to the application made by the auction-purchaser after the confirmation of the sale for delivery of possession of the said holding, on the ground that the sale was illegal.

[728] *Held*, that the confirmation of sale was no bar to the application that was made by the judgment-debtor to have it declared that in execution of such a decree the holding could not be sold, the question being one which related to the execution, discharge, and satisfaction of the decree.

Basti Ram v. Fattu, (1886) I. L. R., 8 All., 146, referred to.

THE facts of the case are shortly these: The judgment-debtors were two brothers, whose property, an occupancy holding, was sold in execution of a decree for rent obtained by some of the co-sharer landlords. The decree-holders purchased the holding. After the purchase one of the brothers applied to have the sale set aside under section 311 of the Code of Civil Procedure, but that application was rejected. The sale was in due course confirmed and a certificate of sale was granted to the auction-purchasers. An application was made by them under section 318 of the Code of Civil Procedure for delivery of possession, whereupon the other brother put in a petition, objecting to the sale on the ground that there was no saleable interest in the property, and also opposing the application of the decree-holders under section 318 of the Civil Procedure Code.

The Munsif, upon the evidence, held that the occupancy holding of the judgment-debtor was not transferable by custom and therefore not saleable, and rejected the decree-holder's application for delivery of possession.

On appeal the Subordinate Judge set aside the decision of the first Court, disallowed the objections of the judgment-debtors, and ordered the sale to be confirmed.

Against this decision the judgment-debtors appealed to the High Court.

Babu Chunder Kant Sen for the Appellants.

Babu Joy Gopal Ghosha for the Respondents.

The judgment of the High Court (*Ghose* and *Banerjee, JJ.*) was as follows:—

This is an appeal which arises out of two applications, one made by the judgment-creditors, who are also the auction-pur-[729]chasers at a sale in execution of the decree under section 318 of the Code of Civil Procedure, for an order for delivery of possession of the property purchased by them, and the other by the judgment-debtors under section 244 of the Code, objecting to the propriety of the sale, and asking, in effect, that the sale be set aside.

The decree in question was obtained on the 24th April 1894. It purports to be a decree for rent, and it was made in a suit instituted by certain fractional shareholders of a zemindari. Having obtained this decree in respect of their share of the rent they brought the property in the occupation of the defendants, the judgment-debtors, and in respect of which the rent was claimed, to sale on the 5th of June 1896, and purchased it themselves. The sale seems to have been confirmed on the 14th July 1896. They then applied for an order under section 318 of the Code for delivery of possession. Thereupon, as already indicated,

the judgment-debtors came in, in the first place, opposing the application of the decree-holder under section 318, and secondly insisting that the sale itself was bad and should, therefore, be set aside.

It is unnecessary to refer to the earlier stages of the proceedings in the Courts below in connection with this matter. It is sufficient to say that the last order that was made by the Court of First Instance on the 27th May 1898 was to the effect that the sale being a sale of a *kursa* holding was not a good sale, for the *raiyat* had no disposing power in it, and accordingly set aside the sale, though the actual words used in the judgment were to the effect that the property was not saleable, but which, we understand, really amounted to an order setting aside the sale.

On appeal against this order by the purchasers, the Subordinate Judge has held, having regard to the provisions of sections 22, 65 and 73 of the Bengal Tenancy Act, that, in execution of a decree for rent, the occupancy right possessed by the defendants, judgment-debtors, was capable of being sold, though the decree itself was obtained by certain co-sharers in the zemindari. He has, however, observed that the other co-sharers might refuse to recognise the purchase on the part of the decree-holders; but that so far as the judgment-debtors [730] are concerned, it is not open to them to contest the right of the decree-holders to bring to sale the holding in question. Accordingly he has ordered that the sale be confirmed, and that the objection of the judgment-debtors be disallowed.

It seems to us that the initial mistake that the learned Subordinate Judge has fallen into is this: He has regarded the decree in execution of which the property was sold as a decree under the Bengal Tenancy Act. The decree no doubt was a decree for rent, but it was obtained by some of the co-sharers in the zemindari, and not by the whole body of zemindars; and therefore it could not be regarded as a decree under the Bengal Tenancy Act (See in this connection section 188 of the Bengal Tenancy Act and the cases of *Prem Chand Nuskur v. Monkshoda Deln*, (1887) I. L. R., 14 Cal., 201, and *Jugobundhu Pattuck v. Jadu Ghose Alkushi*, (1887) I. L. R., 15 Cal., 47.

If it was not a decree under the Bengal Tenancy Act, it is obvious that the proceedings in execution thereof could only be in accordance with the provisions of the Code of Civil Procedure, and not with those of the Bengal Tenancy Act. The decree may well be regarded as a decree for money, in execution of which the property or rather the right, title and interest of the *raiyat* defendant in it were sold, if such right, title and interest in the holding were saleable under the law. The question that here arises is whether, having regard to the provisions of section 266 of the Code of Civil Procedure, the holding was saleable; whether the *raiyat* had a disposing power in it. If he had not, it is obvious that it could not be sold in execution of the decree obtained by certain fractional shareholders in the zemindari.

The Court of First Instance, in the judgment to which we have already adverted, held that the holding was not saleable by custom or otherwise, but the Subordinate Judge has rather assumed than found that it was saleable. It has, however, been contended before us by the learned Vakil for the respondent that the sale having already been confirmed the question is no longer an open question between the parties, but it seems to us that the confirmation [731] of sale is no bar to the application that has been made by the judgment-debtors to have it declared that in execution of the decree obtained by certain co-sharers in the zemindari the holding could not be sold; that he had no disposing power in it: and that therefore the sale has passed no interest whatever to the purchaser. The enquiry which should have to be made upon

an application like this would be an enquiry under the provisions of section 244 of the Code of Civil Procedure, uncontrolled by the provisions of sections 311 and 312, which deal with irregularities in the conduct of sale and the confirmation of sale where such irregularities are not made out. In the case of *Basti Ram v. Fattu*, (1886) I. L. R., 8 All., 146, decided by a Full Bench of the Allahabad High Court, where a judgment-debtor, whose occupancy tenure had been sold in execution of a decree for money, brought a suit against the purchaser for recovery of the property, on the ground that the sale of the occupancy right in execution of the decree was illegal and void, being in contravention of the provision of the Rent Act which obtains in the North-West Provinces, it was held that the question involved in the suit was one of the nature referred to in section 244 (c) of the Code of Civil Procedure as determinable only by order of the Court executing the decree, and that the suit was, therefore, not maintainable. In delivering the judgment of the Court Mr. Justice OLDFIELD made the following observations, which are pertinent to the present enquiry: "In the case before us, the judgment-debtor has sued the auction-purchaser to recover the property sold in execution of the decree, on the ground that the property, which is a tenant's right in land, is not by law saleable in execution of decree. This question is one which arose between the plaintiff judgment-debtor and the decree-holder, who is also the purchaser, and was determined against the former by the Court which executed the decree prior to the sale, and it is a question which must be considered to relate to the execution, discharge, or satisfaction of the decree. It is in effect whether any property was liable to attachment and sale to satisfy the decree. Certain things are by section 266 of the Code of Civil Procedure not liable to attachment and sale. The question regarding liability to attachment and sale arising out of the [732] provisions of section 266 of the Code of Civil Procedure would clearly be questions within the meaning of section 244 of the Code of Civil Procedure. The question of the liability of the property, the subject of this suit, to attachment and sale, arises out of a provision in the Rent Act; but equally with questions under section 266 of the Code of Civil Procedure, it is one which falls within the meaning of section 244 of the Code of Civil Procedure." We concur in these observations.

But then a difficulty arises in this wise: An order for sale was made, and in furtherance of that order, the property was sold, whatever may be the effect of that sale. If the judgment-debtors were parties to that order, or were aware of it, and did not appeal against it, they are now precluded from questioning the propriety of that order, and consequently of the sale that has taken place under that order. They say, however, in their application, to which we have already referred, that they were not aware of the proceedings in attachment of this property, nor of the proceedings in connection with the sale thereof, clearly indicating that they were not parties to the order for sale; and they say that this was owing to the fraud on the part of the decree-holders. The Courts below have not gone into this question. In the view we take of this case it would be necessary to enquire into the matter and determine whether the judgment-debtors were parties to the order for sale or were aware of it. If this question be answered in the affirmative, then we are clearly of opinion that it is not open to them now to question the propriety of the sale that has already taken place.

The learned Vakil for the respondent has, however, argued that, assuming that, by custom or usage, the holding in question is not saleable, yet the interest of the judgment-debtors, whatever that might be worth, is saleable, and that it is certainly saleable at the instance of an execution-creditor, the contention

being that the sale would be a sale only of the right, title and interest of the judgment-debtors in the property in question. In the case of *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha*, (1897) I. L. R., 24 Cal., 355, decided by Mr. Justice BANERJEE and Mr. Justice RAMPINI, where a question somewhat similar to the one now before us was raised and discussed, the following [733] observations, occurring in the judgment, are pertinent to the question now before us. After referring to the provisions of some of the sections of the Bengal Tenancy Act, which have been quoted in the judgment of the Court of Appeal below in this case, those learned Judges said as follows: "That no doubt makes an occupancy holding saleable at the instance of the landlord in execution of a decree for rent; but though that is so, it does not follow from that that an occupancy holding is saleable at the instance of the occupancy *raiyat* or of any creditor of his other than his landlord seeking to obtain satisfaction of his decree for arrears of rent" (the word "landlord" here used we take to refer to the whole body of landlords) "such an inference is, in our opinion, clearly negatived by the absence in chapter V of any provision relating to the transferability of occupancy holdings. Nor does section 73 warrant any contrary conclusion, seeing that there are cases in which occupancy *raiya*ts may transfer their holdings without the consent of the landlord; we mean cases in which such holdings are transferable by custom or local usage" and so on.

We think, having regard to the observations we have just referred to, that if the holding was not saleable according to custom or usage, it was not open to the creditors (for we cannot regard the decree-holders in this case in any other light than mere creditors) to bring to sale the interest of the occupancy *raiyat* in this holding, that it is open to the latter, having regard to the provisions of section 266 of the Code of Civil Procedure, to raise the objection which they did raise in the Court below, namely, that the holding was not a saleable property.

We observe that the Court of Appeal below has come to no decision or finding upon the question, whether the holding was saleable either according to custom or usage. When this case is taken up again under the order of remand that we propose to make, this matter will also have to be gone into.

Upon these grounds we think that the order of the Court below should be set aside and the case sent back to that Court for retrial with reference to the foregoing observations. Costs will abide the result.

S. C. G.

Appeal allowed; case remanded.

NOTES.

[I. As regards the question of saleability in execution of an occupancy holding, see also (1913) 20 I.C., 273 (Cal.): 18 C.L.J., 564; *Dayamayi v. Ananda Mohan Roy Chowdhury*, (1914) 43 Cal., 172; (1910) 37 Cal., 687; 14 C.W.N., 779; (1906) 11 C.W.N., 83; (1903) 7 C.W.N., 572; 4 C.W.N., 571; 27 Cal., 187.

II. A fractional co-sharer who has obtained a decree for his share of the rent cannot sell the tenure or holding:— 26 Cal., 937; 29 Cal., 219; 30 Cal., 550; 32 Cal., 680; 10 C.W.N., 176; 35 Cal., 774; 13 C.W.N., 746; 9 C.L.J., 479; 16 C.W.N., 1006; 16 C.L.J., 379. See also 8 C.W.N., 472; 5 C.W.N., 763; 5 C.L.J., 235.

In *Pramada Nath Roy v. Ramani Kanta Roy*, (1907) 35 Cal., 331, the Privy Council held that an agreement to pay rent to co-sharers separately might establish the right to sue separately for the several rents but that it in no other respects modified the terms of the holding.

III. The question of saleability in tenure falls within sec. 47 of the Civil Procedure Code, 1908:—(1899) 27 Cal., 187; (1899) 27 Cal., 415; (1900) 27 Cal., 810; (1901) 29 Cal., 54; (1904) 10 M.L.J., 110; (1905) 27 All., 702; (1907) 9 C.W.N., 972; (1907) 35 Cal., 61; 11 C.W.N., 1011; 6 C.L.J. 320; (1907) 29 All., 612.]

[734] *The 22nd March, 1899.*

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE RAMPINI.

Mukhoda Dassi.....Defendant No. 1
versus

Gopal Chunder Dutta, (Plaintiff), and others.....Defendants Nos. 2 and 3.*

Sale in execution of decree—Mortgage decree, Sale in execution of—Purchase by a third party, while the decree and the order for sale are valid—Effect on sale of reversal of ex parte decree—Right of redemption of mortgagor.

A mortgagor is not entitled to redeem the property which was purchased by a third party at a sale held in execution of an *ex parte* mortgage decree and confirmed whilst the *ex parte* decree was still in force, though the said decree was set aside and subsequently reaffirmed after trial.

THE plaintiff brought a suit upon a registered mortgage bond executed by defendant No. 1 for a consideration of Rs. 100. This suit was heard and decided *ex parte* against defendant No. 1 alone, and in execution of that decree the mortgaged property was sold and purchased by a third party. The whole of the decretal amount not having been realized by the sale, the plaintiff followed some other property of defendant No. 1, whereupon she appeared and applied to set aside the *ex parte* decree, and the application was granted. On the case coming on for trial again she pleaded that defendant No. 2 was the rightful owner of the property in suit; that she was *benamdar* for defendant No. 2 by whom she was prevailed upon to execute the mortgage in suit; that no consideration-money was paid for the mortgage bond; and that therefore she was not liable for the debt due thereunder. It was also urged by her that the auction-purchaser defendant No. 3 was not a *bona fide* purchaser, but was a *benamdar* for the plaintiff.

The Munsif, upon the evidence, held that the defendant failed to substantiate her pleas, and passed a personal decree against defendant No. 1 for the sum remaining due after part satisfaction of the debt realized by the sale proceeds of the mortgaged property.

On appeal to the Subordinate Judge, a new point was taken by the defendant No. 1, that the *ex parte* mortgage decree having [735] been set aside, the sale which took place in accordance with that decree could not stand, and that an opportunity should be given to her to redeem the mortgaged property by paying to the auction-purchaser the amount of the purchase money. The Subordinate Judge decided against it and dismissed the appeal.

Against this decision the defendant No. 1 appealed to the High Court.

Dr. Ashutosh Mookerjee for the Appellant.

Babu Jagat Chunder Banerjee for the Respondents.

The judgment of the High Court (BANERJEE and RAMPINI, JJ.) was as follows:—

Banerjee, J.—The question raised in this appeal, which arises out of a suit to enforce a mortgage, is, whether upon an *ex parte* decree made in a

* Appeal from Appellate Decree No. 1751 of 1897, against the decree of Babu Rajendra Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 17th of August 1897, confirming the decree of Babu Jadupati Banerjee, Munsif of Alipur in that district, dated the 4th of March 1897.

mortgage suit being set aside, and subsequently reaffirmed after trial, the mortgagor becomes entitled to redeem the property, not only as against the mortgagee, but also as against a third party who purchased it at a sale held in execution of the *ex parte* mortgage decree and confirmed whilst the *ex parte* decree was still in force.

The Court of Appeal below has answered this question in the negative, relying upon the cases of *Rewa Mahton v. Ram Kishen Singh*, (1886) I. L. R., 14 Cal., 18 : L. R., 13 I. A., 106 ; and *Zain-ul-Abdin Khan v. Muhammad Ashgar Ali Khan*, (1887) I. L. R., 10 All., 166 : L. R., 15 I. A., 12.

In second appeal it is contended on behalf of the defendant, mortgagor, that the decree of the Lower Appellate Court is wrong in law, and that the cases relied upon in the judgment of the Court below, which are cases of sale in execution of money-decrees, are distinguishable from a case like the present, in which the auction-purchaser, whose rights have been held to remain unaffected by the subsequent reversal of the decree in execution of which he made his purchase, was an auction-purchaser in execution of a mortgage decree.

We are of opinion that so far as the present question is concerned, there is no real distinction between an auction-purchaser [736] at a sale in execution of a money decree and an auction-purchaser at a sale in execution of a mortgage decree. The way in which the learned Vakil for the appellant sought to distinguish this case from the cases relied upon by the Lower Appellate Court was this : He contended in the first place that the reason of the rule in the cases of *Rewa Mahton v. Ram Kishen Singh*, (1886) I. L. R., 14 Cal., 18 : L. R., 13 I. A. 106, and *Zain-ul-Abdin Khan v. Muhammad Ashgar Ali Khan*, (1887) I. L. R., 10 All., 166 : L. R., 15 I. A., 12, was the same as the reason for the decision in the case of *Jan Ali v. Jan Ali Choudry*, (1868) 1 B. L. R., A. C., 56 : 10 W. R., 154, which is stated in the following passage in the judgment in the last mentioned case : " If the sale of the chattel should be avoided the vendee would lose his chattel and his money too and thereupon a great inconvenience would follow ; " and he argued that that was a reason which could not hold good in the case of a sale in execution of a decree in a mortgage suit, as the mortgagor being required to redeem the property the mortgage money will always go to recoup the auction-purchaser. He also argued that in the case of a sale in execution of an ordinary money decree, the reversal of the decree does not amount to a reversal of the order for sale, under which the sale in execution was held, but that the reversal of a decree in a mortgage suit means, and, in terms carries with it, a reversal of the order for sale which is part and parcel of the decree itself. In the second place it was argued that as a purchaser at a sale in execution of a mortgage decree acquires all the interest that the mortgagor and mortgagee can jointly transfer, and that as, if the decree-holder had been the auction-purchaser, the reversal of the decree would result in the reversal of the sale, the purchase at a sale in execution of a mortgage decree being, in part at least, the representative in interest of the mortgagee decree-holder, the purchase by him would become inoperative upon the reversal of the mortgage decree.

We are of opinion that these contentions ought not to prevail. With reference to the first contention, we would observe that the real reason for upholding a sale, notwithstanding the subsequent reversal of the decree, in execution of [737] which it takes place, is stated in the judgment of the Privy Council in the case of *Rewa Mahton v. Ram Kishen Singh*, (1886) I. L. R., 14 Cal., 18 : L. R., 13 I. A., 106, in these words : " To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchases under executions. If the Court has jurisdiction,

a purchaser is no more bound to inquire into the correctness of an order for execution than he has as to the correctness of the judgment upon which the execution issues." In other words, a sale in execution of a decree at which a third party becomes the purchaser is upheld, notwithstanding the subsequent reversal of the decree, because otherwise there will be less inducement to intending purchasers to buy at an execution sale, and consequently less chance of property fetching proper value at such sales. So again in the case of *Zain-ul-Abdin Khan v. Muhammad Ashgar Ali Khan*, (1887) I. L. R., 10 All., 166 : L. R., 15 I. A., 12, their Lordships of the Privy Council observe : " It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the *bona fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree and when the order for the sale was a valid order."

There is no real distinction between the two cases, namely, the case in which a sale takes place in execution of a money decree and that in which a sale takes place in execution of a decree on a mortgage, by reason of the order for sale in the one case being distinct from the decree and in the other case being part of the decree itself. In both cases, the order is a valid order as long as the decree remains unreversed, and in both cases it would lose its force upon reversal of the decree. Nor is there any real distinction between the two classes of cases by reason of the money paid by the auction-purchaser being irrecoverable in the one case and recoverable in the other, as will appear from the following considerations.

[738] The property sold in execution of a mortgage decree would not necessarily sell for exactly the amount of the mortgage debt. In many cases it may sell for more, and the difference between the amount of the mortgage debt, which will go to the decree-holder, and the purchase-money, might, before the decree is reversed, be seized and taken out of Court by any creditor of the mortgagor, in which case the mere fact of any subsequent decree ordering redemption of the mortgaged property may not be sufficient to reimburse the auction-purchaser.

Then, again it may be that the decree made after the reversal of the decree, in execution of which the sale took place, may be for a very much smaller amount, in which case also an order for the redemption of the mortgaged property would not reimburse the auction-purchaser. It was argued that in such cases the Court might put the judgment-debtor to terms. So might the Court do in any case in which a sale in execution of a money decree takes place ; but that has not been considered a sufficient reason for holding that, after the reversal of the decree, the sale ought to be held liable to reversal when a third party was the auction-purchaser.

Then as to the second branch of the appellant's contention, although it is true that the purchaser at a sale in execution of a mortgage decree may avail himself of the rights of the mortgagee, for certain purposes such as to meet the claim of any subsequent mortgagee, or other person claiming any right to the property created after the date of the mortgage, still it could not be said that he was for all purposes a representative of the mortgagee decree-holder ; and in so far as the rights claimed by the auction-purchaser are derivable from the mortgagee decree-holder, those rights will be available or not, according as the mortgage decree stands or not. In the present case no such question arises.

We should add that though the *ex parte* decree was set aside it has subsequently been practically reaffirmed ; in other words, according to the facts found,

it appears that the same decree that was originally made would have been made if the suit had been a contested suit from the beginning. We should also add that the [739] defendant No. 1 who is the sole appellant before us, in her defence disclaimed all interest in the property sold.

We are unable on the grounds suggested in the argument for the appellant to distinguish this case from the class of cases in which the rule has been laid down that where a third party purchases in execution of a decree whilst that decree is in force, the subsequent reversal of that decree cannot affect his rights. The fact that the decree in execution of which a sale took place was an *ex parte* decree subsequently set aside, might perhaps under certain circumstances form a ground for distinguishing the case of such a sale from the cases cited. But it is unnecessary to consider this point, as it was not raised in this Court or in the Courts below, and as, moreover, the appellant before us in her written statement in the first Court disclaimed all interest in the property sold.

The appeal therefore fails and must be dismissed with costs.

S. C. G.

Appeal dismissed.

NOTES.

[See also (1900) 22 All., 377 ; (1900) 23 All., 25 ; (1909) 13 C.W.N., 710.]

[26 Cal. 739]

The 26th April, 1899.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE BANERJEE.

Assanullah Bahadur.....Plaintiff

versus

Mohini Mohan Das and others.....Defendants.*

Landlord and Tenant—Accretion to parent estate, Assessment of rent in respect of—Reg. XI of 1825, section 4, cl. (1)—Act X of 1855, section 1—Reg.

VII of 1852—Act IX of 1847—Act XXXI of 1858—Bengal

Tenancy Act (VIII of 1885), section 52.

In a suit brought by the *talukdar* of a certain *mouzah* against the *dur-talukdar* for a declaration that he was entitled to get rent at a certain rate annually, also for arrears of rent at that rate, and in the alternative for compensation for use and occupation of the disputed land which was an accretion to the said *mouzah*, and in respect of which a settlement was made with him by Government treating it as a separate estate, the defence (*inter alia*) was that the suit was not maintainable unless a rent was assessed in the first instance, and that no arrears of rent could be claimed as there was no relationship of landlord and tenant between the parties.

* Appeal from Appellate Decree No. 2373 of 1897, against the decree of Amrita Lal Pal, Subordinate Judge of Dacca, dated the 17th of September 1897, affirming the decree of Babu Bepin Behary De, Munsif of Kaligunge, dated the 4th of January 1897.

[740] *Held*, the landlord could not treat it as a separate tenure altogether; that the increment was to be regarded as part of the parent estate, and treating it as part and parcel of the parent estate he was entitled to get assessment of rent on the disputed land; but he was not entitled in the suit to back rent or compensation for use and occupation.

THE plaintiff as lessee under Government, of a certain *dearah mehal* 10,842 of the Dacca Collectorate, from April 1891 to March 1901, sought to recover arrears of rent from 1299 B. S. to 1302 B. S., at a certain rate specified in the plaint, by adjudication of his right to obtain the same, or at any other rate which, on enquiry, might be assessed by the Court for the use and occupation of the said *mehal* during the period in suit. The allegation in the plaint was that he was the proprietor of *chur* Rampore bearing *Towji* No. 5035 of the Tipperah Collectorate as well as lessee under Government of the aforesaid *dearah mehal* which was contiguous to it: that the defendants were the *dur-talukdars* under him of *asli chur* Rampore; that he attempted to collect rent from *rai-yats* who held land in the said *dearah mehal*, but they refused to pay rent to him on the ground that they had paid their rent to the defendants for such land; that the defendants were in wrongful possession of the said *dearah mehal*, by collecting rent from the *rai-yats*; that the defendants who were only *dur-talukdars* of *asli chur* Rampore had no right to remain in possession of the *dearah mehal* by collecting rent from its *rai-yats* without payment of a separate *jama* in respect of it for their use and occupation; that on measurement of the *dearah mehal* by his own men the sum of Rs. 44-5 as. 11 pie. was assessed to be its annual *jamabandi*, and that he was entitled to recover the sum of Rs. 39-14as. after having deducted Rs. 4-10as. as collection expenses, from the defendants as provided for in their *dur-talukdar pottah*; that the defendants, notwithstanding repeated demands, did not pay the said *jama* together with cesses and interest, and therefore the present action was brought.

The defence mainly was that the suit was not maintainable unless a rental was assessed in the first instance, and that the plaintiff was not entitled to claim arrears of rent as there was no relationship of landlord and tenant between the parties. The Munsif dismissed the suit, holding that inasmuch as there was no [741] relationship of landlord and tenant between the parties the action for recovery of arrears of rent would not lie.

On appeal the learned Subordinate Judge confirmed the decision of the first Court.

Against this decision the plaintiff appealed to the High Court.

Babu Srinath Das, and Babu Bussunt Kumar Bose, for the Appellant.

Babu Sarada Churn Mitter and Babu Jnanendro Mohan Das, for the Respondent.

The judgment of the High Court (Ghose and Banerjee, JJ.) was as follows:—

The plaintiff is the *talukdar* of *mouzah chur* Rampore, the defendant is the *dur-talukdar* of that property. Certain lands accreted to *chur* Rampore, and the Government, having taken proceedings, as we understand it, under Act XXXI of 1858 and Act IX of 1847, settled the accretion, treating it as a separate estate, with the *talukdar*, the plaintiff in the present case. Subsequently, this suit was brought claiming certain reliefs as against the defendant, the *dur-talukdar*, in respect of the said increment.

There are two or three contradictory statements in the plaint as to the position of the defendant, but ultimately it treats him as one entitled to hold the increment as tenant, and asks that it be declared that the plaintiff is entitled to obtain annually Rs. 39-14-11 as rent from the defendant in respect of such lands, and that a decree for rent in respect of the years from 1299 to 1302 at

the said rate be awarded. And as an alternative relief it asks for compensation for the use and occupation of the lands in question by the defendant.

Both the Courts below have dismissed the suit, being of opinion, as we understand their judgments, that neither under the Bengal Tenancy Act, nor under the provisions of Regulation XI of 1825, is the plaintiff entitled to any of the reliefs claimed by him in his plaint.

Referring to Regulation XI of 1825, section 4, clause 1, we find it enacted that when land is gained by gradual accretion, [742] whether from the recess of the river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zamindar or other superior landholder, or is a subordinate tenure held by any description of under-tenant whatsoever. Provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed to a right of property or "permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed," and so on. That is to say, the land thus formed by the gradual recess of a river or of the sea shall be considered an increment to the parent estate or tenure, or, in other words, it shall be regarded as a part of that estate or tenure the land having been gained by gradual accession.

Referring in the next place, to Act XXXI of 1858, under which the Government proceeded in settling the accretion with the landlord, we find that, though under section 1 of that Act, it is competent to the Government to settle the increment as a separate estate, yet under section 2 it is provided that: "Nothing contained in the preceding section shall affect the rights of under-tenants in alluvial land under the provisions of clause 1, section 4 of Regulation XI of 1825. It shall be the duty of all officers making settlement of such land, whether the land be settled separately or incorporated with the original estate, to ascertain and record all such rights according to the rules prescribed in Regulation VII of 1822, and determine whether any and what additional rent shall be payable in respect of the alluvial land by the person or persons entitled to any under-tenure in the original sum," and so on; that is to say, whatever may be the mode adopted by Government in settling the increment, it would not affect the rights of any under-tenant in the same property—rights which he may possess under the provisions of the Regulation just cited.

Now what are the rights conferred by clause 1, section 4, of Regulation XI of 1825 upon an under-tenant to whose property land may accrete by gradual accession? As we understand the [743] matter, the tenure-holder is entitled to possess the increment in the same right and upon the same footing as that upon which he holds the parent estate, see the cases of *Gobind Monee Debia v. Dino Bundhoo Shaha*, (1871) 15 W. R., 87, and *Golam Ali v. Kali Krishna Thakur*, (1881) I. L. R., 7 Cal., 479; 8 C.L.R., 517. What may be the limit of the demand which the landlord is entitled to make as against the tenure-holder, is not clearly prescribed by the section.

In this connection we may refer to section 52 of the Bengal Tenancy Act, but before doing so it would be just as well to notice the last portion of clause 1, section 4 of Regulation XI of 1825, as it existed before it was repealed by the Bengal Tenancy Act. That portion ran as follows: "Nor if annexed to a subordinate tenure held under a superior landholder shall the under-tenant, whether a *khudkasht raiyat* holding a *mourasi istemrari* tenure at a fixed rate of rent per bigha or any other description of under-tenant liable by his engagement or by established usage to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of

any increase of rent to which he may be justly liable." The substance of this portion seems to have been embodied with modifications in section 52 of the Tenancy Act. That section runs thus: "Every tenant shall be liable to pay additional rent for all land proved by measurement to be in excess of the area for which the rent has been previously paid by him, unless it is proved that the excess is due to the addition to the tenure or holding of land which, having previously belonged to the tenure or holding, was lost by diluvion or otherwise, without any reduction of the rent being made." Sub-clause (b) speaks of abatement of rent which we need not consider. Then in clause 2 it is provided that in "determining the area for which rent has been previously paid, the Court shall, if so required by any party to the suit, have regard to the origin and conditions of the tenancy, for instance, whether the rent was a consolidated rent," and so on, and then clause 3 provides: "In determining the amount added to the rent the Court shall have regard to the rates payable by tenants [744] of the same class for lands of a similar description and similar advantages in the vicinity, and in the case of a tenure-holder to the profits to which he is entitled in respect of the rent of his tenure, and shall not, in any case, fix any rent which under the circumstances is unfair and inequitable," and so forth.

Now reading this section with Regulation XI of 1825 and Act XXXI of 1858, to which we have already referred, it seems to us that, if the increment is to be regarded, as we think it ought to be regarded, as part of the parent tenure, the landlord cannot treat the increment as a separate tenure altogether, but that treating it as a part and parcel of the parent tenure he can claim such relief as under the law he is entitled to obtain as against the tenure-holder.

Having made these observations which we think arise upon a consideration of the law upon the subject, let us see what are the reliefs to which the plaintiff in the present case is entitled. It seems to us in the first place that the plaintiff is not entitled to any back rent, and *that* for two reasons: *first*, there has been no contract between the parties as regards the separate payment of any rent in respect of the additional lands; and, *secondly* because under the law the plaintiff cannot recover the rent of such additional lands separately from the original part of the tenure. It has, however, been contended by the learned Vakil for the appellant, and at one time we were impressed by this contention, that, though the plaintiff may not be allowed to recover back rent in the present suit, he may yet be allowed to obtain compensation for the use and occupation of the land by the defendant. But it seems to us that if we were to give effect to this contention, we should have to hold that the landlord is entitled to treat the additional lands as a separate property, for which he is entitled to receive from the defendant compensation for the use and occupation. We think that the landlord is not entitled to any such relief in the present case. Indeed, there can be no claim for compensation for use and occupation, seeing that the law makes the defendant a tenant of the accreted land from the time of accretion, and the claim, if any, must be one for rent. But then the plaintiff asks [745] for the assessment of rent upon the land in question. We are of opinion that there is no reason why he should not be entitled to this relief. The lands have formed as an accretion to the defendant's tenure; rent must be assessed upon such lands, and the plaintiff cannot recover any rent from the defendants until it be in the first instance determined what is the additional rent he ought to pay for it, though, no doubt, if he had taken proceedings under section 52 of the Bengal Tenancy Act, for the purpose of recovering rent

in respect of the entire tenure, including the lands which have formed by way of accretion to the defendant's tenure, relief might have been given to him after such investigation as the provisions of that section require. But the fact that he has not taken that course does not, we think, disentitle him to a declaration how much additional rent should be paid for the land in question. In determining what is the additional rent which ought to be assessed upon the land the Court will have to be guided by the provisions of section 52 of the Bengal Tenancy Act, indicating the principle upon which such additional rent may be claimed for any excess area in the occupation of a tenure-holder or a *raiyat*. We think it right and proper to remand the case to the Court of First Instance with the view of determining what is the additional rent which the plaintiff, the landlord, is entitled to obtain from the defendant, the tenure-holder, on account of the lands which have accreted to his tenure. It will be open to both parties to adduce such further evidence as they may be advised to adduce. As regards the costs we are of opinion, having regard to the conflicting statements made in the plaint as to the position of the defendant, and to the somewhat conflicting reliefs which the plaintiff asked for, that the ends of justice require that the respondent should have all the costs of this litigation up to the present stage. The costs which may be incurred in future will abide the result of the trial we now direct.

We desire to add that, though this order of remand is expressly with the view of trying the question of assessment of rent upon the additional area in the occupation of the defendant, yet it would not debar the Courts below from trying any other questions which legitimately arise between the parties in the case.

S. C. G.

*Appeal allowed. Case remanded.***NOTES.**

[See also (1901) 29 Cal., 247 at 251 ; (1903) 30 Cal., 811 ; (1914) 19 C.L.J., 308.

In (1914) 19 C.L.J., 614 at 617, these cases were distinguished on the ground that there the alluvial land had been settled not with the entire body of proprietors of the original estate, but with only one of them.]

[746] CRIMINAL REVISION.*The 9th May, 1899.***PRESENT :****MR. JUSTICE GHOSE AND MR. JUSTICE WILKINS.**

W. B. Colville and others.....Petitioners

versus

Kristo Kishore Bose.....Opposite Party.*

Revision—High Court's power of revision—Presidency Magistrate, Proceedings of—Order for further inquiry—Criminal Procedure Code (V of 1898), sections 423, 435 and 439—Letters Patent, High Court, 1865, clause 28.

The High Court has under sections 435 and 439, read with section 423 of the Criminal Procedure Code, the power to revise the proceedings of a Presidency Magistrate and order a

* Criminal Revision No. 240 of 1899, made against the order passed by Syed Ameer Hossein, Esq., Presidency Magistrate of Calcutta, dated the 3rd of March 1899.

further inquiry to be made. It has the same power under clause 28 of the Letters Patent of 1865.

THE complainants filed a complaint against the accused before the Presidency Magistrate of Calcutta for having committed offences under sections 417 and 418 of the Penal Code. The Magistrate, after hearing the evidence on behalf of the prosecution, was of opinion that no *prima facie* case had been made out against the accused and ordered his discharge under section 253 of the Criminal Procedure Code. The complainants moved the High Court and a rule was granted for the purpose of considering whether the High Court had not power to order a further inquiry into the matter, and also for determining whether the order of discharge made by the Presidency Magistrate should not be set aside.

Mr. Garth, Mr. Zorab, and Babu Tarak Chunder Chakrabati for the Petitioners.

The judgment of the High Court (Ghose and Wilkins, JJ.) was as follows:—

This rule was issued upon the Presidency Magistrate of Calcutta to show cause "why his order discharging the accused should not be set aside in order that it may be considered whether this Court has not, under section 15 of the Charter Act, power to [747] order a further inquiry or otherwise deal with the matter as it may appear proper." As we understand this rule, it was granted for a double purpose, *first*, for the purpose of determining whether the order of discharge made by the Presidency Magistrate should not be set aside, and *secondly*, that it may be considered at the same time whether this Court has not, under section 15 of the Charter Act, power to order a further inquiry into the matter. So far as the first mentioned purpose is concerned, it seems to us, upon examining the judgment of the Presidency Magistrate, and after hearing Mr. Garth in support of the rule, nobody appearing on the other side to show cause, that the Presidency Magistrate has not dealt with the matter before him in the way in which he should have dealt with it. He seems to have thrown out, in the course of his judgment, that he has no jurisdiction to take cognizance of the complaint, because the offence, if any, was committed at Shalimar within the jurisdiction of the District Magistrate of Howrah. But it appears to us that the monies having been received from the complainants' firm at Calcutta, and the false accounts, as stated by the complainants, having been rendered in Calcutta, the Presidency Magistrate had jurisdiction to take cognizance of the complaint in question. The Magistrate has in this connection referred to the evidence of one Mr. Morse as showing that the accounts used to be sent to Kidderpore and the money drawn from that place. But, as we understand it, the transactions out of which this particular complaint has arisen are transactions which took place subsequent to the time of Mr. Morse and, therefore, are not affected by the evidence that was given by that gentleman.

Then, as regards the grounds upon which the Magistrate holds that no *prima facie* case has been made out, we are of opinion that that officer has misguided himself. He seems to have been under the impression as if the main (if not the whole) question before him was whether the accused was justified in paying the coolies at higher rates than the rates at which the complainant says they ought to have paid. But, according to the case for the prosecution, as laid before us, there were no payments made by the accused at all to many of the coolies; and it is further alleged that the accused, having made certain false [748] entries in the shape of payments made to the coolies, and having submitted his accounts at the head office in Calcutta, drew further sums of money from that office and, in that way, cheated the complainants' firm of a

considerable sum of money. It seems to us that this part of the case has not been, as it ought to have been, gone into by the Presidency Magistrate; and that this ought to be now done. It follows, therefore, that the order of discharge is erroneous, and should be set aside.

As regards the other purpose for which the rule was granted, it seems to us that, under sections 435 and 439 read with section 423 of the Code of Criminal Procedure, this Court has the power to revise the proceedings of the Presidency Magistrate, he being subject to the Appellate jurisdiction of this Court. But beyond this, on referring to clause 28 of the Letters Patent bearing date the 28th December 1865, it appears that this Court has the power to revise the proceedings of the Criminal Courts subject to its Appellate jurisdiction. The Courts of the Presidency Magistrates are subject to our Appellate jurisdiction: and it follows, therefore, that this Court has the authority to revise the proceedings now before us under the said clause of the Letters Patent, not section 15 of the Charter Act, mentioned in the rule, which was obviously a mistake for clause 28 of the Letters Patent. With these remarks the rule is made absolute, the order of the Presidency Magistrate being set aside, and a further inquiry being directed into the complaint instituted. We further direct that the trial of this case should be held by the Chief Presidency Magistrate. Let the records be sent down to his Court.

S. C. B.

Order for further inquiry.

NOTES.

[As regards revision, in (1899) 27 Cal., 126 this was dissented from, but that decision was dissented from in (1909) 36 Cal., 994; 27 Bom., 84.

As regards jurisdiction over head office in respect of offence of the branch firm, see also (1912) 34 All., 487; 15 L.C., 317.]

[26 Cal. 741]

The 1st June, 1899.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Satish Chandra Rai and another.....Petitioners

versus

Jodu Nandan SinghOpposite Party.*

*Warrant of arrest—Criminal Procedure Code (Act V of 1898), section 80—
Notification of substance of warrant—Penal Code (XLV of 1860),
section 225 B.*

[749] An arrest by a police officer without notifying the substance of the warrant to the person against whom the warrant is issued as required by section 80 of the Criminal Procedure Code is not a lawful arrest, and resistance to such an arrest is not an offence under section 225 B of the Penal Code.

A WARRANT of arrest was issued for the purpose of obtaining the attendance of a person who was a party to certain proceedings under section 110 of the

* Criminal Revision No. 272 of 1899, made against the order passed by B. C. Mitter, Esq., Officiating Sessions Judge of Faridpur, dated the 9th February 1899.

Criminal Procedure Code. At the time of making the arrest the police officer did not notify the substance of the warrant, as required by section 80 of the Criminal Procedure Code, but merely showed the warrant, which he held in his hand along with other warrants, to the person to be arrested. The petitioners resisted the execution of the warrant, and were convicted of an offence under section 225 B of the Penal Code by the Deputy Magistrate of Faridpur. The District Judge on appeal upheld the conviction. The petitioners moved the High Court, and obtained a rule contending that the conviction under section 225 B could not stand, inasmuch as the substance of the warrant under which the arrest was made was not notified to the person arrested as required by section 80 of the Criminal Procedure Code.

Mr. *P. L. Roy*, Mr. *C. R. Das*, and Babu *Manmatha Nath Mookerjee* appeared on behalf of the Petitioners.

The **judgment** of the High Court (**Prinsep and Hill, JJ.**) was as follows :

The petitioners were convicted by the Appellate Court under section 225 B of the Indian Penal Code.

On this rule, we have to consider whether the conviction is a valid conviction because the arrest was not lawfully made within the terms of section 80 of the Code of Criminal Procedure, inasmuch as when the police officer, who was resisted, made the arrest, he did not notify the substance of the warrant which he held to the person to be arrested. As an authority for this we have been referred to the case of *Abdul Gafur v. Queen-Empress*, (1896) I. L. R., 23 Cal., 896, in which it was held that an arrest so made is not a lawful arrest, resistance to which is an offence under the Penal Code. The arrest here made was not for an offence for which a police [750] officer was competent to make the arrest without a warrant. It was for the purpose of obtaining the attendance of a person who was a party to certain proceedings instituted under section 110 of the Code of Criminal Procedure; that is, who had been required to show cause why he should not give security for good behaviour. It has, however, been said that the person to be arrested, and the petitioners were aware that the police constable had a warrant of arrest, and that, although he did not notify its substance, he showed it on the occasion of the arrest. We are not satisfied that this in itself would be sufficient to make an arrest valid without any notification of the substance of the warrant, or an opportunity given to the person to be arrested by showing him the warrant so that he might read it. In this case the warrant was held in the hand of the police officer along with six other warrants, and thus shown to him, and it was impossible for any one to know what the substance of the warrant may have been, or indeed for him to satisfy himself that the police constable really held a warrant for the arrest he was making. The conviction and sentence must, therefore, be set aside and the rule made absolute.

S. C. B.

NOTES.

[A civil warrant was held not to be invalid, merely because it was not addressed to a particular bailiff :—(1914) 24 I.C. 175 (Mad.).]

[26 Cal. 750]

APPELLATE CIVIL.

The 20th March, 1899.

PRESENT:

MR. JUSTICE MACPHERSON AND MR. JUSTICE AMEER ALI.

Chhatrapat Singh.....Judgment-debtor

versus

Gopi Chand Bothra and others.....Decree-holders.*

*Bengal Tenancy Act (VIII of 1885), section 148, cl. (h)—Assignee of decree—
Trustees applying for execution for benefit of assignor's heirs.*

The word "assignee" as used in section 148, clause (h), of the Bengal Tenancy Act, does not include trustees who execute decrees under an assignment which is not for their own benefit but for the benefit of the heir of the assignor.

RAI DHUNPUT SINGH obtained two decrees against the appellant for arrears of rent on the 10th of July 1896, in respect of two [751] *putni mehals* situated in Pergunnah Haveli. On the 27th of June 1893 he had sold his right and interest in the said Pergunnah to one Bhugwanbuti Chowdrani. The above rent decrees were on account of rents due from the appellant for a period prior to the date of the sale.

On the 19th of July 1896 Rai Dhanput Singh executed a deed of trust in favour of the respondents, by which he conveyed to them various properties, both moveable and immoveable, upon certain trusts; the above two decrees against the appellant were included in the said deed. The following is a copy of the deed without the schedule of properties:—

"I, Rai Dhunput Singh Bahadur, son of the late Babu Protap Singh, by caste Oswal, by occupation zemindar, etc., inhabitant of Azimgunge, division Asanpura, Sub-Registry Baluchur, district Moorshedabad, execute this trust deed, i.e., (*nyaspatra*) in respect of immoveable and moveable properties as follows:—

In the month of February of the year 1893, owing to the unjust proceedings of one Kastur Chand, Rai Bahadoor, I being declared an insolvent by an order of the Hon'ble High Court at Calcutta in its Original Insolvent Jurisdiction, dated the 16th February 1893, was involved in considerable debts. By sale and mortgage, I have lately paid off a large amount of debt, but still I have debts to a large amount. It is necessary for me to make a settlement for the purpose of liquidating the said debts in due (time). Owing to physical and mental uneasiness, I am personally unable to do business any more in a satisfactory way, and it is the wish of most of my creditors that I should make over my properties to the hands of trustees, for the purpose of liquidating my debts. For all these reasons, I make over all my immoveable and moveable properties, that is to say, all kinds of property of which I am now the owner, by appointing as trustees, Gopi Chand Bothra, son of the late Fakir Chand Bothra, by caste Oswal, and Kirat Chand Srimal, son of the late Mogni Ram Srimal, inhabitants of Azimgunge, occupation service, and Surja Coomar Adhikari, son of the late Bhagwan Chunder Adhikari, by caste Brahmin, occupation service, now residing at Baluchur. The trustees, on being entitled to and coming into possession of all my properties as proprietors (*maliks*) and causing their names to be registered, etc., in the Collectorate, etc., according to law, shall pay my debts from the profits of the properties or by mortgage and sale of all or some of them; and as to those sums which are

* Appeal from Order No. 351 of 1897, against the order of Babu Chakredhar Prosad, Subordinate Judge of Purneah, dated the 2nd of September 1897.

due to me, they on becoming representatives in my place, shall realise amicably or by aid of Court, and shall hand over the same also to the extent practicable for the liquidation of my debts, and shall in the first place pay the expenses that may be incurred on account of doing all these acts, as well as on account [752] of litigation. They shall discharge debts by even selling those properties which I have mortgaged. As to those properties which may be left as surplus, or which it may be unnecessary to sell, they are to give back the same to me or to my heir Srimon Maharaj Bahadoor. I give below a list of the properties, of which I am now the owner, but if owing to mistake any property be omitted from the list, it shall also be included in this trust deed. Prior to the liquidation of my debts, neither I nor my heir shall be able to interfere with the acts of the trustees, and unless they commit an act of waste, neither I nor any of my representatives shall be able to revoke the said trust; the trust shall operate in an irrevocable way. For preparing a list of my debts, the trustees shall ascertain (the same) by inspection of my *khata* papers, and shall not acknowledge any debts not covered by *rokas*, *hatchittas* or *hundis*, bearing the signature of me or of my *munib gomashlas* or decrees. As to any arrangements which the trustees may make, with respect to the preservation and supervision of the properties, neither I nor anybody else shall make objections to the same, and they may, according to their wish, dismiss the old *amlas* and appoint new *amlas*. As to the sale of the properties, they may sell properties to any one whom they like at the value which they may think to be proper, and any *kobala* signed by them and which is registered shall have the same force as one bearing my signature or the signature of my representatives. If it be necessary to borrow money by mortgaging properties, the trustees shall do the same, but the interest on such mortgage shall not exceed Rs. 9 (nine) per cent. per annum. As to the realization of the moneys remaining due, the trustees have become the representatives in my place and they shall act by using their respective names as trustees. This trust deed shall remain in force until my debts are satisfied, that is to say, not only during my lifetime, (but) also after my death, and my heirs and representatives shall be bound by the terms of this trust deed. If all or any of the trustees be willing to give up the trust, they must appoint another trustee and he shall act according to the trust. But if any of the trustees should resign without appointing another trustee, or if he should die before the appointment of another trustee, then any person whom I, during my lifetime or after my death, my widow Rani Mina Kumari or my youngest son Maharaj Bahadoor, if he had (?) of age, may appoint as trustee, shall be the trustee. This trust deed shall be treated as a deed of conveyance of property. As to those landed properties, *jotes* and *jummas* which are made over to the hands of the trustees under this trust deed, they shall be the persons fully entitled to realize the arrears and outstandings, etc., and all kinds of dues relating to them. To this effect I execute this trust deed in a sound state of mind.

Dated the 5th Srabun 1303, corresponding with the 19th July 1896."

Dhunput Singh died in the month of September 1896, and on the 3rd of December following the trustees, respondents, applied [753] for execution of the said two decrees. The appellant, judgment-debtor, raised several objections, contending amongst other things, that, under section 148, clause (h) of the Bengal Tenancy Act, the application for execution of the decree by the trustees was not maintainable inasmuch as the landlord's interest in the land had not become vested in them.

The Subordinate Judge overruled the objections and ordered the execution of the decrees.

The judgment-debtor appealed to the High Court.

Dr. Rash Behari Ghose, and Babu Joy Gopal Ghose, for the Appellant.

Babu Saroda Churn Mitter, and Babu Pramatha Nath Sen, for the Respondents.

The following judgments were delivered by the High Court (MACPHERSON and AMEER ALI, JJ.).

Ameer Ali, J.—This appeal arises out of an application for execution of two decrees obtained by one Rai Dhunput Singh Bahadoor against the present appellant in respect of certain *putni* rents. The application is dated the 3rd of December 1896.

It appears that on the 27th of June 1893 Rai Dhunput Singh, who was the owner of Pergunnah Haveli within which the *putni mehals* are situated, sold his right and interest to one Mussammat Bhagwanbuti Chowdrani. On the 10th of July 1896, he obtained the decrees in question for the rents due from the appellant for a period prior to the sale; and on the 19th July 1896 he executed a trust deed in favour of one Gopi Chand Bothra and others by which he conveyed to them various properties, both moveable and immoveable, upon certain trusts. The two decrees against the appellant were included in the said trust deed.

Dhunput Singh died in September 1896; and on the 3rd of December following, as already stated, the trustees applied for execution.

On the 3rd March 1897 a petition of objection was put in on behalf of the judgment-debtor in which he contended, *first*, that the trustees' power came to an end on the death of Dhunput Singh, and that, therefore, they had no authority to apply for [754] execution; *secondly*, that the decree-holder's adult sons Gunpat Singh and Nurput Singh, together with his minor son, Maharaj Bahadoor Singh, were his legal representatives; *thirdly*, that, inasmuch as the judgment-debtor's right in the properties had already been sold, and purchased by one Bibi Jarao Kumari Saheba, the respondents were not entitled to proceed against the tenure; and *fourthly*, that under section 148, clause (h), of the Bengal Tenancy Act, the application for execution of the decree on behalf of the trustees was not maintainable.

Upon these objections the Subordinate Judge laid down the following points as arising for determination:—

"1st.—Is the application for execution of the decree on behalf of the trustees maintainable?"

"2nd.—If maintainable, whether the decree under execution can be treated as a first charge on the properties sought to be sold, and whether they should be considered rent decrees?"

"3rd.—Whether Maharaj Bahadoor alone is legal heir and representative of the deceased Babu Rai Dhunput Singh, the original decree-holder?"

"4th.—Whether a subsequent application by Maharaj Bahadoor for being added as an applicant, remedies the defect which the judgment-debtor seeks to press?"

It is to be noticed that on the 7th of August 1897 Maharaj Bahadoor, the infant son of Dhunput, joined in the application for execution.

The Subordinate Judge holds that the power of the trustees did not expire with the death of Dhunput, and that the trustees are entitled to execute the decrees; he holds further that inasmuch as the rents for which the decrees were obtained accrued when the relationship of landlord and tenant existed between Dhunput and the judgment-debtor, the lien still continues and that the trustees are entitled to enforce the same. He also holds that any technical defect in the application arising from the non-joinder of the personal representatives of Dhunput was cured by the fact of Maharaj joining in the application. And the learned Judge accordingly overruled the judgment-debtor's

[755] objections, directed execution of the decrees at the instance of the trustees and Maharaj Bahadoor, and declared that the *putni* tenures were liable to be sold in execution of those decrees.

The judgment-debtor has appealed to this Court. His case has been argued with considerable ingenuity, and the same objections which were taken in the Court below have been pressed before us.

I think, however, that those objections are not tenable.

First, with regard to the authority of the trustees the contention is that they were merely agents of Dhunput Singh, and that consequently upon the death of Dhunput the agency came to an end, and the trustees became practically *functi officio*, all authority vesting in them by virtue of the trust deed falling to the ground. In my opinion this argument proceeds upon a somewhat fallacious reasoning. The passages cited from Lewin on Trusts must be read with the documents on which the cases referred to in the text-book proceeded. Each case must, it seems to me, be dealt with upon its own special facts; and we have, accordingly, to see what the document in the present case directs and provides. In other words, we must see whether, as is contended by the appellant's pleader, it only gives to the trustees an authority to do certain acts, constituting them merely as his agents for certain purposes, or whether, as the learned Subordinate Judge finds, it conveys a legal estate to the trustees and virtually amounts to an actual transfer in their favour, subject to certain trusts. For this purpose it is necessary to refer to the terms of the trust deed. It begins by reciting that the executant Dhunput was largely involved in debt, and that it was necessary for him to make a settlement for the purpose of liquidating the same and accordingly, as he himself was "unable to do business any more in a satisfactory way," and it was the wish of most of his creditors that he should make over all his properties, moveable and immoveable, "that is to say, all kinds of properties of which he was then the owner," to certain trustees for the purpose of liquidating his debts, he, accordingly, made over all his immoveable and moveable properties to the persons therein named. The deed then goes on to provide that the trustees were to hold possession [756] of all his properties as proprietors, to get their names registered in the Collectorate, and pay the debts from the profits of the properties or by mortgage and sale of all or some of them. After the debts were discharged they were to give back the surplus or whatever remained to Dhunput or his heir, Maharaj Bahadoor. The deed then declares that neither he nor his representatives shall be able to revoke the said trust, and that it shall operate in an irrevocable way. And it then goes on to state as follows:—

"This trust deed shall remain in force until my debts are satisfied, that is to say, not only during my life-time (but) also after my death and my heirs and representatives shall be bound by the terms of this trust deed. If all or any of the trustees be willing to give up the trust they must appoint another trustee and he shall act according to the trust. But if any of the trustees should resign without appointing another trustee, or if he should die before the appointment of another trustee, then any person whom I, during my lifetime, or after my death, my widow Rani Mina Kumari or my youngest son Maharaj Bahadoor, if he had (?) of age may appoint as trustee, shall be the trustee." And it winds up by declaring: "This trust deed shall be treated as a deed of conveyance of property. As to those landed properties *jotes* and *jummas*, which are made over to the hand of the trustees under this trust deed, they shall be persons fully entitled to realize the arrears and outstandings, etc., and all kinds of dues relating to them. To this effect I execute this trust deed in a sound state of mind."

Upon the terms of the deed there can be no doubt that it purports to convey to the trustees, absolutely, the properties covered by it subject to certain trusts. In my opinion there is no ground whatsoever for saying that it was merely an authority to the so-called trustees to do certain acts, which authority ceased with the death of the principal. The properties were conveyed to the trustees for the purpose of discharging his debts, and then returning any residue left either to Dhunput or his heir. It was to be irrevocable on the part of his heirs and representatives, was to take effect as a conveyance, and was to continue in force, not only in his lifetime, but after his death, until the purpose for which [787] it was executed had been fully discharged. In my opinion there is no ground for contending that the trustees under such a conveyance had no power to execute the decrees. I hold, therefore, that the first objection is wholly untenable.

It is also clear from the recitals contained in the document printed at page 44 of the Paper Book, which bears date the 30th June 1893, and from the entire evidence on the record, that the two adult sons of Dhunput separated from him in 1887, and ceased to have any interest whatsoever in the properties covered by the deed of trust, and that Maharaj Bahadoor, Dhunput's minor son, alone is the person entitled to the benefit of the trust. No question of limitation is raised in this case. Maharaj has by a petition joined in the application for execution; and I think the learned Judge in the Court below was right in holding that Maharaj, in conjunction with, or separately from, the trustees, was entitled to execute the decrees obtained by his father.

It was contended that under clause (h) of section 148 of the Bengal Tenancy Act the trustees were not entitled to execute the decrees. That clause runs as follows :—

“(h) Notwithstanding anything contained in section 232 of the Code of Civil Procedure, an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest in the land has become and is vested in him.”

In my opinion there is no force in this contention. From one point of view the trustee is an assignee, inasmuch as the property is conveyed to him as has been done in this case. But to my mind the Legislature never intended to include in the word “assignee” used in clause (h) persons in whom a legal estate was vested by an act of the owner, but who had no independent interest in the property. I think that the provision in question applies only to outside purchasers for consideration.

There remains then only one question to consider, namely, whether, in view of the fact that the *putni mehal* had been sold in execution of a money decree and purchased by one Bibi Jarao Kumari, the applicants are entitled to proceed against the tenures for the satisfaction of their rent decrees. As the learned [788] Judge points out certain rents had become due from the appellant whilst he held the tenure. After Dhunput transferred the property to Mussammut Bhagwanbuti Chowdhurani he obtained decrees for these rents. The sale of these tenures in execution of money decrees could not release the tenures from the lien which had already attached to them. Further it seems to me that as the appellant contends he has lost the property he is not entitled to raise the question that the tenures are not liable to sale in execution of these decrees.

The applicants are clearly entitled to have execution of the decrees; and I should accordingly dismiss the appeal with costs.

Macpherson, J.—I agree that the appeal must fail. We are asked to hold that the Court could not act upon the applications for execution, because the trustees had no authority to make them, and the want of authority was not cured by the subsequent joinder of Maharaj Bahadoor. Also that the Court was wrong in declaring that the *putni mehals* could be sold under the provisions of the Tenancy Act. *First*, because the applications were in direct contravention of the provisions of clause (h), section 148 of that Act, the original applicants being assignees of the decrees in whom the landlord's interest had not become vested; *secondly*, because the decrees were not decrees for rent within the meaning of the Act as Dhunput was not at the time when he obtained them the landlord of the appellant the judgment-debtor.

By the deed of the 19th of July 1896, Dhunput made over the decrees in question, and all his property to the applicants for execution, in trust avowedly for the payment of his debts, and the surplus was to be returned to him, or his heir Maharaj Bahadoor, when the debts were satisfied, but not before. The effect of this deed as a trust for the payment of debts was considered in the case of *Fink v. Maharaj Bahadoor*, (1898) 2 C. W. N., 469. That was a suit brought by the receiver of an estate to recover the money due on three *hundis* drawn by Dhunput. The claim on one of the *hundis* was barred by limitation—unless the creditor could, as he attempted to do, take advantage of the trust deed. It was not [759] proved that the deed had been communicated to the creditors or assented to by them, and the Court held that the creditor was not a beneficiary under the deed and could not take advantage of it. We are now asked to go a step further, and to hold, at the instance of a debtor to the estate, that the deed was wholly inoperative, or that it at all events became so on the death of Dhunput, and this solely for the purpose of determining whether the Court could execute the decrees on the application of the trustees.

There is no doubt as to the execution of the deed which purports to convey the properties, and to be very much more than a deed of agency, it has never been questioned by Maharaj Bahadoor, who putting the creditors on one side, appears to be the only person who could question it, and there is no proof that it has not been acted on. The proof is, indeed, the other way. It seems to me unnecessary in this proceeding to consider what the legal effect of the deed may be as regards the properties affected by it. There was, I think, a perfectly good application for execution under section 232 of the Civil Procedure Code, and the Court might have acted upon it if it thought fit to do so. The judgment-debtor, it is true, objected, and said there had been no valid assignment, but the transferor, or rather his representative, then joined in the application, and by so doing and in the absence of any question of limitation, put an end to the necessity of any further discussion as to the validity of the transfer. It is said that as Dhunput left two other sons Maharaj Bahadoor is not his only representative. It appears that in 1887 there was a family settlement by which the two elder sons took a portion of the property, and agreed not to claim any part of what was left in Dhunput's possession or was afterwards acquired. It is argued that this operated only as an agreement which must be enforced in the regular way. The sons are not before us, and do not appear to have claimed any part of the property covered by the trust deed. They assert no interest in these decrees, and their rights, if any, are not prejudiced by allowing the execution. So far as appears they have no rights, and I see no reason why the decrees should not be executed on the applications before us.

Can they then be executed as rent decrees? Section 148, clause (h) of the Tenancy Act enacts that "notwithstanding [760] anything contained in

section 232 of the Code of Civil Procedure an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree, unless the landlord's interest in the land has become and is vested in him." The landlord's interest in the land is not vested in the trustees, and it is argued that their applications for execution were inadmissible by an express provision of law, and that the subsequent joinder of Maharaj Bahadoor could not make them good applications under the Tenancy Act. Dhunput, it may be observed, had parted with his interest in the land before the decrees were obtained, but it cannot, on that ground, be successfully contended that he could not have executed the decrees under the provisions of the Tenancy Act, by the sale of the tenures in respect of which they were obtained. The relationship of landlord and tenant existed during the period for which the rent was claimed, the rent was due to him as landlord, was decreed to him as such, and it was a charge on the tenures. The only question, therefore, is whether, having regard to the provisions of section 148, cl. (h) of the Tenancy Act, the applications should have been rejected. I agree that the word "assignee" as used in that section does not include persons in the position of the applicants, who are executing the decrees under an assignment, which is not for their benefit, but for the benefit of the heir of their assignor. If the deed does not, as the appellant contends, create a trust for creditors, Maharaj Bahadoor is now the only beneficiary under it, and the applicants are trustees for him. He could certainly have applied for execution without infringing the provision of section 148, and to hold that the trustees could not do so would be, I think, to give the section a wider scope than it was intended to have. He, moreover, has now joined in the application.

It is not alleged that the tenure has been sold for any arrears which have since become due, and the sale of the judgment-debtor's rights and interests, if there has really been any such sale, would not prevent the sale of the tenures in satisfaction of these decrees. For the above reasons I consider that the appeal fails and must be dismissed with costs.

S. C. B.

Appeal dismissed.

NOTES.

[This was approved in (1908) 35 Cal., 737. See also (1906) 33 Cal., 566 : 10 C.W.N., 547 : 3 C.L.J., 470 ; (1904) 31 Cal., 550 : 8 C.W.N., 531.]

[761] The 2nd June, 1899.

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE HANDLEY.

Digambar Mahto.....Plaintiff

versus

Jhari Mahto and others... ..Defendants.*

*Landlord and tenant—Korfa raiyats in Manbhum—Ejectment—
Sufficiency of notice to quit—Act X of 1869.*

There is no authority for the proposition that notice to quit to a *korfa raiyat* in Manbhum must be a six months' notice. Such a *raiya*t is only entitled to a "reasonable

* Appeal from Appellate Decree No. 60 of 1898, against the decree of Babu Sarado Prasad Chatterjee, Subordinate Judge of Manbhum, dated the 9th of December 1897, reversing the decree of Babu Sasi Bhusan Chatterjee, Munsif of Purulia, dated the 18th May 1897.

notice." What is a reasonable notice is a question of fact, which must be decided in each case according to the particular circumstances and local customs as to reaping crops and letting land.

Kishori Mohun Roy Chowdhry v. Nund Kumar Ghosal, (1897) I. L. R., 24 Cal., 720, distinguished.

Jagut Chunder Roy v. Rup Chand Chango, (1882) I. L. R., 9 Cal., 48; *Radha Gobind Koer v. Rakhal Das Mukherji* (1885) I. L. R., 12 Cal., 82; *Bidhumukhi Dabee Chowdhram v. Kefyutullah*, (1885) I. L. R., 12 Cal., 93; and *Kali Kishen Tagore v. Golam Ali*, (1886) I. L. R., 13 Cal., 3, referred to and followed.

THIS was a suit for a declaration of the plaintiff's title to, and for recovery of *khas* possession of, certain lands in Manbhoom. The plaintiff alleged that the defendants were holding the land under him as *korfa raiyats* at a yearly rent, and that he had given to the defendants more than a month's notice to quit. The defendants alleged that they were not *korfa raiyats*, but held the land in ancestral *junglebari noyabadi* right, and further contended that the plaintiff's claim was barred by limitation, and that the notice was not sufficient and therefore invalid.

The Munsif found that the suit was not barred, and that the notice was valid in law, but that the defendants being *junglebari raiyats* could not be ejected.

On appeal by the plaintiff, the Subordinate Judge dismissed the appeal, holding that, even assuming the defendants to be [762] *korfa raiyats*, the defendants were entitled to six months' notice according to the decision in *Kishori Mohun Roy Chowdhry v. Nund Kumar Ghosal*, (1897) I. L. R., 24 Cal., 720.

From this decision the plaintiff appealed to the High Court.

Babu Sarada Charan Mitter (and Babu Digambar Chatterjee), for the Appellant.—The Subordinate Judge ought to have decided whether the notice given was reasonable or not, and not upon a hard and fast rule, which he found in *Kishori Mohun Roy Chowdhry v. Nund Kumar Ghosal*, (1897) I. L. R., 24 Cal., 720. The case relied upon by the Lower Appellate Court came from the District of Dacca, and in it there was a tenancy-at-will, and the subject of the tenancy was not agricultural, whilst the present case came from Manbhoom, in which the provisions of Act X of 1859 prevail. The cases of *Jagut Chunder Roy v. Rup Chand Chango*, (1882) I. L. R., 9 Cal., 48; *Radha Gobind Koer v. Rakhal Das Mukherji*, (1885) I. L. R., 12 Cal., 82; *Bidhumukhi Dabee Chowdhram v. Kefyutullah*, (1885) I. L. R., 12 Cal., 93; and *Kali Kishen Tagore v. Golam Ali*, (1886) I. L. R., 13 Cal., 3, show that the question to be decided is whether the notice is reasonable.

Babu Nolini Ranjan Chatterji for the Respondent.—In *Kishori Mohun Roy Chowdhry v. Nund Kumar Ghosal*, (1897) I. L. R., 24 Cal., 720, the learned Judges decided that for a tenancy reserving an annual rent six months' notice should be given, and in the present case also there is a tenancy with an annual rent reserved. Hence the Lower Appellate Court was quite right in relying on that case.

The judgment of the High Court (Rampini and Handley, JJ.) was as follows:—

This is an application against the decision of the Subordinate Judge of Manbhoom, dated the 9th December 1897. The suit was one for the ejectment of *korfa raiyats*, who held at a yearly rent of Rs. 5-6 annas 10 gundas, and the Subordinate Judge has dismissed the plaintiff's suit on the ground that the notice to

[763] quit served upon the *korfa raiyats* was insufficient, being one of about two months.

The learned Subordinate Judge held that in this case the defendants were entitled to six months' notice expiring at the end of the year of the tenancy before they could be ejected from their holding, and in support of this view he relies on the case of *Kishori Mohun Roy Chowdhry v. Nund Kumar Ghosal*, (1897) I. L. R., 24 Cal., 720.

The learned pleader for the appellant has, however, pointed out to us that the case referred to is no authority for the decision at which the Subordinate Judge has arrived. The present case comes from Manbhum, where the provisions of Act X of 1859 prevail; but the case of *Kishori Mohun Roy Chowdhry v. Nund Kumar Ghosal* referred to above, is one coming from the district of Dacca, in which the defendant was a tenant-at-will, and in which the subject of the tenancy was certainly not agricultural land, otherwise the provisions of the Bengal Tenancy Act would have been applicable.

The cause of action in that suit arose from the fact that the defendants had built a *pucca posta* and *ghat* upon the land, and the learned Judges who decided that case said that it did not come under the Tenancy Act, but under the purview of the case of *Rajendronath Mookhopadhyaya v. Bassider Rhuman Khondkhar*, (1876) I. L. R., 2 Cal., 146, and they therefore held that "there being no authority to the contrary in this country, we see no reason, nor has any reason been suggested, why the rule of English law should not be applicable to such a tenancy as the present in this country, and we think that six months, terminating at the end of the year, is the notice to which the tenant under such a tenancy as that in this case is entitled."

We, however, do not think that this is any authority for a six months' notice being required in a case coming from Manbhum, in which the defendants are *korfa raiyats*.

The question of notice to quit in cases coming under Bengal Act VIII of 1869, which Act is similar to Act X of 1859, has [764] been considered in several cases. The first of these cases is *Jagut Chunder Roy v. Rup Chand Chango*, (1882) I. L. R., 9 Cal., 48, in which the learned Judges laid down this rule: "We think that the result of the cases is this, that such a *raiya* is entitled to a reasonable notice. What is a reasonable notice is a question of fact which must be decided in each case according to the particular circumstances and the local customs as to reaping crops and letting land. In the present case a three months' notice was given, and there was no contention that at the time when that notice expired, any crop was upon the ground, the necessity of removing which would have made the notice, under the circumstances, unreasonable."

This case has been followed in the cases of *Rudha Gobind Koer v. Rakhal Das Mukherji*, (1885) I. L. R., 12 Cal., 82; *Budhumukhi Dabee Chowdharain v. Kefyutullah*, (1885) I. L. R., 12 Cal., 93; and *Kali Kishen Tagore v. Golam Ali*, (1886) I. L. R., 13 Cal., 3.

We think that these cases lay down the rule which is applicable to the present case, and we, therefore, set aside the decision of the Subordinate Judge and remand the case to him for a decision according to the law applicable to this case. He must consider what in the circumstances is a reasonable notice to quit, and decide the case accordingly.

If the notice is unreasonable, he should dismiss the suit; otherwise, he should dispose of the other issues which arise in the case.

Costs will abide the result.

M. R. M.

Case remanded.

NOTES.

[See also (1904) 8 C.W.N., 774.]

[26 Cal. 764]

MATRIMONIAL JURISDICTION.

The 8th and 19th June, 1899.

PRESENT :

MR. JUSTICE STANLEY.

Stevenson

versus

Stevenson.

Practice—Divorce Act (IV of 1869), section 36—Alimony pendente lite,

Application for—Denial of means by respondent—Reference to

Registrar—Respondent ordered to attend Court for cross-examination as to his means.

On an application alleging means made by a petitioner, the wife, for alimony *pendente lite* the respondent denied means. The Court refused to [765] refer the matter to the Registrar to inquire and report, but ordered the respondent to attend Court for cross-examination as to his means.

THIS was a wife's petition for divorce. Before the hearing the petitioner applied for alimony *pendente lite* on an affidavit setting out that the respondent had means. The respondent by his affidavit in reply swore he was without means, dependent on his relatives, and out of employment.

Mr. Bell for the Petitioner.

Mr. Knight for the Respondent.

Mr. Bell asked for the usual order of reference to the Registrar to determine the amount of alimony.

Mr. Knight, *contra*.—I submit this is not a question of amount. The respondent swears he has nothing, and is out of employment. The respondent could easily be examined in Court without referring the matter to the Registrar. I would ask the Court not to refer the matter, but dispose of it on the motion. This is the English practice, see *Gaynor v. Gaynor*, (1862) 31 L. J., P. and M., 144, a much stronger case than this, as the respondent there had an appointment, but was on leave. *Fletcher v. Fletcher*, (1862) 2 Sw. and Tr., 434. There also the respondent was holding an appointment, though at the time he was on leave. To refer the matter under the existing circumstances would be simply putting the parties to needless costs.

Mr. Bell.—The practice of the Court has been to refer in all cases.

Stanley, J.—I certainly shall not order an idle reference. Let the respondent attend Court for cross-examination as to his means next Monday week.

On the day fixed the respondent attended as ordered and was put in the witness box by Mr. Knight.

Mr. Bell.—I do not desire to cross-examine the respondent.

Mr. Knight.—Then the application must be dismissed. I do not ask for costs.

Stanley, J.—Counsel on behalf of the petitioner states that he does not desire to cross-examine the respondent. The respon-[766]dent has filed an affidavit in which he states that he is without any means whatever. The application must consequently be dismissed. I reserve the question of costs. The petitioner to have liberty, if such liberty be required, to renew the application at any future time.

Attorneys for the Petitioner : Messrs. S. J. Leslie & Sons.

Attorneys for the Respondent : Messrs. Sanderson & Co.

D. S.

[26 Cal. 766]

ORIGINAL CIVIL.

The 7th July, 1899.

PRESENT :

MR. JUSTICE STANLEY.

Dwarkan Doss Agurwallah

versus

Girish Chunder Roy.

Practice—Deposit by defendant of money in Court in satisfaction of claim—

Right of plaintiff to draw out such money and prosecute suit for balance

claimed—Discretion of Court—Code of Civil Procedure (Act XIV of 1852), sections 377, 379.

Suit for recovery of Rs. 5,500 on three promissory notes. Defendant pleaded minority at the date of the transactions, denied all liability, also denied receiving Rs. 5,500, but admitted receipt of Rs. 1,500, which sum together with interest he tendered to the plaintiff in full satisfaction of his claim. On refusal by the plaintiff to accept that sum it was paid into Court. The plaintiff then applied to the Court for payment to him of the said amount. The defendant contended that the amount should be kept in Court pending the hearing, as all liability was denied, and offered to pay interest if plaintiff succeeded in his suit.

Held, that the plaintiff was entitled to take the money out of Court.

THIS suit was instituted by the plaintiff against the defendant for the recovery of the sum of Rs. 5,500 and interest due on three promissory notes,

dated the 29th June 1895. The defendant being an infant his written statement was filed through his guardian; the execution of the three promissory notes was admitted, but the defendant denied all liability and (*inter alia*) alleged that the sum of Rs. 5,500 had never been advanced as alleged. He admitted having received Rs. 1,500, and alleged that the plaintiff was aware of his being a minor at the date of the transactions. He further pleaded that the plaintiff had insti-[767]tuted a suit against him on one of the notes in the Small Cause Court at Calcutta, and had withdrawn it without leave to institute any further suit, and in consequence thereof the claim so far as that note was concerned was barred. Upon the defendant coming of age the guardian was discharged, and the defendant filed an additional written statement, wherein he adopted the defence set up by his guardian, and further stated that he had on the 22nd March 1899 tendered the sum of Rs. 1,836, being the sum of Rs. 1,500, which he admitted he had received, and interest thereon up to the said 22nd March 1899, to the plaintiff, stating that though he was advised he was in no way liable to the plaintiff, and denied any liability, he had in fact received that sum and was ready and willing to return it with interest thereon, and that he accordingly tendered that sum on condition that the plaintiff should enter up satisfaction for the full amount of his claim in the suit, and had informed the plaintiff that if he refused to accept the said sum it would be paid into Court on the same condition. He also stated that owing to the plaintiff refusing, he had accordingly brought the money into Court, and while still denying all liability he was willing that the plaintiff should be paid the same and allowed to take it out of Court, provided the amount was accepted by him in full satisfaction of all his claims in this suit. Simultaneously with filing his additional written statement the defendant paid the amount into Court, and the order giving him leave to do so was dated the 11th April 1899, and drawn up in the usual form, and while referring to the additional written statement ordered that the defendant be at liberty to pay to the Comptroller-General to the credit of this suit the sum of Rs. 1,836 admitted by him in his additional written statement to be due to the plaintiff. The money was paid into Court by the defendant on the 28th April 1899. The plaintiff on the 7th July 1899 applied in Chambers for payment to him of the said sum of Rs. 1,836, with liberty to him to prosecute the suit for the remainder of his claim.

Mr. *R. Mitter* for the Plaintiff.

Mr. *Hyde* for the Defendant.

Mr. *Mitter*.—The plaintiff is entitled to draw the sum out of Court and prosecute his suit with regard to the rest of his claim [768] (see sections 377 and 379 of the Code of Civil Procedure). The sections of the Code with reference to the payment of monies into and out of Court were based upon and followed the practice at the time those sections were framed, though not now, obtaining in England.

Mr. *Hyde, contra*.—Where, as in this case, the money is paid into Court with a denial of liability and with an offer that if the plaintiff accepts it in full satisfaction of his claim, he can do so; the practice in England now is if the money be not accepted in full satisfaction to retain it in Court, Order XXII, Rule 6, Annual Practice, 1899. I submit that in section 377 of the Code the words "unless the Court otherwise directs" give the Court discretion to keep the money in Court, pending the hearing of the suit, and the Court in exercising that discretion would exercise a wise one, if it proceeded on the basis of the practice now existing in England. No doubt in the order obtained by the defendant on the 11th April 1899 it is stated that the sum of Rs. 1,836 is admitted by the defendant in his additional written statement to be due to the

plaintiff in this suit. That is the usual form in which such orders are drawn up. It is incorrect, as that order referred to and must be read with the defendant's additional written statement, where, while he admits having received Rs. 1,500 when a minor, he denies all liability to the plaintiff of any kind. The defendant is ready to pay interest on the money at the rate of 6 per cent. if the plaintiff succeeds in his suit. The defendant does not in any way desire to profit by what has taken place; as soon as he could do so he at once offered to refund the Rs. 1,500 and interest up to date at 6 per cent. to the plaintiff.

Stanley, J.—The question is not one as to the greater convenience of the English practice or the practice in this country. According to the English practice the money remains in Court till the decision of the suit. That was possibly a wise alteration of the previous practice. The practice is not so here. By the provisions of the Code a defendant is allowed to pay money into Court, and after such payment he is not liable to pay any interest in respect of the amount so paid. The plaintiff is penalised if he does not take the money out. The Code provides that no interest is to be paid to the plaintiff after he receives [769] notice of the payment into Court, and directs that the money shall be paid to the plaintiff "unless the Court otherwise directs." I think the Court has a discretion to refuse to allow the money to be paid out, but that discretion is to be exercised reasonably. In a case where the money sued for is due on a promissory note it would be unreasonable in the absence of special circumstances not to allow the plaintiff to take the money out. I am aware of Mr. *Hyde's* offer to pay interest, but I do not think that this offer would justify me in refusing to grant the application. I think Mr. *Mitter* has established his right to take the money out of Court, and I shall make the order with costs.

Attorneys for the Plaintiff: Messrs. *Kally Nath Mitter & Sarvadhikari*.

Attorneys for the Defendant: Messrs. *Watkins & Co.*

D. S.

[26 Cal. 769]

The 3rd July, 1899.

PRESENT :

MR. JUSTICE STANLEY.

Ghassee Jemadar

versus

Nassiruddin Mistry.

Practice—Agreement as to Costs between attorney and client—Change of attorney—Right of attorney to his taxed costs.

Where *F* an attorney agreed to conduct a suit for his client and to accept Rs. 150 for his personal services, and not in respect of out-of-pocket costs and Counsel's fees, and in the event of his client being successful to recover his full costs from the opposite party and to

refund the Rs. 150, it was *held* upon the client desiring to change to another attorney that he could do so upon payment to *F* of his taxed costs.

IN this case the defendant employed Mr. E. J. Fink, an attorney of the High Court, to defend a suit. The terms upon which the attorney agreed to act were embodied in the following letter dated 30th March 1898 :—

“ Ghassee Jemadar v. Yourself.

“ DEAR SIR,

“ As you are so desirous that I should act for you herein on terms, I will defend this suit and act for you on your paying me Rs. 150 cash for my fees and labor ; stamps and Counsel's fees, and all out-of-pocket expense to be paid by you separately from time to time as and when required. Should you win the suit you will get a refund of the Rs. 150 from me on my realizing my entire costs from the plaintiff.

“ Yours faithfully,

(Sd.) E. J. FINK.”

[770] In pursuance of the said agreement the defendant paid to Mr. Fink from time to time Rs. 205, namely, Rs. 150 his costs as settled, and Rs. 55 on account of out-of-pocket expenses. The defendant, owing, as he alleged, to a misunderstanding having arisen between himself and Mr. Fink as to payment of certain costs, instructed another attorney Babu N. G. Newgie to obtain a change of attorney, and on the 23rd May 1899 the usual order for change of attorneys was obtained, the defendant being directed to pay Mr. Fink the costs due to him upon taxation as between attorney and client. Mr. Fink's costs were taxed, and he was allowed Rs. 353-14 for in-pocket costs and Rs. 71 for out-of-pocket costs. The defendant, however, alleged that under the said agreement Rs. 16 only, being the balance of the out-of-pocket costs, were due by him to Mr. Fink, and on the 3rd July 1899, the defendant, upon notice to Mr. Fink, applied to the Court for an order for the completion of the change of attorney on payment by him to Mr. Fink of Rs. 16. Mr. Fink alleged that he had always been ready and willing to act for the defendant, and that the only misunderstanding he had had with the defendant was entirely unconnected with any matter of costs in this suit, and that he was entitled to his costs as taxed.

Mr. *Bonnaud* for the Defendant.

Mr. *Sinha* for Mr. E. J. Fink.

Mr. *Bonnaud*.—The attorney entered into a special contract with the defendant as to his fees. He cannot now ask that his costs be taxed in the usual way. As to the attorney losing his chance of recovering his fees from the other side, that can be no ground for compelling the client to retain him. There is nothing in the agreement which compels the defendant to continue his services, nor has he agreed to pay him any more than the Rs. 150, in the event of his dispensing with his services. In England, where the attorney has entered into a special contract, the Court has always allowed the client to change his attorney on good cause shown. Here there was a misunderstanding between the client and his attorney, and the client desires to go to another attorney. He has already paid the sum which he agreed to pay, [771] and the order for change should now be made on payment of Rs. 16, the balance of the out-of-pocket costs.

Mr. *Sinha contra*.—There is no doubt that a client is at liberty to change from one attorney to another during suit, and then the ordinary rule is that he can obtain that order for change only on payment of his attorney's costs. Here the client contends that he is not bound by the ordinary rule because of a special agreement, but that special agreement amounts to this, that the attorney was to carry on the suit from beginning to end getting Rs. 150 only

from the client and having a chance of recovering costs from the other side if his client succeeded. The client himself desires to put an end to that contract, as he does not want the attorney to conduct the case any further, though the case is now on the list and ripe for hearing; that being so, he cannot claim any advantage under that special agreement; it is one entire indivisible contract. The special agreement therefore being broken by the client himself, he must under the ordinary rules pay costs irrespective of the special agreement before he can obtain the change.

Stanley, J.—In this case there was an agreement in writing between the defendant and his attorney, whereby the attorney agreed to accept Rs. 150 for his personal services in addition to costs out-of-pocket and Counsel's fees, but in the event of the client being successful the attorney was to refund the Rs. 150, and in that event to recover full costs from the plaintiff. Some misunderstanding appears to have arisen between the defendant and his attorney, and the defendant in consequence desires to change his attorney, and thereby preclude him from carrying on the case to a termination with the chance of success and profit therefrom to the attorney. It is said by Mr. *Bonnaud* that the attorney agreed to conduct the case for Rs. 150, and has been paid that sum, and he is not entitled to have his costs taxed in the usual way. I am of opinion that on the terms of the agreement the attorney is entitled, upon his ceasing at the instance of the defendant to act as attorney for him, to have his costs taxed in the usual way. The special agreement has been rescinded by the client by his insisting upon a change of attorneys; he cannot therefore base any [772] claim upon a contract to which he himself has not adhered. Mr. *Bonnaud's* client must pay the costs of this application, and I certify for Counsel. Application for change of attorney without payment of costs is refused.

Attorney for the Defendant: Babu *N. J. Newgie*.

Mr. *E. J. Fink* acted as Attorney on his own behalf.

D. S.

[26 Cal. 772]

The 5th July, 1899.

PRESENT :

MR JUSTICE STANLEY.

Fink

versus

Maharaj Bahadoor Sing and others*.

Execution of decree—Distribution of proceeds of execution—Assets realized by sale or otherwise in execution—Monies realized by Receiver appointed by decree-holder—Equitable execution—Code of Civil Procedure (Act XIV of 1882), section 295.

Rents of property under attachment which have been realised by a Receiver appointed at the instance of one decree-holder are "assets realized by sale or otherwise in execution of a decree" within the meaning of section 295† of the Code of Civil Procedure.

The appointment of a Receiver by the Court at the instance of a judgment-creditor is a "process of execution".

By a decree in this suit, dated the 30th April 1898, it was (*inter alia*) ordered and decreed that the infant defendant, Maharaj Bahadoor Sing, should out of the estate of his deceased father Rai Dhunput Sing pay to the plaintiff, (the Receiver of the estate of one Sewbux Sureka deceased), the sum of Rs. 3,394-4, with interest at the rate of 6 per cent. per annum, and should also pay to the plaintiff the costs of the suit with interest at the same rate. The costs amounted to Rs. 1,072-13. The defendant having failed to pay the decretal amount and costs the plaintiff, on the 8th August 1898, obtained an order for execution of the decree by attachment of, amongst others, certain premises in Calcutta. By an order, dated the 26th August 1898,

* Original Civil Suit No. 532 of 1897.

†[Sec. 295 :—Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons :

Provided as follows :—

Proviso where property is sold subject to mortgage.

(a) when any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not as such be entitled to share in any surplus arising from such sale.

(b) When any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the assent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same right against the proceeds of the sale as he had against the property sold :

(c) When immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

Proviso.

first, in defraying the expenses of the sale;
secondly, in discharging the interest and principal-money due on the incumbrance;
thirdly, in discharging the interest and principal-moneys due on subsequent incumbrances (if any); and

fourthly, rateably among the holders of decrees for money against the judgment-debtor, who have, prior to the sale of the said property, applied to the Court which made the decree ordering such sale for execution of such decrees and have not obtained satisfaction thereof.

If all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

Nothing in this section affects any right of the Government.]

Mr. Belchambers was appointed Receiver under section 503 of the Code of Civil Procedure to collect the rents of the said premises and pay the same after deducting thereout his commission and [773] charges to the Comptroller-General of Accounts to be placed to the credit of this suit, subject to the further order of this Court. The Receiver on the 19th April 1899 paid in the sum of Rs. 3,493-7-6 to the credit of the suit. No prohibitory order or attachment had been filed in the Office of the Accountant-General affecting this fund, and it appeared that neither this nor any other property of the defendant was affected by any attachment before judgment.

The plaintiff applied on summons to the defendant and to a number of creditors of Rai Dhunput Sing, who had previously obtained execution of decrees, and some of whom had attached the same properties, the rents whereof had been collected by the said Receiver, praying that the amount paid into Court should be paid to him in part satisfaction of his decree, or in the alternative for a reference to the Registrar to ascertain which of the decree-holders were entitled to the money in Court under the provisions of section 295 of the Code of Civil Procedure.

The application was heard in Chambers.

Babu Kally Nath Mitter for the Plaintiff.

Babu Bhupendra Nath Bose for the Defendant.

Mr. N. C. Bose for some of the Attaching Creditors.

Babu Kally Nath Mitter.—Money realized by the Receiver is not “assets realized by sale or otherwise” within the meaning of section 295 of the Code, and, therefore, the plaintiff alone is entitled to the benefit of the money. Section 295 does not in any way apply to money realized by the Receiver in this case; the modes of execution “otherwise than by sale” prescribed in the Code can only be under sections 291, 305 and 322. *Gopal Dai v. Chunni Lal*, (1885) I. L. R., 8 All., 67; *Purshotamdass Tribhovandass v. Surajbharthi Hari-bharthi*, (1882) I. L. R., 6 Bom., 588, and *Sew Bux Bogla v. Shib Chunder Sen*, (1886) I. L. R., 13 Cal., 225, were referred to.

Mr. N. C. Bose, *contra*.—The appointment of a Receiver after decree under section 503 of the Code is a mode of realizing [774] money in the hands of third parties. It does not make any difference in the nature of the money realized, nor does it take it out of the operation of section 295: *Sorabji Edulji Warden v. Govind Ramji*, (1891) I. L. R., 16 Bom., 91 (97 to 99).

Babu Bhupendro Nath Bose supported the contention put forward by the plaintiff: *Prosonomoyi Dassi v. Sreenauth Roy*, (1894) I. L. R., 21 Cal., 809, and *Siriah v. Muckanachary*, (1887) I. L. R., 10 Mad., 194. The appointment of the Receiver was in the way of “equitable execution.” It is an execution not under the provisions of the Code, and therefore does not come under the word “otherwise” in section 295.

Stanley, J.—In this matter a summons was taken out by the plaintiff for an order for payment to him by the Accountant General of the balance which shall remain of the sum of Rs. 3,458-7-5 representing monies paid into Court by the Receiver appointed at the instance of the plaintiff over certain immoveable property of the defendant after payment of costs, or in the alternative that it be referred to the Registrar to report who are the persons if any entitled to participate in the fund besides the plaintiff.

The plaintiff obtained a decree against the defendant on the 30th of April 1898 for the sum of Rs. 3,394-4-0 and costs, and on the 8th of August 1898 he obtained an order of attachment of, amongst other, certain property of the defendant in Khungraputty Street and in Cross Street in Calcutta.

By an order of the 26th of August 1898 made in this action Mr. Belchambers was appointed Receiver to collect from the tenants the rents of the property above referred to, and was directed, after payment thereof of charges and commission, to pay the balance of the amount so to be realized to the Comptroller-General of Accounts and the Secretary and Treasurer of the Bank of Bengal, with the privity of the Accountant-General to be by them placed to the credit of this suit, subject to the further order of this Court. The Receiver collected the rents, and on the 19th of April last he paid into Court the sum of Rs. 3,493-7-6.

[775] No prohibitory order or attachment has been filed in the office of the Accountant-General affecting this fund, and from the Sheriff's certificate, dated the 25th of May 1899, it appears that neither this nor any other property of the defendant is affected by any attachment before judgment.

A number of decree-holders other than the plaintiff in this action having obtained attachments against the immoveable properties of the defendant between the 24th of January 1895 and 23rd of May 1899, contend that under section 295 of the Code of Civil Procedure they are entitled to have the fund in Court rateably divided between them and the plaintiff.

It is clear that no creditor, who obtained an attachment order subsequent to the realization of the rents now represented by the moneys in Court, is entitled to participate, as it is only decree-holders who have applied to the Court for execution of their decrees prior to the realization who are comprehended in the section.

The question then is whether or not rents of property under attachment which have been realized by a Receiver appointed by one decree-holder are assets realized "by sale or otherwise" in execution of a decree within the meaning of section 295 of the Code. This is a question of some difficulty and of considerable importance. On the part of the plaintiff it is contended that the words "or otherwise" refer to a realization under sections 291, 305, or 322, the provisions of these sections being all modes of realizing assets from the property of the judgment-debtor "otherwise" than by sale, and do not include a realization of assets by the appointment of a Receiver under section 503. On the part of the other decree-holders it is argued that the words by "sale or otherwise" are comprehensive, and should be construed as meaning by sale or by other process of execution provided for by the Civil Procedure Code, and that the assets realized by the appointment of a Receiver are assets realized by a process of execution provided for by the Code.

The object of the Legislature in introducing section 295 into the Code was manifestly to place all judgment-creditors on the same footing in the administration by the Court of their [776] debtor's estate, provided that they had taken the precaution of invoking the aid of the Court by applying for execution of their decrees in any of the modes prescribed by the Code. Here the mode of execution in which the assistance of the Court was required by the creditors was by attachment of the debtor's property, but the plaintiff also sought execution of his decree by the appointment of a Receiver.

None of the cases to which I have been referred govern the present case.

In the case of *Purshotamdass Tribhovandass v. Surajbharthi Haribharthi*, (1882) I. L. R., 6 Bom., 588, it was held that moneys paid by a judgment-debtor under arrest in satisfaction of the decree were not assets realized "by sale or otherwise" under section 295 of the Code; that this section must be read as if the words "from the property of the judgment-debtor" were inserted after

the word "realized." In this case, it will be observed, the debt was not realized by any of the modes of execution prescribed by the Code.

That decision was approved of in the case of *Gopal Dai v. Chunni Lal*, (1885) I. L. R., 8 All., 67. In that suit the plaintiff and the defendant held decrees against one Bishambarnath and took out execution of them, and the judgment-debtor's property was attached, but no sale took place. The judgment-debtor paid into Court the sum of Rs. 1,200 on account of the plaintiff's decree, and it was held that the plaintiff was entitled to the sum so paid into Court, and that it could not be regarded as "assets realised by sale or otherwise in execution of a decree" so as to be rateably divisible between the decree-holders under section 295 of the Code, inasmuch as it could not be said that there was a realization from the property of the judgment-debtor. The payments in both these cases were made by the judgment-debtor voluntarily, though no doubt under the pressure of the decrees.

In the case of *Sew Bux Bogla v. Shib Chunder Sen*, (1886) I. L. R., 13 Cal., 225, the plaintiff had obtained a decree against the defendant for [777] a sum of Rs. 1,397-11-0. In execution of this decree certain property of the judgment-debtor was attached on the 7th of January 1886. On the 31st of August 1885 one Bhugwan Doss obtained a decree against the same defendants for the sum of Rs. 1,241-14-3, and on the 8th of January 1886 applied for attachment of the defendant's property. On that date a warrant was issued, but the property was never actually attached. Some time between the 8th and 15th of January 1886 the defendants filed their petition of insolvency, and the usual vesting order was made. The Official Assignee then paid into Court the amount of the decree obtained by Sew Bux, and the property was released from attachment. In an application of Bhugwan Doss to the Court under section 295 of the Code for a share of the money so paid into Court, it was held by TREVELYAN, J., that the applicant was not entitled to participate in it, inasmuch as section 295 only provided for the case where by the process of the Court in execution of a decree property has become available for distribution amongst the judgment-creditors. The learned Judge expressed his opinion that the words "by sale or otherwise" meant by sale or by other process of execution provided for in the Civil Procedure Code. This decision was followed by SALE, J., in the case of *Prosonnomoyi Dassi v. Sreenauth Roy*, (1894) I. L. R., 21 Cal., 809.

I concur in this view. I see no good reason for limiting the meaning of the words so as to exclude from their operation any process of execution which is available to a judgment-creditor under the provisions of the Code. The Legislature in my opinion intended by the language of the section to secure for all judgment-creditors who had invoked the aid of the Court in the manner pointed out by the section a rateable participation in all assets realized by any process of execution.

It remains then to consider whether the appointment by the Court of a Receiver is a process of execution. Section 503 of the Code provides that "whenever it appears to the Court to be necessary for the realization, preservation or better custody or management of any property, moveable or immovable, the subject of a suit or under attachment, the Court may appoint a Receiver." [778] The appointment of a Receiver by the Court at the instance of a judgment-creditor is equitable execution—see the judgment of COTTON, L. J., in *Anglo-Italian Bank v. Davies*, (1878) L. R., 9 Ch. D., 275 (290). It is a process of execution which is enforced by the Court at the instance of a judgment-creditor. Unlike the cases above referred to, where the moneys were paid into Court voluntarily by the judgment-debtor and by the Official

Assignee, respectively, the moneys recovered in this suit have been realized out of the estate of the judgment-debtor *in invitum* and by the aid of the Court. This being so, I fail to see any reason for limiting the application of the principle of rateable distribution adopted in section 295 in the way in which the plaintiff submits that it should be limited. My decision no doubt will deprive the plaintiff to a large extent of the immediate fruits of his superior diligence, but it is, I believe, consonant with the spirit and intention of the framers of the Code.

I shall therefore refer the matter to the Registrar under the alternative relief asked by the summons. The costs of all parties other than the defendants of this application to be paid out of the balance of the fund in Court before distribution after satisfying the costs of realization, including the plaintiff's costs of this application.

Attorneys for the Plaintiff: Messrs. *Kally Nath Mitter & Sarvadhikari.*

Attorney for the Defendant: *Babu Bhupendra Nath Bose.*

Attorney for the Attaching Creditors: *Mr. N. C. Bose.*

D. S.

NOTES.

[In the C.P.C., 1908, sec. 73, the words '*held by a Court*' were substituted for '*realised by sale or otherwise in execution of a decree.*'

See also (1903) 28 Bom., 264 ; 9 C.L.J., 210.]

[26 Cal. 778]

The 13th June, 1899.

PRESENT :

MR. JUSTICE SALE.

Deno Nath Batabyal

versus

Nuffer Chunder Nundy and others.*

Presidency Small Cause Courts Act (XV of 1882), section 26, sub-sections 2, 3, 4, sections 28, 61, 62—Attachment—Claim by mortgagor in execution proceedings in Small Cause Court—Civil Procedure Code (Act XIV of 1882), sections 278, 279, 280, 281, 282, and 293,—Presidency Small Cause Court Rules of Practice, 49, 50, 51—Tiled huts—"For the purposes of execution," Meaning of—Res judicata.

[779] An order made upon a claim to attached property filed in the Small Cause Court of Calcutta in a proceeding under section 278 of the Civil Procedure Code is "an order made in a suit" within the meaning of section 37 of the Presidency Small Cause Courts Act (Act XV of 1882), and is final, subject only to the right to apply for a new trial.

The words of section 28 (Act XV of 1882) "*for the purposes of execution*" must mean for all purposes of execution, inclusive of the purpose of determining objections made to attachments. Tiled huts for all purposes of execution are therefore moveable property under that section.

* Original Civil Suit No. 54 of 1898.

The Small Cause Court has full power and authority to determine the question of title under a mortgage over attached property, and that question is, therefore, *res judicata*, *Ismail Solomon Bhamji v. Mahomed Khan*, (1891) I. L. R., 18 Cal., 296, followed.

THIS was a suit on a mortgage of certain tiled huts executed by the defendant Nuffer Chunder Nundy in favour of the plaintiff.

The defendants Adhur Chunder Sett and Hridoy Nath Sett obtained a decree for Rs. 2,000 against the defendant Nuffer Chunder Nundy in the Calcutta Small Cause Court, and in execution of that decree attached the said tiled huts which had been mortgaged to the plaintiff. The plaintiff thereupon filed a claim in the Small Cause Court, but the claim was disallowed, the Court being of opinion that the mortgage was not a genuine transaction. The Small Cause Court also allowed compensation to the defendants, the attaching creditors. The plaintiff having failed to substantiate his claim in the Small Cause Court, brought this action in the High Court on his mortgage, making the attaching creditors as well as the mortgagor defendants, praying as against the former that a Receiver might be appointed to take charge of the property, and also that the former might be restrained by and under the injunction of this Court from proceeding to a sale or otherwise disposing of the property.

Mr. R. Mitra, and Mr. S. R. Das, for the Plaintiff.

Mr. B. Chakravarti, and Mr. N. Chatterjee, for the Defendants Adhur Chunder Sett and Hridoy Nath Sett.

The defendant Nuffer Chunder Nundy did not appear.

[780] Mr. Chakravarti.—This suit is not maintainable—see *Ismail Solomon Bhamji v. Mahomed Khan*, (1891) I. L. R., 18 Cal., 296. Although section 23 of the Small Cause Courts Act (Act XV of 1882) has been repealed by section 12 of Act I of 1895, section 9 of Act I of 1895 continues in force the whole of the practice and law of procedure in force on the 31st of December 1894, unless and until cancelled and varied by rules made by the High Court. The plaintiff had the choice of his forum. He could either have come to the High Court or the Small Cause Court. He elected to have his claim investigated and adjudicated upon by the Small Cause Court; he would not be allowed to agitate the High Court because his claim was disallowed. The order of the Small Cause Court is final and conclusive under section 37 of Act XV of 1882. Here the properties under attachment are the tiled huts which, by legislation, have been made moveable property, at any rate for the purpose of execution. See Tagore Lectures (1895), page 36.

Mr. Mitra.—Under the General Clauses Act, section 3, sub-section 25, tiled huts are immoveable property—see also *Nattu Miah v. Nand Rani*, (1871) 8 B. L. R., 508. The rules made by the Small Cause Court are *ultra vires*.

The following judgment was delivered by

Sale, J.—The plaintiff in this case seeks to enforce a mortgage against the defendant Nuffer Chunder Nundy executed by him in favour of the plaintiff on the 24th of November 1896, to secure a sum of Rs. 1,000 with interest, which sum the plaintiff alleges he advanced to the mortgagor as a loan. The mortgaged property consisted of three tiled huts situate in Calcutta, which the mortgagor either acquired by purchase or caused to be erected on land rented by him.

The plaintiff further alleges that the defendants Adhur Chunder Sett and Hridoy Nath Sett, in the month of September 1897, caused the said properties to be attached in execution of a money decree obtained by them against the mortgagor, and that he (the plaintiff) as mortgagor of the properties filed a claim

in [781] the Court of Small Causes, which was, on the 30th of November 1897, disallowed.

The plaintiff accordingly submits that the Sett defendants, the attaching creditors, are necessary parties to this suit, and he says they have been called on to redeem the said mortgaged properties, and the relief prayed against them is, that a Receiver may be appointed to take charge of the properties, and that they (the attaching creditors) may be restrained by and under the injunction of this Court from proceeding to a sale or other disposition of the said properties.

The defendant Nuffer Chunder Nundy has not appeared in the suit, but the defendants Adhur Chunder Sett and Hridoy Nath Sett have appeared to contest the plaintiff's claim, and in their written statement make the following allegations :—

That the mortgage in suit is a fraudulent transaction resorted to by the mortgagor in collusion with the plaintiff with the object of defeating the just claim of the attaching creditors.

That the decree, in execution of which the mortgaged properties have been attached, was made on the 21st of July 1897 in a suit instituted in the Small Cause Court on the 24th of November 1896, a day previous to the date of the alleged mortgage, in which the claim was in respect of a sum of Rs. 2,000 due from the defendant Nuffer Chunder Nundy on a *hathchitta*.

That the sum due to the attaching creditors under the said decree is Rs. 2,000, together with the sum of Rs. 254-12 awarded as costs.

That the claim filed by the plaintiff in the Court of Small Causes came on for hearing on the 2nd November 1897, when the Court found on the evidence that the alleged mortgage was not a genuine transaction; that it was a device concocted by the defendant Nuffer Chunder Nundy, in conjunction with the plaintiff, to defeat the decree which the attaching creditors obtained against their judgment-debtor, and that the Court, accordingly, dismissed the plaintiff's claim and allowed the sum of Rs. 100 as compensation to the judgment-creditors.

That the plaintiff had filed an application for a new trial which [782] was then pending. That in pursuance of a consent order made by this Court on the 10th February 1898, the mortgaged properties had been sold, and the sale proceeds had been paid into Court to the credit of this suit.

At the hearing it was contended on behalf of the attaching creditors by way of a preliminary objection to the suit that the order of the Small Cause Court disallowing the plaintiff's claim is a bar to the relief which is sought against them, and that the finding also of the Court as to the genuineness of the mortgage is conclusive between the parties, and that, as a result, the suit is not maintainable and ought to be dismissed as against them.

No evidence was adduced on either side upon the preliminary point, the argument proceeding upon the basis that the finding of the Small Cause Court in the claim suit was correctly stated in the defendant's written statement. It was stated, however, and not disputed, that the plaintiff's application for a new trial of the claim suit was withdrawn, and that the amount of the sale proceeds of the mortgaged properties now in Court is insufficient to satisfy in full the claim of the attaching creditors.

The procedure of the Small Cause Court is now regulated by Act XV of 1882 as amended by Act X of 1888 and I of 1895.

By section 37 of the amended Act it is provided that, subject to the right to apply for a new trial, every decree and order of the Small Cause Court in a suit shall be final and conclusive.

The first question then is, whether the order of the Small Cause Court disallowing the plaintiff's claim—based on his mortgage, to have the attachment of the judgment-creditors removed, can be said to be an order made in a suit.

The procedure as to claims made in respect of attached property by persons other than the judgment-debtor is regulated by section 26 of Act XV of 1882, paragraphs 2, 3 and 4, sections 61 and 62 of the same Act, sections 278, 279, 280, 281 and 282 of the Civil Procedure Code, and by rules 49, 50 and 51 of the Small Cause Court rules of practice.

No doubt section 23 of Act XV of 1882, which extended certain portions of the Civil Procedure Code, including the claim [783] sections, to the Small Cause Court has been repealed by section 12 of the Amending Act I of 1895, but, on the other hand, section 9 of the same Amending Act continues in force the whole of the present practice and law of Procedure of the Small Cause Court, until this procedure has been superseded by a new procedure to be introduced by rules framed by the High Court.

The rules of practice of the Small Cause Court have been framed under the powers reserved to the Court by section 9 of Act XV of 1882, as it stood before the Amending Act I of 1895 came into operation. By that section the Court was empowered, with the previous sanction of the High Court, to make rules to provide in such manner as it thought fit for all matters not specially provided for by the Act.

Section 61 of the Act provides : " If any claim is made to or in respect of any property seized under this chapter, or in respect of the proceeds or value thereof by any person not being the debtor, the Registrar of the Small Cause Court, upon the application of the bailiff who seized the property, may issue a summons calling before the Court the claimant and the person who obtained the warrant."

The section, after providing for the stay of any suit which may have been brought in the High Court in respect of the claim, proceeds : " And a Judge of the Small Cause Court shall adjudicate upon such claim and make such order between the parties in respect thereof and of the costs of the proceedings as he shall think fit; and such order shall be enforced as if it were an order made in a suit brought in such Court. The procedure in the Small Cause Court in cases under this section shall conform, as far as may be, to the procedure in an ordinary suit in such Court."

Section 62 gives the Court power to award compensation to the claimant, and provides that the order of the Judge awarding or refusing such compensation shall bar any suit for the recovery of compensation for any damage caused by the distress. Similarly by section 26, para. 2, it is provided " when any claim preferred or objection made under section 278 of the Civil Procedure Code is disallowed, the Small Cause Court may in its [784] discretion order the person preferring or making such claim or objection to pay to the decree-holder or to the judgment-debtor or to both by way of satisfaction as aforesaid such sum or sums as it thinks fit." And further : " Any order made under this section may, in default of payment of the amount payable thereunder, be enforced by the person in whose favour it is made against the person against whom it is made, as if it were a decree of the Court."

Rule 49 of the rules of practice provides that the claimant who is summoned before the Court under the provisions of section 61 of the Act must file a plaint, and shall be the plaintiff, while the person who obtained the warrant shall be the defendant, and the matter shall then be treated as a suit. In every respect, therefore, both under the Act and under the rules and also under

section 278 and the following sections of the Civil Procedure Code, a claim proceeding is to be treated and dealt with as a suit, and I have no doubt, therefore, that an order made in such a proceeding by the Small Cause Court is an order made in a suit within the meaning of section 37 of the Act. Section 283 of the Civil Procedure Code, which expressly reserves to the party against whom an order is made in a claim proceeding to establish his right by suit, does not affect the present question, because that section has been excluded from application to a claim proceeding in the Small Cause Court by a notification issued by the Court under the powers reserved to it by section 23 of the Act, which notification under section 3 of Act X of 1888 is still in force.

I agree with the view expressed by WILSON, J., in the case of *Ismail Solomon Bhamji v. Mahomed Khan*, (1891) 1. L. R., 18 Cal., 296 (301), that the omission of section 283 from the sections of the Procedure Code applied to the Small Cause Court was intended to preserve the finality of orders made in claim suits by the Small Cause Court.

If then the order of the Small Cause Court disallowing the plaintiff's claim to interfere with the attachment of the defendants is final and conclusive between the parties, it would seem to follow [785] that his claim in this suit to restrain the defendants from proceeding with their attachment is barred. But then it is said the order of the Small Cause Court disallowing the plaintiff's claim is bad, because it was based upon a finding which was *ultra vires*, as it affected the plaintiff's title on his mortgage. Tiled huts, it is contended, are immoveable property, and the Small Cause Court had, therefore, no power to determine the question of the validity of the mortgage, as it involved a question of title to immoveable property. The answer is that the plaintiff himself put the validity of his mortgage in issue in the proceeding by basing his claim to the attached property on his mortgage. How then can he be heard to say that the order complained of is bad, because the Court in making it determined the very question he invited it to determine? Moreover, assuming that tiled huts are for certain purposes immoveable property, it is clear, and this I did not understand to be disputed, that by virtue of section 28 of the Small Cause Court Act XV of 1882 popularly known as the tiled hut section—the mortgaged property for the purposes of execution must be deemed to be moveable property.

The words of the section "for the purposes of execution" must mean for all purposes of execution inclusive of the purpose of determining objections made to attachments. It would be hardly reasonable to suggest that what the Legislature intended was that for the purposes of issuing process tiled huts were to be deemed moveable property, whereas for the purposes of determining objections to such process they were to be deemed immoveable property.

I think, therefore, the Small Cause Court had under the circumstances and for the purposes of the plaintiff's claim full power and authority to determine the question of the plaintiff's title under his mortgage to the attached property, and that this question is now *res judicata* as between the parties.

It is to be observed that the Small Cause Court, under section 282 of the Civil Procedure Code, if satisfied with the validity of the plaintiff's mortgage, had power to continue the attachment subject to such mortgage. WILSON, J., in the case already cited, remarks as follows: "Under the rules of the Small Cause Court [786] claims are not tried summarily, they are dealt with just as suits are with the same remedy in case of mistake by application for a new trial, and the Court has full power to award damages to either party. A person who thinks himself aggrieved by the seizure of goods in execution of a Small Cause Court decree has his choice of remedies. He may bring an ordinary suit in the proper Court, or he may make a claim in the Small Cause Court. In

either case his rights are fully tried out, and it would, I think, be inconvenient and contrary to sound principle to allow him to try first one remedy and then the other."

With these observations I entirely agree. This suit must be dismissed against the defendants Adhur Chunder Sett and Hridoy Chunder Sett, and the plaintiff must pay their costs on scale No. 2. Liberty to these defendants to apply for payment of the money in Court.

Suit dismissed with costs.

Attorney for the Plaintiff: Messrs. *Thakur & Bysack*.

Attorney for the Defendant: Babu *K. M. Gangooly*.

C. E. G.

NOTES.

[This was **reversed** on appeal, (1900) 4 C.W.N., 470. See also (1907) 84 Cal., 823 at 826.]

[26 Cal. 786]
CRIMINAL REVISION.

The 12th May, 1899.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE WILKINS.

Jagat Chandra Mozumdar.....Petitioner

versus

Queen-Empress.....Opposite Party.*

Magistrate, Jurisdiction of—Criminal Procedure Code (Act V of 1898), section 190 sub-section (1), clauses (a) and (c), and section 191—Taking cognizance of offence by Magistrate upon receiving a complaint of facts—Right of the accused to claim a transfer—Penal Code (Act XLV of 1860), section 193—Sanction unnecessary when offence alleged to have been committed in the course of an investigation by the Police—Interference by the High Court in a pending case.

The complainant made a complaint to the Magistrate by a petition in which he named three persons and charged them with offences under certain sections of the Penal Code. The Magistrate thereafter examined the com-[787]plainant and some witnesses on his behalf and issued summonses against the three persons mentioned in the petition of complaint as well as against the petitioner in this case for an offence other than those mentioned in the said petition.

Held, the Magistrate took cognizance of the offence as against the petitioner under clause (a) and not clause (c) of sub-section (1) of section 190, and consequently he was not debarred by section 191 of the Criminal Procedure Code from trying the case.

* Criminal Revision No. 133 of 1899 made against the order passed by G. Balthasar, Esq., Sub-Divisional Magistrate of Goalpara, dated the 5th October 1898.

No sanction under section 195 of the Criminal Procedure Code is necessary for taking cognizance of an offence under section 193 of the Penal Code when the alleged false evidence is said to have been fabricated, not in relation to any proceeding pending in any Court, but in the course of an investigation by the Police into the matter of an information received by them.

It is inadvisable to interfere in a pending case unless there is some manifest and patent injustice apparent on the face of the proceedings and calling for prompt redress.

ON the 13th of September 1898 Kunja Ganika lodged a complaint against three persons in the Court of the Sub-divisional Magistrate of Goalpara charging them with having committed offences under sections 352, 354 and 109 of the Penal Code. The Magistrate subsequently examined the complainant on oath and some witnesses on her behalf and ordered summonses to be issued against the three persons mentioned in the petition of complaint as well as against the petitioner in this case under sections 193 and 109 of the Penal Code. On subsequent dates he heard evidence and drew up a charge under sections 193 and 109 against the petitioner. Then on the 30th November the petitioner moved the Deputy Commissioner of Goalpara to stay all proceedings as against himself, but he declined to interfere. The petitioner then moved the High Court and obtained a rule in the following terms :—

“ Let the record be sent for and a rule issue to the District Magistrate of Goalpara to show cause why the case should not be transferred to another Magistrate by reason of section 191 of the Code of Criminal Procedure, and next because the Sub-divisional Magistrate has, in the proceedings, shown a bias against the accused, or why such other orders should not be made as to this Court may appear proper. The objection in regard to the invalidity of the proceedings in consequence of the want of sanction under section 195 will be better determined when the facts are made clear by the record of the [788] proceedings, and the Court will then be in a position to consider also whether, as contended by learned Counsel, there is any case at all made out for the prosecution of the petitioner. In the meantime further proceedings will be stayed.”

Mr. Jackson, and Babu Har Prasad Chatterjee, appeared for the Petitioner.

The High Court (GHOSE and WILKINS, JJ.) in their judgment, after reading the terms of the rule as above, continued as follows :—

The facts appear to be as follows :—

One Kunja Ganika filed a petition of complaint before the Magistrate, Mr. Balthazar, on the 14th September 1898. She was examined by the Magistrate, and deposed that the petitioner, who was then a Sub Inspector of Police, came to her house with a head constable and with other persons and enquired from her about a *sari*, in respect of which apparently a charge of theft had been lodged by some other person. Her complaint was that the head constable himself introduced this *sari* into her house, and then pretended to have found it there; and that she was then assaulted by the head constable and taken away to the *thana*, whence she was ultimately allowed by the petitioner to depart without bail. Of the persons named in her vernacular petition of complaint as accused, the present petitioner is not one; and the offences charged against others were stated to be offences under sections 352 and 354 of the Indian Penal Code.

The Magistrate forwarded the complaint to his Deputy Commissioner for sanction to the prosecution thus instituted: in doing so he appears to have acted under some executive order in respect of complaints made against police officers. Sanction having been obtained, the Magistrate then summoned and examined the complainant's witnesses before issuing process against the accused. Then, on the 28th September, he passed an order to summon

the head constable under section 193 of the Indian Penal Code, and the Sub-Inspector (petitioner) under sections 193 and 109 of the Indian Penal Code. He then, on the 5th October and subsequent dates, heard evidence and drew up charges, viz., charges under section 193 of the Indian Penal Code, and section [789] 29 (Act V of 1861) against the head constable and a charge under section 109 read with section 193 of the Indian Penal Code against the petitioner and two others who were not police officers.

In the meantime, on the 5th October 1898, the Magistrate had asked his superior officer for a specific sanction to proceed against the sub-inspector, and he was on the 2nd November directed to proceed with the trial.

Then on the 30th November, the petitioner moved the Deputy Commissioner to stay all proceedings as against himself, and on the 10th February 1899 the Deputy Commissioner declined to interfere. The petitioner then moved the High Court and obtained a rule in the terms already set forth.

We have heard Mr. *Jackson* for the petitioner and have considered the cause shown by the Deputy Commissioner in his letter of explanation.

We think that the petitioner is not entitled to have this case transferred either on the ground of bias or by reason of section 191 of the Criminal Procedure Code. As to bias of any kind disqualifying the Magistrate from trying out the case, or rendering it inexpedient that he should try it out, we can find no indications upon the record, and indeed this part of the case was not pressed upon us by the learned Counsel for the petitioner. As regards section 191 of the Criminal Procedure Code it is contended by Mr. *Jackson* that as the complaint of Kunja Ganika disclosed no offence under section 193 of the Indian Penal Code the Magistrate must have taken cognizance of that offence under clause (c) of section 190 of the Criminal Procedure Code. But this is hardly so. The Magistrate in effect received a complaint of facts, which in his opinion constituted an offence under section 193 of the Indian Penal Code, and consequently took cognizance of that offence under clause (a) of section 190 of the Criminal Procedure Code. The fact that the complainant did not specifically, and in terms, accuse any one of an offence under section 193 of the Indian Penal Code does not affect the real position of affairs; if the facts, as stated by her in her deposition of complaint, constituted an offence which really would fall under section 193 of the Indian Penal Code, then her complaint was one [790] under clause (a) of section 190 of the Criminal Procedure Code; and consequently the Magistrate was not debarred by section 191 of the Code of Criminal Procedure from trying the case.

Then it was contended on the petitioner's behalf that the Magistrate could not legally take cognizance of the offence under section 193 of the Indian Penal Code in the absence of any sanction under clause (b) of section 195, Criminal Procedure Code, inasmuch as this alleged fabrication of false evidence was "in relation to" some proceeding in some Court, and the case of *Chandra Mohon Banerjee v. Balfour*, (1899) ante, p. 359, was referred to in support of this contention. But that case was altogether upon a different footing, for the petitioner therein was accused of having instigated one Mrs. Balfour to give false evidence in a divorce case, which was actually pending in the High Court at the time. In the case now before us, there was no proceeding pending in any Court in relation to which the alleged false evidence was said to have been fabricated. There was then simply an investigation, which was being held by the Police into the matter of the information in connection with the theft of the *sari*. We are therefore of opinion that no sanction under section 195 of the Criminal Procedure Code was necessary in this case. That none was legally required

under any local executive order, in order to give the Magistrate jurisdiction, is conceded.

We finally proceed to consider the last question stated in the rule, *viz.*, as to whether there is any case at all made out for the prosecution of the petitioner; but before doing so, we desire to say that, in our opinion, it is only in very exceptional instances that this Court should as a Court of Revision interfere with the action of a subordinate Court in respect of any pending case, and especially when such a case has reached the stage where a charge has been drawn and only the defence of the accused remains to be heard. We do not desire to lay down, nor can we lay down, any hard and fast rule upon the subject, for the interference of this Court should be regulated by the particular circumstances of each case. But speaking generally it seems to us to be inadvisable to [791] interfere in a pending case, unless there is some manifest and patent injustice apparent upon the face of the proceedings and calling for prompt redress. As we understand this portion of the rule, it contemplates the existence of such an injustice in the present case; for if neither the complaint, nor the evidence for the prosecution, makes out any case whatever against this petitioner, it is manifest that he should not have been charged and so called upon to enter upon his defence, and it follows that he should not be left, for a moment longer than is necessary, in the position of a person accused of an offence and forced to defend himself against a charge which there is no legal evidence to establish. Now, we have considered the whole of the evidence for the prosecution in the case before us, and we fail to see that it discloses any act of the accused which can be interpreted so as to bring him within the four corners of the charge. There is nothing whatever to show that he himself did anything, or connived at any other person doing anything, towards fabricating any false evidence against the complainant either with or without the intention that such evidence should be used in any stage of a judicial proceeding. Whatever the head constable or the other accused may have done, there is nothing to shew that the petitioner acted in any way except in the *bond fide* discharge of his duty, or that he was cognizant of any one fabricating any false evidence for the purpose in question. This being so, it is clearly most unfair to him that he should now be called upon to rebut a charge which, upon the evidence, is baseless in so far as it affects him. And to remedy this injustice, it is right that we should interfere.

We accordingly quash the proceedings, so far as the petitioner is concerned, and direct that he be at once discharged.

S. C. B.

NOTES.

[I. This was followed as regards interference where the materials disclosed no offence in, 38 Cal., 68; (1910) 19 C.L.J., 43.

II. No sanction is required to prosecute a person for having instituted a false charge before the Police:—(1909) 10 C.L.J., 564.]

[792] APPELLATE CIVIL.

The 2nd May, 1899.

PRESENT:

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, MR. JUSTICE PRINSEP,
AND MR. JUSTICE BANERJEE.

Prosunno Coomar Roy.....Plaintiff

versus

The Secretary of State for India in Council.....Defendant.*

Settlement—Settlement of noabad taluks in Chittagong—Power of Government to make settlement—Waste lands—Resumption—Kabuliat, Effect of—Acceptance of kabuliat by the landlord—Ratification—How far the acts of Government officers bind the Government—Regulation III of 1822, section 5, clause 1—Regulation VII of 1822, section 7, clause 1—Evidence—Presumption of due performance of official acts—Acquiescence—Acceptance of rent after term of settlement.

The plaintiff sued the Secretary of State for India in Council for the declaration that a certain *noabad mehal* of his in the District of Chittagong was a permanent *taluk*, not resumable by the Government. He based his claim on two grounds: (1) that the *mehal* existed from before the time of the Decennial Settlement, and the settlement of 1800 confirmed the permanent right of the *talukdar* in the same; (2) and that at any rate, a *kabuliat* executed in 1836 by his predecessors in title with the approval of the Collector had the same effect. In defence, it was alleged (1) that the *mehal* was not in existence at the time of the Decennial Settlement and the settlement of 1800 was a temporary one; and (2) that the *kabuliat* was never accepted by the Government, but that on the contrary the Government passed distinct orders that the settlements of 1836 were for thirty years only, which order was duly published by an *istahar* to that effect. It was found on the evidence that the *taluk* was not shown to have been in existence before 1800 and the settlement proceedings of that year and the variation of rent from time to time did not support the plaintiff's contention: *Held*, that the *kabuliat* of 1836 was merely an offer on the part of the *talukdar* for the time being and was not binding on the Government, its terms not having been accepted either by the Government or by any duly authorised officer thereof; that both by law and by the special instructions issued for the guidance of settlement officers, no settlement could be binding on the Government unless confirmed by the Governor-General in Council.

There being no proof given by either party as to whether the *istahar* above mentioned was or was not duly published, *Held*, that the publication of the *istahar* must be presumed, having regard to the presumption in favour of the due performance of official acts.

Held also that, even assuming that the officers of the Government induced by their act and conduct a belief in the *talukdar* that the *kabuliat* had been accepted by the Government, or that a permanent settlement had been sanctioned by the Government, that did not amount to a ratification of the *kabuliat*, inasmuch as such conduct of the officers was in violation of their duty as such officers and in direct contravention of the express orders of the Government.

* Letters Patent Appeal No. 1 of 1898 in Appeal from Original Decree No. 264 of 1896.

Held, also, that the acceptance by the Government of rent at the old rate from the *talukdar* for a long time after expiration of thirty years did not amount to an acquiescence in the terms of the *kabuliat*.

Unsettled and unoccupied waste land, not being the property of any private owner, must belong to the State.

THE plaintiff, Prosunno Coomar Roy, brought the present action against the Secretary of State for India in Council for the establishment of the plaintiff's title to a certain *noabad mehal* known as *taluk* Shermast Khan, No. 203, situated in *mouza* Rajarkal, Thana Ramu, in the District of Chittagong, for a declaration that 86 *drones* 2 *kanis* 9 *gandas* and 2 *karas* of *hasila* (arable) land, and 491 *drones* 15 *kanis* 2 *gandas* and 1 *kara* of *khila* (waste) land, aggregating to 578 *drones* 1 *kani* 11 *gandas* and 3 *karas* of land, as measured and found by the recent survey, was included in the said *taluk* Shermast Khan; and for a further declaration, upon the construction of a *kabuliat*, dated the 9th November 1836, that the Government had no right to take any land out of the said *mehal*, or make it *khas*, or interfere in any way with the rate of rent at which the plaintiff has been paying, in accordance with the terms of the same *kabuliat*. The plaintiff alleged that the said *mehal* had been in existence from before the Decennial Settlement, and averred in effect that the permanent character of the *taluk* was confirmed by the *kabuliat* which the Government took from Sheik Obedulla and others, his predecessors in title, on the 9th November 1836.

In defence, it was urged, amongst other things, that the plaintiff's *taluk* was not in existence at the time of the Permanent Settlement, but that it was included in the Cox's Bazar *khas mehal*, No. 34613, which had never been permanently settled; [794] that the settlement made with Sheik Obedulla and others was for a term of thirty years only; and that the *kabuliat* upon which the plaintiff based his claim was not accepted by the Government, who never approved it, but that, on the contrary, the order of the Government was conveyed in letter No. 620, dated the 17th April 1838, approving grants of thirty years' leases and declining to grant perpetual leases, which order was duly published and notified. The defendant also denied that the waste land claimed by the plaintiff was ever in his possession and that at any time it formed part of his *taluk*.

It appears that in 1796, the Government, having discovered that a *sanad*, under which the descendants of one Joy Narain Ghosal claimed all the waste lands of the Chittagong district as belonging to their *mehal noabad* Joynugger, was a forged document, directed the whole of the said *mehal* and lands to be resumed and brought under assessment. This measure was carried into effect in the year 1800, under the Collector, Mr. Kerr. The instructions issued by the Government to regulate the resumption and assessment proceedings were as follow:—

I. (a) Perpetual *pottahs* were to be granted for the cultivated and uncultivated lands, which had already been brought upon the *jumma* in favour of the defendant *talukdars*, by whom they were then held, on condition that the boundaries of the lands should be fixed by actual measurement.

(b) Such lands as had been reduced to cultivation since the last measurement (of 1788-89) were to be brought upon the *jumma* of Government.

(c) The assessment of the whole (a) and (b) was to be adjusted according to the rates observed in forming the assessments on the lands of other independent proprietors in the Chittagong District, by which means the *talukdars* would pay to Government exactly *pro rata* what they then paid to the descendants of Gokul Chunder Ghosal.

II. (d) Other waste lands, not brought upon the *jumma*, were to be granted, with fixed and ascertained boundaries, to individuals, in small and compact portions, according as applications might be made for them.

• (e) Revenue was to be assessed upon the waste land lots [specified in (d)], according to the established rates of assessment, for such area as might, at the end of three years, be reduced to cultivation.

(f) The revenue in respect of these waste land lots was to be further proportionally increased, on the above principle, for such area as might be afterwards brought into cultivation, whenever, and as often as it might be [795] thought advisable to set on foot an inquiry for the purpose of ascertaining that point.

It appears that previous to this, *mouza* Rajarkal, Thana Ramu, was measured in 1126 Maghi (1764-65), and 1150 Maghi (1788-89). In the measurement papers of 1764-65, there was no mention of *taluk* Shermast Khan. In the measurement papers of 1788-89, the following entries occurred :—

<i>Lakhiraj</i> pending decision	Total quantity of land. 126d.	{ <i>khila</i> —34d.
Khairat. Zimma Shermast	4k. 18g. 1k.	{ 7k. 6g. 1k.
Khan, son of Zabardast		{ <i>hasila</i> —91d.
Khan.		13k. 12g.
Zimma Shermast Khan ...	Total quantity of land. 55d.	... <i>Khila</i> —55d.

There was no assessment with regard to either of these lands held by Shermast Khan. But in the measurement papers of the year 1800, a *noalad mehal*, called *taluk* Shermast Khan, was described as containing 11 *drones* 7 *kanis* 18 *gandas* 1 *kara* of *khila* land and 41 *drones* 6 *kanis* 9 *gandas* 3 *karas* of *nasila* land, altogether 52 *drones* 14 *kanis* 8 *gandas*, assessed at the annual revenue of Rs. 659-6-2; then there are mentioned some '*Lakhiraj* pending decision' and other lands. Afterwards, as stated by Mr. J. I. Harvey, Collector, "in the survey of 1176 Maghi (1814-15) 29 *drones* 6 *gandas* 1 *kara* of *hasila* land of the village were measured under the *taluk* Shermast Khan, on which a *jumma* of Rs. 460-5-1 (*sicca*) was fixed; the remaining lands of the survey of 1162 Maghi (1800-1) were improperly included under the head of *lakhiraj* land in the name of Shermast Khan. This caused a decrease in Government revenue from the *jummabandi* of 1162 Maghi by Rs. 199-1-0 (*sicca*)," the arrears of which amount were subsequently realised by Mr. Harvey (Exhibit I).

In 1815, the Ghosals obtained a decree of the Sadar Dewany Adalat adjudging that they should recover as much as might be ascertained to have been in the year 1764 the undoubted property of their family. In order to facilitate the execution of this decree, by the identification and separation of the lands awarded to the Ghosals, the Government in 1833 resolved to conclude the Chittagong settlement on a scientific and exhaustive basis. The settlement was conducted by the Collector, Mr. Harvey, under the superintendence of Mr. Dampier, then Commissioner. Thana [796] Ramu was surveyed in 1834-35, and the settlement was submitted to the Government for sanction on the 5th November 1837, with a memorandum by Mr. Walter, temporary member of the Sadar Board of Revenue (Exhibit D). In this memorandum, Mr. Walter solicited the sanction and confirmation of the Government for the result of the survey and assessment regarding the Government portion of the *noabad* estate, in each of the 51 *mouzas* included in the thana for a period of 30 years, and that the *taluks* should be considered dependent *taluks*. It was stated, however, evidently with approval, that "Mr. Dampier and Mr. Harvey strongly recommend the grant of *pottahs* to all the *noabad talukdars*, and further that notice should be issued declaring that the present measurement should always be respected and the new cultivation alone be subjected to assessment" [para. 45]. The Government order on this memorandum was communicated to the Board of Revenue in a letter, dated the 19th April 1838 (Exhibit C.) The Government assented to the proposition that the *taluks* should be considered dependent *taluks* as well as to the proposition to grant *pottahs* to the *talukdars*

for a period of thirty years. But with regard to the recommendation that the *pottahs* should convey an assurance that the cultivated lands included in the several *taluks* and holdings should not be liable to any enhancement of assessment at any future time, it was observed as follows :—

9. *Pottahs* conveying an assurance to the above effect would in fact be equivalent to perpetual leases for that portion of the land included in them which is now in cultivation. Such *pottahs* the Deputy Governor thinks objectionable ; there being no reason whatever why Government as proprietor of the estate should not have the increased rents which the land may be expected to be capable of yielding thirty years hence, either from being rendered more productive than they are at present by improved husbandry, or in consequence of a general rise in the value of agricultural produce.

10. The Deputy Governor is of opinion that the boundaries of each of the several *taluks* and holdings according to the measurement described in para. 116 of the memorandum should be fixed ; and that a lease (*pottah*) should be granted for the whole of the land, both cultivated and uncultivated, included within those boundaries ; which lease should convey no other assurance than that no increase to the *jumma* assessed by the present settlement will be demanded either for the cultivated or uncultivated lands within the boundaries specified, during the period of the lease.

[797] These orders were communicated on the 16th June 1838, by Mr. Farvey, then Commissioner, to Mr. Raikes, the Collector of Chittagong, with the following instructions (Exhibit E) :—

4. You will please to publish the accompanying *istahar* for public information at your *kutchery* and in the Thana of Ramu, intimating that the detailed measurement and settlement of the Thana of Ramu, effected under the provisions of Regulation VII of 1822, has received the sanction of Government, and that no increase on the *jumma* assessed by the present settlement will be demanded either for the cultivated or uncultivated lands borne on the *jummabandi* of each *taluk* for a period of thirty years from the date of *jummabandi*.

5. You will hereafter receive *pottahs* prepared in accordance with the orders of Government for distribution to the *talukdars*, *utmandars* and *raiyats* who have engaged for their holdings.

No evidence having been given by either party to the present suit as to whether the *istahar* abovementioned was or was not duly promulgated, the following extracts from Vol. IV of the Selections from the Records of the Board of Revenue, L. P., compiled by Mr. Cotton, will be found to have some bearing on the question as to how far the responsible officers of Government took steps to impress on the *noabad talukdars* the temporary character of their *taluks* and to induce them to execute revised engagements.

Letter from Mr. Scott, Collector, to Sir Henry Ricketts, Commissioner, No. 45, 18th April 1842, regarding settlement of mouza Beala Manick Chur.

" I have before communicated on the inexpediency and hardship of sending for these *talukdars* after a lapse of years merely to execute revised engagements, to say nothing of the contingency of objections."

Instructions given by Sir Henry Ricketts to Mr. Scott. Letter No. 2443, 20th April 1842.

" The settlements sanctioned by Government have been for thirty years, and at the back of all the engagements of the *talukdars* in these settlements it should be recorded that the settlement was sanctioned for thirty years, and not in perpetuity, as inserted in the *talukdar's* engagement. If this be not done, considerable embarrassment may be experienced on the expiration of the term thirty years hence ; of course all settlements were made conditionally on their being approved by Government, and the limited approvement accorded by Government should be distinctly noted. . . . It appears to me that the contingency of objections is in favour of revised engagements being taken, instead of against it. Should he have objections to offer, surely he should be heard. Moreover, it would be wrong to allow a *talukdar* to [798] remain quietly in possession, and spend his money under the

impression that his lease was in perpetuity while we have a document in our desk authorising us at the expiration of thirty years to reassess him I request that you will send for the *talukdar* and take an engagement from him for thirty years."

From Mr. Scott to Sir Henry Rickets. No. 93, 31st August 1842.

"Another point of great importance in the disposal of settlements that have been concluded by former Deputy Collectors arises from the view the Commissioner has taken of the *kabuliat* which has been hitherto used. Considering their documents as conveying a right to the assessment now fixed in perpetuity and not during the pleasure of Government, it appeared to him expedient to have revised engagements taken, and the parties concerned to be informed of their limited interests. . . . I offer no objection to the revised form, but submit that there is no necessity for any retrospective adoption of it. As to the people being under the impression that the assessment is in perpetuity, I have never heard it advanced by any one, and it is opposed to all their past experience."

From Sir Henry Ricketts to the Government. No. 1424, 20th December 1842.

"As to the revised *kabuliat* I have directed to be taken from all *talukdars*. The form in use appeared to me distinctly to convey a right to possession of the cultivated land at the *jumma* now fixed for ever. No mention of any limited period was made, and as it is not likely any of us shall be here thirty years hence to explain that the settlement was for thirty years only, I considered it prudent and likely to prevent misunderstandings and doubts hereafter to direct that the form should be altered before settlements were submitted for approval."

It is also necessary to mention that on the 2nd March 1829, circular instructions were issued by the Government for the guidance of the local Revenue Commissioners, which contained, amongst others, the following directions (Exhibit H) :—

1. No settlement of land revenue shall be concluded by the Sadar Board, or be held binding upon Government, unless the same shall have been formerly confirmed by the Governor-General in Council.

2. Settlements shall be made in the manner prescribed by the Regulations by the Collectors or Deputy Collectors subject to the Commissioners, the Sadar Board and the Government.

In the settlement proceedings of Mr. Harvey, dated the 21st November 1836, and in the settlement record of the same officer, dated the 29th January 1837, forming part of the survey and settlement of Thana Ramu mentioned above, *taluk Shermast [799] Khan* was recorded as containing, as then measured, 79 *drones* 6 *kanis* 7 *gandas* 1 *kara* of *hasila* land, and 137 *drones* 14 *kanis* 18 *gandas* 1 *kara* of *khila* land, aggregating 217 *drons* 5 *kanis* 5 *gandas* 2 *karas* of land, belonging to the zemindari of the Government, and assessed at the annual revenue of Rs. 659-6-2 (*sicca*—old *jumma*) [Rs. 607-14-0 (Company's)] Rs. 1,311-3-5 (Company's), Rs. 607-14-0 being the assessment for the *excess hasila* land of 37 *drones* 15 *kanis* 17 *gandas* 2 *karas*, as compared with the survey of 1800.

The *kabuliat* relied upon by the plaintiff was executed in the office of Mr. Harvey by Sheik Obedulla and others on the 9th November 1836, and bears at the top the following endorsement: "Executed in this office by the within named.—J. I. Harvey, Chittagong Collectorate, 14th November 1836." It contains the following clauses :—

"In the measurement of 1197 Maghiera, 79 *drones*, 6 *kanis* 7 *gandas* 1 *kara* of *hasila* land and 137 *drones* 14 *kanis* 5 *gandas* 1 *kara* of *khila* land, in all 217 *drones* 5 *kanis* 5 *gandas* (*sig*) 2 *karas* of *hasila* and *khila*, land in *mouza* Rajarkal, Thana Ramu, in the *noabad mehal*, the zemindari of the (East India) Company's Government, known as *taluk Shermas Khan*, were measured as the *milkiat* of Sheik Obed, Sheikh Badi-uz-zaman Asalat Khan and Dewan Bibi, *maliks*. Out of this area, 41 *drones* 6 *kanis* 9 *gandas* 3 *karas* of land are mentioned in

the *jummabundi* and measurement papers of 1162 Maghi era. We do therefore of our own free will and accord execute this *kabuliat* and declare as follows :—

“ We will hold as *maliks* with power to make sale or conveyance 41 *drones* 9 *kanis* 9 *gandas* 3 *karas* of *hasila* land on account of the former *jummabundi* on a *jumma* of *sicca* Rs. 659-6-2 as *sicca* Rs. 15-14-16 *gandas* per *drone* and also 37 *drones* 15 *kanis* 7 *gandas* 2 *karas* of *hasila* land on (a *jumma* of) Company's Rs. 607-14-0 at Rs. 16 per *drone*, the whole amount of revenue being Rs. 1,267-4-2 in *sicca* and Company's coin which we will pay in proper time according to the terms of the *jummabundi* and the *kistibundi*, and we will appropriate the proceeds of the said property, and our descendants, generation after generation, will continue to do the same. For any quantity of cultivation-land, which may be found in our possession at the time of the next measurement, we will pay *jumma* at the above rate along with that aforesaid *taluk*.”

In the settlement proceedings of Mr. Harvey, dated the 21st November 1836, above referred to, it was also stated that there were 26 *drones* 8 *kanis* 9 *gandas* 2 *karas* of *bat*, or culturable [800] fallow land in the *taluk* *knoabad* in dispute, on account of which, Rs. 209-6-5 were remitted for three years only from 1198 Maghi to 1200 Maghi. It appeared, however, that the plaintiff and his predecessors had up to the date of the present suit all along paid the annual rent of Rs. 1,106-8-6, never the full amount of Rs. 1,311-3-5, the difference being attributed by the plaintiff to the said remission.

In 1888 and 1890, the Government of Bengal ordered a survey to be made and a record of rights to be prepared in respect of lands situate in old Thana Ramu, under section 101 of the Bengal Tenancy Act. A record of rights of *mouza* Rajarkal was accordingly completed and finally published in 1894 ; and the Revenue Officer, having held that the term of the plaintiff's *mehal* had expired, offered to resettle with the plaintiff 86 *drones* 10 *kanis* 6 *gandas* 1 *kara* of *hasila* land and 45 *drones* 2 *kanis* 10 *gandas* of *khila* land at an annual rent of Rs. 1,474, failing which, the lands were to be settled with other people. Hence the present suit.

The District Judge dismissed the suit, and the plaintiff appealed to the High Court. The appeal came on for hearing before a Division Bench consisting of RAMPINI and HENDERSON, JJ. The Judges having differed in opinion, the decree appealed against was affirmed and the appeal dismissed under section 575 of the Code of Civil Procedure.

The plaintiff then preferred an appeal under section 15 of the Letters Patent.

Mr. Hill, Babu Aukhoy Coomar Banerjee, and Babu Jatramohan Sen, for the Appellant.

The Advocate-General (Sir Charles Paul), Mr. Woodroffe, Babu Ram Charan Mitter, and Babu Lal Mohan Dass, for the Respondent.

The judgment of the Court (MACLEAN, C.J., PRINSEP, J., and BANERJEE, J.) was delivered by

Maclean, C.J. (PRINSEP and BANERJEE, JJ., concurring).—This appeal arises out of a suit brought against the Secretary of State for India in Council by the plaintiff, appellant, to establish his title to certain lands, and to obtain certain declarations, the [801] most important of which are that the said lands are included in plaintiff's *taluk* Shermast Khan, and that the Government has no right to resume any lands of the said *taluk*, or to assess any rent on the same, otherwise than under the terms of a certain *kabuliat* of the 9th of November 1836.

The material allegations upon which the plaintiff bases his right to the reliefs claimed are, that *taluk* Shermast Khan is the purchased ancestral property of the plaintiff ; that the *taluk* has been in existence from before the Decennial

Settlement; and in 1162 Maghi, that is 1800, a *jummabundi* was made by which 41 odd *drones* of land of the said *taluk* were assessed at Rs. 15-14-16 *gandas* per *drone* and a *jumma* of 659-6-2 pies was fixed: that in 1197 Maghi, that is 1835, the *taluk* was measured again and found to contain 79 odd *drones* of *hasila* or culturable lands, and 137 odd *drones* of waste land, and Government on the 9th of November 1836 took from the *taludar* a *kabuliat* fixing the *jumma* at Rs. 1,267-4-2 pies (in *sicca* or Company's coin), which was made up of the old *jumma* of Rs. 659-6-2 *sicca* and an additional *jumma* of Rs. 607-14-0 in Company's coin at the rate of Rs. 16 on the excess of 37 odd *drones* in the culturable area; that the *kabuliat* contains a stipulation that any additional land that might be found, on future measurement, to have been brought under cultivation was to be assessed at the rate of Rs. 16 a *drone*; that out of the *jumma* fixed by the *kabuliat*, a certain deduction on account of *bat khila* or waste land being made, the sum of Rs. 1,101-8-6 pies continued to be the *jumma* payable and was actually paid: that at the recent survey, the *mehal* was improperly recorded as the *khas* property of Government, and the plaintiff was, by a notice, dated the 26th July 1892, and by a proceeding, dated the 6th August 1892, required to take a fresh settlement, on the ground of the former settlement having expired: and that these alleged illegal proceedings have endangered the plaintiff's permanent right to *taluk* Shermast Khan.

The defence, so far as it is necessary to be considered for the purposes of this appeal, was, in substance, a denial of the permanent *talukdari* right claimed by the plaintiff.

The first Court found for the defendant and dismissed the suit.

[802] The plaintiff preferred an appeal to this Court against the decree of the first Court. that appeal was heard by a Division Bench, and as one member of that Bench, Mr. Justice RAMPINI, was of opinion that the decree appealed against should be affirmed, while the other, Mr. Justice HENDERSON, was of a contrary opinion, the decree was consequently affirmed under section 575 of the Code of Civil Procedure. Against the judgment of Mr. Justice RAMPINI, affirming the judgment of the first Court, the present appeal has been preferred by the plaintiff under section 15 of the Letters Patent.

The points urged in this appeal on behalf of the plaintiff are shortly these: *First*, that the settlement of 1800 was in confirmation of certain existing *talukdari* rights, and had the effect of conferring on the plaintiff's predecessor in title a permanent right in the *taluk* Shermast Khan and in the lands in dispute, as appertaining to that *taluk*: *second*, that the *kabuliat* of the 9th of November 1836 had the same effect; and *third* that even if the *kabuliat* alone could not have such effect, it was subsequently ratified by the Government through its officers, and even if not ratified, that the Government have acquiesced in the terms of the *kabuliat*, and that it is not now open to the Government to resile from those terms. We ought to state that it is no part of the plaintiff's case that the lands in suit, which are claimed as *taluk* Shermast Khan and as settled at the permanent settlement, formed part of the estate of Joynugger.

Upon the first point it has been urged for the appellant that, by the policy of the British Government (as indicated in the earlier Regulations, such as the preambles to Regulations II and IX of 1793) which was in accordance with the policy of the Mahomedan Government, the property in the suit was declared to be vested in the landholder, and the claim of the Government declared to be limited to a share of the profit in the shape of revenue; that in pursuance of that policy the Government approved the recommendations made by the Board of Revenue for the settlement of the waste lands of Chittagong, which had not been included in any *zemindari* or *turuf*, and which

were called *noabad* or newly reclaimed lands ; that the lands comprising *taluk* [803] Shermast Khan were accordingly settled with the holder thereof ; and that regard being had to these circumstances and to the terms of the Board's recommendation, the settlement of the *taluk* should be taken to be a perpetual settlement in recognition of pre-existing rights in the *talukdar*.

On the other hand, it has been contended for the Government that though, in regard to land that is settled with or occupied by any one, the right of the Government may be limited to the revenue, yet unsettled and unoccupied waste land belongs to the Government ; that there is nothing to show that *taluk* Shermast Khan existed before the Decennial Settlement, and that the settlement of *taluk* Shermast Khan in 1800 was not under the directions of the Board a perpetual settlement, but came under that head of the directions which recommended temporary settlement.

We are dealing with a state of circumstances and a condition of affairs which are involved in some obscurity, owing to a century having expired since the date of the transactions in question, and there is practically no direct evidence on the matter, either oral or documentary. It must, however, be borne in mind at the outset, that, if the plaintiff sets up as against the Government a permanent or perpetual settlement, it is incumbent upon him to make out that case ; and upon the question of evidence we may perhaps observe that no question has been raised by either party as to the admissibility of the various despatches and correspondence and other documents which have been referred to by both sides and in some sense relied upon by both sides during the course of the argument. Both parties have treated them as admissible and the case has been argued upon that footing.

After carefully considering the arguments on both sides, we are of opinion that unsettled and unoccupied waste land, not being the property of any private owner, must be held to belong to the State. This view is not opposed to the policy of the British Government in India, and is in accordance with such policy as appears from the express language of the preamble of Regulation III of 1828. But it is unnecessary to pursue this discussion, as the holder of *taluk* Shermast Khan in the *kabuliat* executed by [804] him on the 9th of November 1836, upon which the plaintiff's case is so strongly based, admits that the *taluk* is situated " in the *noabad mehal*, which is the zemindari of the East India Company's Government."

It has, in our judgment, been established that *taluk* Shermast Khan is not shown to have been in existence from before the Decennial Settlement. The earliest settlement of *taluk* Shermast Khan, that is mentioned or referred to, is that of 1800 by Mr. Kerr, Collector of Chittagong. We have not before us the papers of 1800, nor was any application made by the plaintiff for the production of these papers, until after he had closed his case, and it may well be that he was not very anxious to have them produced lest they might prejudice his case. It must be remembered that the plaintiff claims a permanent *talukdari* right, not merely in the 41 odd *drones* settled as *taluk* Shermast Khan, at a rent of Rs. 659 odd in 1800, but in an area of 578 odd *drones*. Be that, however, as it may, we should have felt inclined to give effect to the argument that, from the proved existence of *taluk* Shermast Khan in 1800, a reasonable presumption arose in favour of its existence before that date, were it not for the fact that, as appears from the settlement proceedings of Mr. Harvey, Collector of Chittagong, dated the 21st of November 1836, which is the earliest document showing the existence of the *taluk* in 1262 Maghi or 1800 A. D., the *taluk* had no existence in 1150 Maghi or 1788 A. D., there being no mention of it, though there is mention of certain other lands specified as *lakhiraj* in the name of

Shermast Khan in the survey of 1788, which was the next preceding survey and of which the particulars are given in the proceedings. And it may be noticed that in the survey proceedings of 1162 Maghi (A. D. 1800), a distinction is drawn between *noabad* lands such as those now in suit, and *lakhiraj* lands. The interval between 1788 and 1800 was not long, and it is not suggested that there was any survey or settlement between these two dates. It cannot, therefore, be reasonably inferred that *taluk* Shermast Khan was formed before 1800.

Nor can the directions of the Board of Revenue under which Mr. Kerr acted, on settling *taluks* in 1800, warrant our holding [805] that the settlement of *taluk* Shermast Khan was a settlement in perpetuity. Those directions which have been copiously referred to on both sides from the abstract given of them in the report of the case of *Vakeel of Government v. Rajesree Debea* (2 Sel. Rep., S. D. A., New Ed., 199) will be found at pp. 349 and 350 of the Paper Book.

These directions, as we gather from the memorandum of Mr. Walters, dated the 5th of November 1837 (Ex. D.) para. 8 and from Mr. Cotton's note, para. 6 (p. 222 of the Paper Book) which were referred to on both sides, were issued in 1796 or 1797; so that the latest measurement before they were issued was the measurement of 1788, and the only lands that could come under the first description referred to in the above extract, would be lands measured in 1788, all lands not covered by the measurement of that year being included in the second description. Now the lands of *taluk* Shermast Khan were not included in that measurement, for the measurement papers are silent as to them, and so they did not fall under the first description, and the direction for the grant of a perpetual *pottah* could not apply to them. It was argued for the appellant that the land of *taluk* Shermast Khan should be taken as coming under the first description as having been permanently settled, and, as being land which "had been reduced to cultivation since the last measurement," that is, the measurement of 1788, and that it could not come under the second description because it was settled, not in small portions but as in one large area, and the rent was made payable not after three years but at once, which could not have been the case if the land had been of the second description. The first branch of this argument is, in our opinion, unsound. The only lands that could come under the first description, as being lands which had been reduced to cultivation since the last measurement, are those which had already been included in the measurement of some *taluk*, but which had not been assessed owing to their not having been brought under cultivation, and the land settled as *taluk* Shermast Khan in 1800 was not of this class. As to the second branch of the argument, if the fact of the land being a large area of 41 *drones*, and being assessed with the rent of Rs. 659 odd payable at once, militates [806] somewhat against the view of its being temporarily settled as land of the second description, the fact of its being re-measured and re-assessed in 1176 Maghi, that is in 1814, as a smaller area of 29 *drones* for a smaller rent of Rs. 460 odd (as appears from the settlement proceeding of 1836, Ex. I, p. 15), and the fact again of the rent being changed from Rs. 1,311-3-5 to Rs. 1,101-8-6 (see Ex. I, para. 16 and the plaint, para. 4) and of the rate being changed from Rs. 15-14-16 sicca to Rs. 16 Company's coin (see *kabuliat* Ex. II and Ex. I, para. 13), are wholly inconsistent with the theory of a perpetual settlement of the *taluk* in 1800.

The first contention of the appellant must, therefore, fail; in other words the plaintiff has failed to establish a perpetual settlement in 1800.

The second contention of the appellant, namely, that the *kabuliat* of the 9th of November 1836 conferred on the holder of *taluk* Shermast Khan a permanent *talukdari* right in respect of certain lands, would be well founded, if the *kabuliat* amounted to a binding contract between the *talukdar* and the Government. The *kabuliat* doubtless provides that the *talukdar* will hold the land of the *taluk*, generation after generation, on payment of the stipulated rent, and of such additional rent, at the fixed rate, as may be payable on account of any additional land that may be subsequently found by measurement to have been brought under cultivation. But how does this *kabuliat* amount to a contract binding on the Government? It was no doubt executed by the holder of *taluk* Shermast Khan for the time being, and it was executed in the office of the Collector, Mr. Harvey, as the note at the top of the document shows; but there was no execution or acceptance by the Government of the terms of this *kabuliat* or by any duly authorized officer of the Government. It was an offer on the part of the owner for the time being of the *taluk* in question, and nothing more. No doubt Mr. Harvey recommended the grant of permanent *pottahs* to all *noabad talukdars* (see Mr. Walters' Memorandum, Exhibit D, p. 45), but it is amply clear that this view not only did not find favour with the Government, but was distinctly repudiated by it. It is equally clear Mr. Harvey had no authority to bind the Government in the matter. The settlement by Mr. Harvey was made [807] under Regulation VII of 1822, which had been extended to the whole of the Bengal Presidency by Regulation IX of 1825, and both by general law (see Regulation III of 1822, section 5, clause 1 and Regulation VII of 1822 section 7, clause 1), and by the special instructions issued for the guidance of Settlement Officers (see Exhibit H, para. 1) no settlement could be binding on the Government unless confirmed by the Governor-General in Council. The proceedings of Mr. Harvey were in the ordinary course submitted to Government, along with a Memorandum by Mr. Walters (see Exhibit I and Exhibit D), but the Government by its letter, dated the 19th April 1838, Exhibit C, refused to sanction any perpetual settlement, and assented to the granting of *pottahs* for 30 years only. The *kabuliat* cannot be regarded as conferring any permanent rights on the *talukdar*, it does not represent any contract between the *talukdar* and the Government.

Then it is contended, and this contention was accepted as well founded by Mr. Justice HENDERSON, that though the *kabuliat* standing alone, might not be sufficient to confer any permanent rights on the *talukdar*, yet, by reason of ratification or acquiescence on the part of the Government, as evidenced by the acts and conduct of its officers, the *talukdar* must be held to have acquired the permanent rights referred to in the *kabuliat*. Ratification is one thing, acquiescence is another, and though they have been much intermingled in the argument, it will be preferable to deal with them separately.

What then are the acts and conduct of the officers of the Government, which are relied upon as constituting ratification of the *kabuliat* on behalf of the Government? In dealing with this question, it must be borne in mind that "the acts of a Government officer," as was pointed out by the Privy Council in *The Collector of Masulipatam v. Cavalry Vencata Narrainapah*, (1860) 8 Moore's I. A., 500 (554), "bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or if he exceed that authority, when the Government, in fact or in law directly or by implication, ratifies the excess."

We are invited to infer this ratification from the following circumstances:

(1) The omission of the officers of the Government [808] to issue the *istahar*

or proclamation which the Collector of Chittagong was, by the Commissioner's letter of the 16th June 1838, Exhibit E, (*ante* p. 797) directed to publish, intimating that the settlement of Thana Ramu (which included *taluk* Shermast Khan) had been confirmed only for thirty years, and their omission to give any intimation to the holder of *taluk* Shermast Khan that his *kabuliat* was not accepted by the Government; (2) their strong expressions of opinion in favour of the permanent rights of *noabad talukdars*, as expressed in their official correspondence.

With regard to the alleged omission to issue the *istahar* or proclamation, which the Commissioner directed the Collector to publish, it is contended for the appellant, that, as the publication of the *istahar* is not proved, its publication ought not to be presumed, seeing there was great disinclination on the part of the Collectorate officers, including the Collector himself, to intimate to the *talukdars* the refusal of Government to sanction a perpetual settlement as is shown by Mr. Scott's letter of April 1842 to the Commissioner (see *ante*, p. 797). It is further urged that, if the publication of the *istahar* was thus purposely omitted by the officers of Government, the holder of *taluk* Shermast Khan was led to believe, and to act upon the belief, that the permanent settlement embodied in the *kabuliat* of the 9th November 1836 was sanctioned, and the Government ought to be held precluded from questioning the existence of the permanent right referred to in the *kabuliat*.

We are of opinion that this argument cannot prevail. The direction of the Commissioner to publish the *istahar* or proclamation was conveyed in his letter of the 16th June 1838 (*ante* p. 797) to Mr. Raikes, the Collector of Chittagong, and there is absolutely nothing to show that Mr. Raikes evinced any disinclination to publish the proclamation, or that it was not duly published. We are invited to say that the officer in charge in 1838 neglected to do his duty, in publishing the proclamation, because his successor in 1842 four years afterwards expressed to his superior officer an opinion adverse to the policy of sending for the *talukdars* to execute revised engagements. Having regard to the presumption in favour of the due performance of official acts, we [809] are of opinion that in the absence of evidence to the contrary the publication of the *istahar* in question must be and ought to be presumed. Moreover, though, perhaps, it is unnecessary to follow this up, the disinclination of Mr. Scott related to sending for the *talukdars* to execute revised engagements, and when he was in reply directed by the Commissioner, Sir Henry Ricketts, to give due intimation to the *talukdars*, as "it would be wrong to allow a *talukdar* to remain quietly in possession, and spend his money under the impression that his lease was in perpetuity" (see *ante*, pp. 797, 798), Mr. Scott replied (see *ante*, p. 798) "as to the people being under the impression that the assessment is in perpetuity, I have never heard it advanced by any one, and it is opposed to all their past experience." This indicates that, in Mr. Scott's opinion at any rate, no impression had been created in the mind of the people that permanent rights had been created. It is extremely improbable that the *talukdars* were not aware that their *kabuliats* and assessments had to be submitted for the sanction of the Government, and that being so, that they would not inquire whether such sanction had or had not been granted. There is nothing to indicate that the officers of the Government did anything to lead the holder of *taluk* Shermast Khan to believe that the *kabuliat* of the 9th November 1836 had been accepted by the Government, or that a permanent settlement had been sanctioned by the Government. Even if the officers of the Government had induced any such belief, their conduct was in violation, and not in discharge, of their duty as such officers, and being

in direct contravention of the express orders of Government, could not bind the Government in any way.

There are no doubt strong expressions of opinion by certain local officers of the Government, especially Mr. Lowis and Mr. Cotton (see pages 264 and 277 of the Paper Book) in favour of the creation of permanent rights in *noabad talukdars* generally, and criticising adversely the policy of the Government in this matter; but these views were never accepted by the Government, and can have no real effect upon the question whether or not permanent rights were created.

We now pass to the last question, that of acquiescence. We are asked to say that the Government has acquiesced in the terms [810] of the *kabuliat*, by accepting the rent thereby reserved after the expiration of the 30 years running from 1836. In the first place the rent was paid, not according to the terms of the *kabuliat*, which fixed the amount at Rs. 659-6-2 sicca and Company's Rs. 607-14-0, but at the rate of Rs. 1,101-8-6. This is admitted in the plaint (paragraph 4). There was then no acceptance of rent according to the terms of the *kabuliat*.

But in dealing with this question, one must bear in mind that, when the lease of a particular *taluk* determines it is not the practice of the Government to, at once, make a fresh or revised settlement of that particular *taluk*, but to deal with the district generally, and until the re-settlement of the district can be dealt with, to continue to accept the rent previously paid in respect of any particular *taluk*. It often takes, as in this case—the case of a large and wild district in Chittagong—many years before the Government can be sufficiently advised by its executive officers as to the terms of a re-settlement, and in the meantime it accepts the old rent. To say that this is tantamount to an acquiescence on the part of the Government that a previous settlement is to be regarded as creating permanent rights, does not strike us as a well founded conclusion. In our opinion no case of ratification or acquiescence has been established against the Government, such as to preclude it from saying that no permanent rights have been created under the *kabuliat* of the 9th November 1836.

The contentions urged for the appellant, therefore, all fail, and this appeal must consequently be dismissed, and the decree of the District Judge dismissing the plaintiff's suit affirmed with costs.

We cannot, however, part with this case without expressing our deep regret, without desiring to impugn his impartiality, that the District Judge of Chittagong should have thought fit, after the plaint had been filed in the Court of the Subordinate Judge, to transfer the case to himself to be tried, and then to try it. In 1884, as an executive officer of the Government, he had enquired into and reported upon those very *noabad* settlements, and in his report had expressed an opinion distinctly adverse to [811] the asserted rights of the plaintiffs; and notwithstanding this, and the urgent objection of the plaintiffs, he elected at the instance of the Government to try the case, which, we understand, is a test case, and involving a very large amount of money. His judgment under such circumstances can be of but little value, and we express our surprise, equally with our regret, that such a course should have been adopted.

Prinsep, J.—I concur.

Banerjee, J.—I am of the same opinion.

M. N. R.

Appeal dismissed.

NOTES.

[This was followed in (1908) 18 C.W.N., 285; (1907) 11 C.W.N., 928; (1906) 8 C.L.J. 470.]

[26 Cal. 811]

The 10th April, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

F. W. Duke, Chairman of the Howrah Municipality.....Defendant
versus
Rameswar Malia.....Plaintiff.*

Jurisdiction of Civil Court—Bengal Municipal Act (Bengal Act III of 1884), sections 224, 245 and 246—Acts done in accordance with sections 245 and 246, whether subject to the jurisdiction of a Civil Court—Notice under section 246 whether sufficient for the purpose of the removal of huts in a basti as well as a pucca privy.

Where a Municipality, having proceeded in accordance with sections 245 and 246 of the Bengal Municipal Act, decide that certain works are necessary, that conclusion, in the absence of *malâ fides* or fraud or considerations of that nature, cannot be questioned in a Civil Court.

The action of the Municipality, so far as a privy was concerned, was held not to be *ultra vires*, although in the notice issued in accordance with section 246 of the Bengal Municipal Act they directed the plaintiff to remove, not only certain huts, but also a *pucca* privy inasmuch as the Municipality had a right to require him to remove the privy under section 224 of the Act.

THIS appeal arose out of an action brought by the plaintiff against the Howrah Municipality for a declaration of the plaintiff's right to a *basti* in the town of Howrah, and also for a declaration that the defendant Municipality had no right to enforce the construction of a road through the *basti* by demolishing huts [812] and a *pucca* privy situated on the land in dispute. The allegation of the plaintiff was that the Chairman of the Howrah Municipality had improperly issued a notice upon him under section 246 of the Bengal Municipal Act (Bengal Act III of 1884) for the construction of a new road through his *basti* land; that on the receipt of the said notice he, the plaintiff, made an application to the Chairman stating that there was no necessity for the construction of the road mentioned in the notice; but that the application was rejected and a fresh notice was issued requiring the plaintiff to remove the tiled huts and the *pucca* privy, and to construct the new road through the *basti*. Hence the suit.

The defence (*inter alia*) was that the Commissioners of the Howrah Municipality having been satisfied from the report of the Officiating Sanitary Commissioner of Bengal, that the proposed sanitary improvements were necessary in the *basti*, at a meeting held on the 7th December 1893 resolved that the said

* Appeal from Appellate Decree No. 2188 of 1897, against the decree of Babu Abinash Chunder Mitter, Subordinate Judge of Hooghly, dated the 23rd of July 1897, affirming the decree of Babu Debendra Bijoy Bose, Munsif of Howrah, dated the 29th of March 1896.

basti was, by reason of the manner in which the huts were crowded together, attended with risk of disease to the inhabitants, and directed the locality to be inspected by two Medical Officers as required by section 245 of the Bengal Municipal Act; and that in pursuance of the said resolution the said *basti* was inspected by the Civil Surgeon of Howrah and the Deputy Sanitary Commissioner, Western Bengal Circle, who submitted their report on the 19th April 1894, and upon receipt of the said report they (the Municipal Commissioners) directed notices to issue upon the owners of the land. The defendants further contended that the *pucca* privy in question did not belong to the plaintiff, but to their tenants of the *basti* who were served with a notice under section 224 of the Act to remove the said privy.

The Munsif found that the road was not necessary, and that the Municipality had no right to enforce the construction of the road in question and decreed the plaintiff's suit.

On appeal the Subordinate Judge confirmed the decision of the first Court.

Against this decision the Chairman of the Municipality appealed to the High Court.

[813] Babu Mohendra Nath Roy for the Appellant.

Babu Shiba Prosonno Bhattacharjee for the Respondent.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.):—

Maclean, C.J.—This is a suit, in effect, to restrain the defendant, as Chairman of the Municipality at Howrah, from acting under the resolutions of the Board passed under the following circumstances.

The plaintiff is the owner of certain *basti* land within the jurisdiction of the Municipality, and the Municipality, in 1893, having ascertained that the sanitary condition of these *bastis* was very unsatisfactory, appointed the Officiating Sanitary Commissioner to make a report to them upon the matter, and it is clear from the 8th resolution passed at a meeting of the Commissioners held on Thursday, the 7th December 1893, that the Commissioners, in meeting assembled, were satisfied from the report of the Officiating Sanitary Commissioner, that the existing block of huts in the Bengal Babu *basti*, within the Howrah Municipality, was, by reason of the manner in which the huts were crowded together, attended with risk of disease to the inhabitants or to the neighbourhood, and being unanimously of that opinion, they resolved that the locality be inspected by two medical officers, namely, the Civil Surgeon of Howrah and a gentleman to be nominated by the Sanitary Commissioner, who should make a report under section 245 of the Municipal Act, Bengal Act III of 1884. Accordingly two medical officers were appointed, and they made a report. Without going into the details of the report it is sufficient to say that the medical officers recommended that certain things should be done, and, amongst others, that a road should be made through this *basti*. On the 17th May 1894, that report was read at a meeting of the Municipal Commissioners, and it was duly proposed and seconded that the owners of the land on which the huts stood should be required, under the provisions of section 246 of the Act, to carry out and execute, within four months, all the works as specified in the report. That motion was carried unanimously, and in pursuance of that motion, the plaintiff was required to execute the works in [814] question. In my opinion, in the course which the Commissioners adopted, they have complied with the provisions of sections 245 and 246 of the Municipal Act, Bengal Act III of 1884.

As a consequence of the notice which he received to carry out the works mentioned in the report, the plaintiff instituted this suit on the 25th July 1895, and, as I understand, obtained from the Munsif an *ex parte* injunction in effect restraining the Municipality from proceeding under their resolution. It has not transpired when, actually, in point of date, the notice to do this work was served upon the plaintiff, nor is it explained why there was so long a delay between the date of the resolution in May 1894 and the filing of the suit in July 1895. I feel some surprise, however, that the Munsif should, under the circumstances, have made an *ex parte* order, and greater surprise, that when the defendant applied to discharge that order, instead of listening to the application, he should have ordered it to stand over until the trial of the suit. In the absence of any explanation, that does not strike me as a proper method of procedure, nor consistent with the principles upon which injunctions in such cases ought to be granted. The practical and unsatisfactory result has been that, though the report by the medical officers described the matter as one of urgency, nothing has been done for nearly four or five years, during which period this insanitary *basti* has been allowed to continue in its insanitary condition. This quiescent state of matters has, doubtless, been very satisfactory to the plaintiff, who has thus escaped complying with the direction of the Municipality for some years, but I am surprised that the Municipality should have allowed the matter to linger on in this unsatisfactory manner.

The plaintiff's case is based upon the view that there is no necessity for the construction of the works directed, least of all the construction of the new road. That appears again and again in the plaint, and the learned Judge in the Lower Appellate Court has gone into the question of necessity, and has arrived at the conclusion that the works directed by the Municipality to be executed were not necessary. That is the basis of his decision. In this he has erred, and he [816] ought not to have gone into the question of necessity or no necessity. The question of necessity or otherwise is left by the Legislature to the decision of the Municipality, and though, no doubt, a Civil Court can restrain a Corporation from doing anything *ultra vires*, the question of necessity is not to be so decided. Subject to what I will say in a moment as to the *pucca* privy, no question of *ultra vires* is suggested against the Municipality, nor is it suggested in the plaint that the provisions of sections 245 and 246 have not been duly complied with, or that the works required are outside the terms of the report, which was admitted in the first Court. If the Municipality decide, having proceeded in accordance with the provisions of the above sections, that certain works are necessary, that conclusion, in the absence of *malâ fides* or fraud or considerations of that nature cannot be successfully challenged and cannot be gone into in a Civil Court, otherwise every person, who is directed by a Municipal body to do certain things upon sanitary grounds, could at once institute a suit in a Civil Court, and challenge the necessity of the works directed. This is not what the Legislature contemplated, nor is it reasonable to suppose that any such course could have been contemplated. If it were otherwise, the delay in the present case supplies an apt illustration of how impracticable it would be for Municipalities to control sanitary matters within their jurisdiction. The judgment then of the Court below proceeds upon an entirely erroneous principle, and must be reversed.

But it has been argued that the action of the Municipality was *ultra vires*, because in their notice they directed the plaintiff to remove, not only the huts, but that which is spoken of as a *pucca* privy, and that they had no power under section 246 of the Act to direct an owner to do that, because a *pucca* privy is not a hut. The Municipality did no doubt by their notice require the

plaintiff to remove this privy in order that the road might be made, and they can require him to do this under section 224 of the Act, and they did also serve the occupier under the latter section. When they served their notice on the plaintiff, although it purports to be a notice under section 246, the Municipality clearly had a right to require him to remove the privy under section 224. [816] They had power then, under the Act generally, to require this privy to be removed, and I am not prepared to hold that, because they entitled their notice only under the one section, instead of the two, the whole proceeding is *ultra vires*. Besides, no such case is definitely raised by the pleadings. Again, the Municipality, if they be so advised, can now serve a notice on the plaintiff under section 224, for nothing as yet has been done.

Upon these grounds the view taken by both the Courts below is wrong, and the appeal must be allowed, the decrees of the lower Courts reversed, and the plaintiff's suit dismissed with costs in all the Courts.

Banerjee, J.—I am of the same opinion. The appeal arises out of a suit brought by the plaintiff respondent for a declaration that the plaintiff is entitled to the land in dispute, and that the defendant is not entitled to make a road over that land by demolishing huts and a *pucca* privy situated thereon, and that, if he is entitled at all to do so, he is so entitled only upon payment of compensation to the plaintiff. The allegation upon which the suit is based is shortly that the defendant, the Chairman of the Howrah Municipality, improperly issued on the plaintiff a notice under section 246 of Bengal Act III of 1884 for the construction of a new *basti* road after removal of the plaintiff's *pucca* privy and certain tiled huts, when there was no necessity for the construction of any such new road. The defence was that the Municipality, after going through the preliminary steps required to be taken by section 245 of Bengal Act III of 1884, issued in due form the notice under section 246 of the Act, which is referred to in the plaint; and that as regards the *pucca* privy, the defendant, under the belief that it belonged to the tenants, issued a notice on them under section 224 of the Act, for the removal thereof.

The parties went to trial on the three following issues :—*First* : Whether the suit is maintainable in its present form. *Second* : Does the privy referred to belong to the plaintiff ? And has the defendant Municipality any right to cause its removal, without the plaintiff's consent ? *Third* : Has the defendant Municipality any right to make the road on the plaintiff's land [817] as alleged without the plaintiff's consent, and without giving any reasonable compensation for the same, under the circumstances of the case ?

The first Court found for the plaintiff upon all these issues, and it was of opinion that the *basti* road in question was not necessary to be constructed. On appeal by the defendant, the Lower Appellate Court has confirmed the first Court's judgment on the grounds on which it is based, and on the further ground that the report of the medical officers, appointed by the Municipality under section 245 of Bengal Act III of 1884, was inadmissible in evidence without strict proof thereof.

On second appeal it is contended for the Municipality : *First*, that the Courts below are wrong in holding that it was open to the Civil Court to determine, whether the road in question was necessary or not : and, *secondly*, that the Lower Appellate Court is wrong in holding that the report of the medical officers appointed by the Municipality was not admissible in evidence, because it was not proved, when no question was raised as to the fact of such a report having been made.

On the other hand it is contended by the learned Vakil for the respondent that the Courts below were right in holding that they had jurisdiction to go

into the question of the necessity of the road, and that the Municipality, so far as it required the plaintiff to remove the *pucca* privy, under sections 245 and 246 of the Bengal Municipal Act, has acted beyond the limits of its statutory power, the only power given by those sections being a power of directing the removal of huts.

The first question raised by the learned Vakil for the defendant appellant is a very important question. There can be no doubt that the Civil Courts have jurisdiction to try the question whether the Municipality had been acting within the limits of its statutory power. It is conceded, and very properly conceded, by the learned Vakil for the appellant that that is so. But then it does not follow that the Civil Courts have jurisdiction to try the question whether the Municipality, when it was acting within the limits of its statutory power, was right in its judgment that a certain road should be opened.

[818] The law authorising the Municipality to act in this matter is contained in sections 245 and 246 of Bengal Act III of 1884. Section 245 provides that "whenever the Commissioners at a meeting are satisfied—" I am quoting only so much of the section as is applicable to this case—"by report of competent persons, that any existing block of huts within the Municipality is, by reason of the manner in which the huts are constructed or crowded together, attended with risk of disease to the inhabitants, or the neighbourhood, they may cause the locality to be inspected by two medical officers, who shall make a report in writing on the sanitary condition of the said block of huts, and shall specify, if necessary, in the said report, the huts which should be removed and the roads which should be constructed, with a view to the removal of the said risk of disease;" and then section 246 provides that on receipt of the said report the Commissioners may serve the owner of the land with a notice requiring him to effect the improvements considered to be necessary, and if such notice is not complied with, the Commissioners may themselves execute the works.

In the plaint the plaintiff does not say that the necessary preliminaries have not been complied with. What the plaintiff urges in his plaint is, that there was no necessity for the construction of the new road. And he further urges that the Municipal Commissioners had no power to direct the removal of the *pucca* privy. The Courts below have in their judgment said that the report of the Sanitary Commissioner, and that of the two medical officers, upon which the Municipality took action in the present case, were not sufficient to justify any action being taken.

I do not think that this view is correct. Reading the portions of the report of the Sanitary Commissioner, which are given in the judgment of the first Court, I find that the requirements of section 245 are fully satisfied. What the Courts below have said in effect is, that although the Commissioners say that they were satisfied upon the report that there existed a block of huts within the Municipality which, by reason of the manner in which the huts were constructed or crowded together, was attended with risk of disease to the inhabitants, they ought not to have been so satisfied if they had exercised their judgment properly. But the [819] law makes them the judges upon the point. So long as they had the materials before them it was for them, and them alone, to say whether, upon those materials they were satisfied that there was risk of the kind the section contemplates. So again, upon the report of the two medical officers appointed by them being submitted, if there was such a report, it was for the Commissioners, and for them alone, to say whether there was any necessity for constructing the road such as they directed the plaintiff in the present case to construct.

The view I take is not only consonant with reason and common sense, but is also supported by authority. I may refer to the observations of Lord CRANWORTH in *Stockton and Darlington Railway Co. v. Brown*, (1860) 9 H. L. C., 246, and the judgment of Sir GEORGE JESSEL in *Wilkinson v. Hull Railway and Dock Co.*, (1882) L. R., 20 Ch. D., 323 (329).

I now come to the consideration of the second question raised in this appeal, namely, whether the Lower Appellate Court was right in holding that the report of the medical officers appointed by the Municipality was inadmissible in evidence. The report was put in, it was admitted, by the first Court, and no objection is taken in the plaint to the fact of any such report having been made. That being so, I do not think it was open to the Lower Appellate Court to throw out the report on the simple ground that it had not been strictly proved.

The learned Vakil for the appellant further contended that the certified copy of the report, which was put in in this case, was admissible under section 74, sub-section (1), clause (ii) of the Evidence Act. The question, whether it was so admissible or not, is not altogether free from difficulty, but in the view I take it becomes unnecessary to determine that question.

It remains only to consider the question with reference to the *pucca* privy. Upon this point I have nothing to add to what has been said by the learned Chief Justice except this, that if a notice under section 224 of Bengal Act III of 1884, under which the Commissioners had full power to direct the removal of the privy, [820] had required any preliminaries other than those that are necessary to be complied with before the issue of a notice under section 246, then the absence of compliance with such preliminaries might have stood in the way of our accepting the present notice under section 246 as sufficient; but as that is not the case, I do not think that we ought to consider the present notice as insufficient or invalid.

S. C. G.

Appeal allowed.

[26 Cal. 820]

The 8th May, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I E., CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Mohanund Mondul.....Plaintiff

versus

Nafur Mondul and othersDefendants.*

*Hindu Law—De facto manager—Sale by a de facto manager of minor's property
for legal necessity and for his benefit, whether valid.*

A *de facto* manager of an infant's estate has, in case of necessity or for the benefit of the minor, power to sell his property.

THIS appeal arose out of an action brought by the plaintiff for recovery of possession of certain immoveable property, on establishment of title thereto. The plaintiff's allegation was that the disputed land was his ancestral *jote*; that his father was in possession of the said *jote* as owner till his death; that on his father's death the plaintiff became the owner by right of inheritance while he was a minor; that the defendants acquired no title by their alleged purchase of the said *jote* from his paternal grandmother, who had no right to sell it, inasmuch as he was a minor at the time of the sale; and that the defendants without any title to the disputed land kept him out of possession for six or seven years previous to the suit. Hence this suit was brought by the plaintiff on his attaining majority.

The defence (*inter alia*) was that the suit was barred by limitation, inasmuch as it was not brought within three years from the date of the plaintiff's attaining majority; that the land in suit was sold to the defendants for the benefit of the plaintiff to [821] pay off certain debts by his grandmother and natural guardian during his infancy, therefore the sale was a valid one.

The Court of First Instance, having held that the transfer to the defendants was made by the lawful guardian of the plaintiff for his benefit, dismissed the suit.

On appeal the District Judge affirmed the decision of the lower Court.

Against this judgment the plaintiff appealed to the High Court.

Dr. Ashutosh Mookerjee for the Appellant.

Babu Nalini Ranjan Chatterjee for the Respondents.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.):—

Maclean, C.J.—The point we have to decide upon this appeal is a short one, and not in my opinion a very difficult one.

The suit is one to set aside the sale of a certain property effected under the following circumstances: The sale was effected by the grandmother of the plaintiff, who was then a minor, and it is the minor, now of age, who is seeking to set the transaction aside. The grandmother has not been found by the Lower Appellate Court to have been the duly appointed guardian of the infant, though the Munsif found that she was, and, for the purpose of this decision, therefore, I will take it that she was only the *de facto* manager of the minor's

* Appeal from Appellate Decree No. 1762 of 1897, against the decree of L. Palit, Esq. Officiating District Judge of Moorshidabad, dated the 4th of August 1897, affirming the decree of Babu Nogendra Nath Dhur, Munsif of Jungipur, dated the 24th of March 1897.

property, and that, as *de facto* manager of that property, she sold the property in dispute, in order to pay off a debt secured by mortgage over other parts of the minor's property, upon which mortgage a very high rate of interest was running.

The lower Court, upon the authority of the Privy Council case of *Hunooman Pershad Panday v. Munraj Koonverce*, (1856) 6 Moo. I. A., 412, has decided that the sale was a good one, and that the *de facto* manager, even though not *de jure* manager, had power to sell the property.

It is urged, on behalf of the appellant, that that decision applies only to the case of a mortgage by a *de facto* manager, and not to an out and out sale of the property. I need not dwell upon the obvious distinction between the two, nor point out that from one point [822] of view, a mortgage, inasmuch as an opportunity of redeeming is reserved, may be the more beneficial to the minor; though, on the other hand, if the money can only be raised at a high rate of interest, it may be more beneficial to sell a portion of the estate to pay off existing mortgages than to go on mortgaging at such high rate of interest.

I do not think that the distinction sought to be drawn is well founded. Though no doubt the case cited was one of mortgage, and not of sale, the principle of that decision is, that a *de facto* manager has, under the Hindu law, the power to bind the estate, if he is acting honestly, and the transaction is an honest transaction and one for the purpose of saving or benefiting the estate. I can see no principle upon which it can be successfully urged that he can only do this by way of mortgage, when the circumstances of the estate may be such as to make it obvious that it might be more beneficial to that estate to do it by way of sale. If he have the power to bind the estate, it is difficult to see why he should not have the power of deciding, assuming the most absolute *bona fides* in the transaction, how best, in the interest of the estate, the matter can be dealt with as between a sale and a mortgage. I am assuming of course that the circumstances would support the transaction, had it emanated from a *de facto* and *de jure* manager. I notice that in Mr. Mayne's Book on Hindu Law, section 196, he says: "When the act is done by a person who is not his guardian, but who is the manager of the estate in which he has an interest, he will equally be bound, if under the circumstances the step taken was necessary, proper, or prudent." And he cites as his authority for that proposition, the case in the Privy Council, to which I have just referred. Mr. Mayne is a careful and experienced author, but he draws no such distinction as we are now invited to make. If there were this distinction, seeing that as often as not a manager sells instead of mortgaging, it is curious that there should be no decision upon the point, for the case must have occurred again and again. This absence of judicial authority suggests that the point has not been regarded as open to serious argument. On the contrary, the cases of *Dorab Aly Khan v. Abdool Azeez*, (1878) I. L. R., 4 Cal., 229, [823] and *Gunga Pershad v. Phool Singh*, (1868) 10 W. R., 106; 10 B. L. R., 368, note, tend directly in the opposite direction. I am consequently against the appellant upon the point I have been discussing.

On the second point, whether there was *legal necessity* for the sale, the Judge in the Court below has found that there was such necessity; and, although he has not stated the facts from which he draws that inference, and perhaps it would have been more satisfactory if he had done that seeing that he was affirming the judgment of the Munsif, it is not unreasonable to conclude that he took the same view of the facts upon this question as the Munsif had done.

The appeal fails on both points, and must be dismissed with costs.

Banerjee, J.— I am of the same opinion. The suit was brought by the plaintiff-appellant, to recover possession of certain immoveable property on the allegation that the defendants were holding possession of the same by setting up an unauthorised alienation from the plaintiff's grandmother during his minority.

The defence was that the sale by the plaintiff's grandmother during his minority was one which was authorised by law, and that the defendants purchased the property in good faith for value and were entitled to retain possession.

The Courts below have found that the plaintiff's grandmother, by whom the conveyance in favour of the defendants was executed, was the *de facto* manager of the plaintiff's estate during his minority, and that the alienation by her was made under necessity and for the benefit of the minor's estate; and they have accordingly dismissed the suit.

In second appeal it is contended for the plaintiff-appellant, that the Courts below are wrong in holding that the principle laid down in the case of *Hunooman Pershad Panday v. Munraj Koonweree*, 6 Moo. I. A., 412, upon which they have relied, was applicable to this case, as that was a case of mortgage, whereas the present one was a case of sale; and it is further contended that the finding upon the question of necessity is not sufficient to warrant the decree that has been made by the Courts below.

Now it is quite true that in the case of *Hunooman Pershad [824] Panday* the alienation in question was a mortgage and not a sale; and it is true also that in one respect there is a distinction between a mortgage and a sale, the distinction being that whereas in the case of a mortgage the property may be redeemed and recovered, in the case of a sale the minor loses all chance of recovering the property even upon repayment of the consideration money. But though that is so, is there any reason for holding that the principle that applies to the case of a mortgage by a *de facto* manager of an infant's estate should not apply to the case of a sale by such manager, even though pressure on the estate or benefit to it was established? I am of opinion that the question must be answered in the negative. The reason why a *de facto* manager of an infant's estate has been held competent to alienate his property by way of mortgage would, in many cases, hold equally good where the alienation is by way of sale. Indeed, in some cases the reason for the rule in favour of upholding an alienation by a *de facto* manager of an infant's estate would be satisfied better if the alienation was by way of sale than if it was by way of mortgage, for in some instances, such as in this case, as has been found by the first Court, the sale of a part of the minor's estate may prove more beneficial to him than a mortgage. And it would not therefore be quite reasonable to hold that the power, which the *de facto* manager in such cases possesses, should be limited to one of creating a mortgage only. Nor is there anything in the Hindu law (upon which some stress was laid in the course of the argument) for drawing any such distinction, for one of the well-known passages authorising alienation by a *de facto* manager of the property of the minor (I mean paragraphs 28 and 29 of the *Mitakshara*, Chapter I, section I) speaks of sale as well as mortgage. It is true that that passage has reference to cases of joint property where the *de facto* manager of the minor's estate possesses some proprietary interest in himself, but that does not in my opinion affect the question, because, so far as the minor's interest is concerned, the right of the co-owner to dispose of it rests only on his power as manager.

Then there is the case of *Ram Chunder Chuckerbutty v. Brojonath Mozumdar*, (1879) I. L. R., 4 Cal., 929, in which a sale of a minor's immoveable [825] property by the *de facto* manager of his estate was upheld by a Full

Bench of this Court. It is true that the precise question that is now raised was not raised in that case, but the affirmance of the principle that the *de facto* manager of a minor's estate has power to sell his immoveable property is necessarily involved in the decision arrived at in that case. In support of the view I take that no distinction in principle can be drawn between the power of a manager of an infant's estate to mortgage and his power to sell, I may also refer to a well-known work on the subject, "The Law relating to Minors" by Mr. Trevelyan, in which it is said at page 164 of the second edition, "No distinction can be drawn between the power to charge and the power to sell, and the need which would justify the exercise of the one would justify that of the other."

Lastly, a distinction was sought to be drawn between the case of the exercise of the power of mortgage or sale by the *de facto* manager of a minor's estate who was also his natural guardian and the case of a *de facto* manager who was not his natural guardian according to the Hindu law. Without entering into any discussion as to whether there exists such a distinction, it will be enough in the present case to say that the *de facto* manager was the paternal grandmother of the minor, his father and mother both being at the time dead. If that was so, it is not questioned, and it cannot be very well questioned, that the *de facto* manager answers to the description of natural guardian in this case.

On these grounds I am of opinion that upon reason as well as authority the view taken by the Courts below, that the *de facto* manager of the infant's estate has in case of necessity or for the infant's benefit power to sell his property, is correct.

With regard to the second point, the finding arrived at by the Lower Appellant Court is sufficient in my opinion to warrant the decree that has been made. The judgment of the Lower Appellate Court affirms that of the first Court, and therefore, though it is not very explicit, we may take it that it in substance adopts the view taken by the Munsif with regard to the question of legal necessity.

S. C. G.

Appeal dismissed.

NOTES.

[As regards the guardian's powers, see also (1914) 36 All., 158 ; (1914) 27 M.L.J., 285 ; (1912) 23 M.L.J., 638 per SUNDARA AYYAR, J.]

[826] *The 22nd February, 1899.*

PRESENT :

**SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE AND
MR. JUSTICE BANERJEE.**

Radha Madhub Samonta.....Plaintiff

versus

Sasti Ram Sen and others.....Defendants.*

*Voluntary payment—Contract Act (IX of 1872), section 60—Payment
by a purchaser of a putni taluk during the pendency of an
appeal for setting aside the putni sale—Person interested
in the payment of the putni rent—Putni Regulation
(VIII of 1819) section 14.*

A payment of rent made by the purchaser of a *putni taluk*, after the decision of the first Court in a suit brought by the defaulting *putnidars* for the setting aside of the *putni* sale, by which it was held that the sale was invalid, and during the pendency of an appeal preferred not by the plaintiff, the auction-purchaser, but by the zemindar at whose instance the said sale had been brought about, is not a voluntary payment, inasmuch as he (the plaintiff) is a person interested in the payment of the money, within the meaning of section 69 of the Contract Act.

Bmdubashini Dass v. Harendra Lal Roy, (1897) J. L. R., 25 Cal., 305, followed.

The remedy which the plaintiff in this case had, after the reversal of the sale, to be reimbursed by the defendant under section 69 of the Contract Act, was held not to be curtailed by the provisions of section 14 of Regulation VIII of 1819.

THE plaintiff in this case purchased a *putni taluk* at a sale held under Regulation VIII of 1819 in Joist 1299 B. S. (June 1892), and he was in possession of it till Joist 1300 B. S. (June 1893), when the defendants Nos. 1 to 5 instituted a suit against the zemindar and the present plaintiff to set aside the sale, which suit was decreed on the 14th May 1894, and the order setting aside the sale was confirmed by the High Court. During the pendency of that suit the defendants Nos. 1 to 5 (who were the plaintiffs in that suit) made an application under section 501 of the Civil Procedure Code and took possession of the *putni taluk* on the 25th January 1894 through the Court by ejecting the plaintiffs, and they as well as defendants Nos. 6 to 13, who were [827] their co-sharers, were in possession till the time of the institution of the present action. After the setting aside of the sale by the first Court, the zemindar alone preferred an appeal to the High Court, and during the pendency of the said appeal, proceedings under Regulation VIII of 1819 were taken by him in respect of rent for the year 1301 B. S. (1894) against the plaintiff and the defaulting *putnidars*. The plaintiff to save his *putni* right satisfied the demand, and the present action was brought by him to recover the money so paid, either from the defaulting *putnidars* or from the zemindar.

The defence (*inter alia*) was that the plaintiff was not entitled to be reimbursed by the defendants, inasmuch as the payment was a voluntary one.

The Subordinate Judge dismissed the suit.

On appeal the District Judge confirmed the decision of the first Court.

* Appeal from Appellate Decree No. 879 of 1897, against the decree of J. Bradbury, Esq., District Judge of Hooghly, dated the 17th of February 1897, affirming the decree of Babu Abinash Chunder Mitter, Subordinate Judge of that District, dated the 6th of May 1896.

Against this decision the plaintiff appealed to the High Court. *

Babu Saroda Churn Mitter, and Babu Haro Kumar Mitter, for the Appellant.

Babu Ram Churn Mitter (Senior Government Pleader), Dr. Ashutosh Mookerjee, Babu Shiva Prosonno Bhattacharjee, and Babu Jaygopal Ghose, for the Respondents.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.):—

Maclean, C. J.—The principle of the case of *Bindubashini Dassi v. Harendra Lal Roy*, (1897) I.L.R., 25 Cal., 305, which was recently before this Court, governs the present case, though in the facts there is some distinction.

The defendants are certain *putnidars*; they defaulted in their rent; the zemindar took proceedings against them; the property was ordered to be sold; it was sold, and the plaintiff, in May 1892, purchased the *putni* interest at the sale held in pursuance of the order. On the 12th May 1894, the sale was, in a suit instituted for the purpose, set aside; the zemindar alone appealed against that decision, and the plaintiff was a respondent on the appeal. In April 1895, during the pendency of the appeal, the [828] zemindar applied to the plaintiff to pay the rent which had accrued from the 13th April 1894 to November in that year, and in the same month he instituted proceedings against the plaintiff to enforce his rights upon the footing of the non-payment of the rent. On the 16th May 1895, the plaintiff paid the money claimed amounting to Rs. 2,000 or thereabouts. On the 9th August 1895, the appeal was heard and the decision of the Court below setting aside the sale was affirmed. On the 12th December 1895, the present suit was instituted by the plaintiff against the defendants, the bulk of whom are the *putnidars*, the only other defendant being the zemindar. He claims to recover the Rs. 2,000 upon the ground that when he made the payment he was a person interested in the payment of the money which the *putnidar* were bound by law to pay, and that he is entitled to be reimbursed by them.

Both the lower Courts have decided against him; hence this appeal. The first question is, whether the case falls within section 69 of the Contract Act. I think it does. It is difficult to say that, at the time the plaintiff made the payment, he was not interested in that payment which the *putnidars* were bound to make. If the decision of the lower Court had been reversed by this Court, the plaintiff would have been confirmed in his position as *putnidar*; and as such would have been liable to pay the rent to the zemindar. No doubt at the time he made the payment it had been held that the sale ought to be set aside, in which case his interest in the *putni* lease was gone. But at the same time an appeal was pending, and there was the possibility at least of a reversal of the decision. Under these circumstances can it be successfully urged that he was a mere volunteer, and not interested in the payment of the money, which, as matters have eventuated, the present respondents are bound by law to pay? We should be placing a narrow construction upon the section if we acceded to this view. If he had not paid it and the decision had been reversed, he would have run the risk of his *putni* interest being sold at the suit of the zemindar. The defendants have had the benefit of this payment, if it had not been made, their *putni* lease might have been again put up [829] for sale at the suit of the zemindar. The principles of justice, equity and good conscience appear to me to demand that the plaintiff should be reimbursed by the defendants, the *putnidars*.

But it is said that the concluding sentence of the first clause of section 14 of Regulation VIII of 1819 virtually bars this suit, and that the plaintiff is not entitled to maintain it, and that he ought to have applied in the previous suit for the reimbursement in question. In point of fact he had made no payment when the suit was before the first Court, though he had when it was before this Court. If the attention of this Court had been directed to the matter, I am not prepared to say that it might not have made an order reimbursing the plaintiff against this payment, or for any other loss he might have sustained, but I am not prepared to say that, when the section speaks only of the Court being careful to indemnify the person paying against all loss, that that is sufficient to deprive the plaintiff of a right to maintain the present suit. The language of the section is not sufficiently precise to justify us in saying that the plaintiff's right to sue for reimbursement is taken away.

In the result, the appeal will be allowed with costs as against the respondents Nos. 1 to 13 and dismissed with costs as against the respondent No. 14. There must be the usual decree for payment of the amount claimed, with the costs of the suit.

Banerjee, J.—I agree with the learned Chief Justice in thinking that this case comes within the scope of section 69 of the Contract Act, and is governed by the principle laid down in the cases of *Dakhina Mohun Roy v. Sharoda Mohun Roy*, (1893), I. L. R., 21 Cal., 142, and *Bindubashini Dassi v. Harendra Lal Roy*, (1897) I. L. R., 25 Cal., 305.

It was contended for the defendants, in the first place, that the plaintiff was not a person interested in the payment of the money in question within the meaning of section 69 of the Contract Act, and that the present case is distinguishable from the cases to which I have just referred, because the payment here was made after the decision of the first Court in the suit for reversal of the *putni* sale by which it was held that the sale was invalid, and during the pendency of an appeal preferred, not [830] by the plaintiff, the auction-purchaser, but by the zemindar, at whose instance the *putni* sale had been brought about; and in the second place, it was contended that the suit was barred by the provisions of the first clause of section 14 of Regulation VIII of 1819. Then it was, in the third place, contended on behalf of the defendant No. 8, that he ought not to be held liable in any event, as the payment was made by the plaintiff at a time when the *putni* was in the possession, not of all the *putnidar* defendants, but of defendants Nos. 1 to 5 only.

I am of opinion that the first contention is not sound, and that the circumstances relied upon do not really distinguish this case from the cases to which reference has been made above, and do not take this case out of the purview of section 69 of the Contract Act. It is quite true that the decision of the first Court in the suit for reversal of the *putni* sale was in favour of the defaulting *putnidars*, but that did not preclude the possibility of a contrary decision being arrived at by the Court of Appeal, and the fact of the plaintiff not having been the appellant did not make him any the less a person interested in the payment, when the appeal of the zemindar would, if successful, have inured to the benefit of the plaintiff.

Section 69 of the Contract Act does not require that the person who made the payment should have done anything actively to keep up the interest which he claims. All that is required is, that the payment should be made by a person who is interested in the payment; and the plaintiff was clearly interested in the payment that he made, seeing that if it had not been made and the *putni* had been sold in consequence, it would have prevented him from reaping the

advantage that he might have gained in the event of the success of the zemindar's appeal.

Nor is there much force in the second contention. All that section 14 of Regulation VIII of 1819 says, with reference to the point now before us, is this—that "the purchaser shall be made a party in such suits, and upon a decree passing for reversal of the sale, the Court shall be careful to indemnify him against all loss at the charge of the zemindar or other person at whose suit the sale may have been made."

[831] This, no doubt, provides for the auction-purchaser, in the event of reversal of the sale, being indemnified against all loss that may have been sustained by him, and the remedy is to be at the expense of the zemindar at whose instance the sale was brought about. But it does not say that the remedy prescribed is to be the sole remedy to which the auction-purchaser is entitled, notwithstanding that, by virtue of any other provision of law, he may be entitled to a remedy against any other person than the zemindar.

If then section 69 applies to the case, and as I said above it does apply to it, and the plaintiff is, in consequence, entitled to be reimbursed by the defaulting *putnidars*, who were bound to pay the money, the provisions of section 14 of Regulation VIII of 1819, quoted above, cannot, in my opinion, stand in the way of the plaintiff's obtaining such relief. That the defaulting *putnidars* were liable for the rent, the demand for which was satisfied by the plaintiff's payment, is not disputed, and cannot be disputed. That being so, I do not think that the remedy which the plaintiff has under section 69 of the Contract Act is curtailed by the provisions of section 14 of Regulation VIII of 1819 quoted above.

As to the third contention, namely, the one urged on behalf of the defendant No. 8, I do not think that his case can be distinguished from that of the other *putnidars*, defendants, because he was as much bound by law to pay the rent which was paid by the plaintiff as the other *putnidars* who had been put in possession under section 501 of the Code of Civil Procedure. There is no valid reason shown why he should be held not bound by law to pay the arrears of rent due on account of this *putni* when he claims to be interested in the *putni* just as much as the other *putnidars* are. The contentions urged before us on behalf of the respondents in support of the lower Court's judgment therefore all fail.

S. C. G.

Appeal allowed.

NOTES.

[See also 7 O.C., 146 ; 11 O.C., 279.]

[832] *The 12th May, 1899.*

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE STEVENS.

Hem Chandra Chowdhry.....Plaintiff

versus

Kali Prasanna Bhaduri and others.....Defendants.*

Enhancement of rent—Partition of estates—Bengal Tenancy Act (VIII of 1885), sections 7 and 186—Customary rate of rent—Fair and equitable rent—Joint-landlords—Onus of proof—Road-cess returns—Evidence Act (1 of 1872), sections 21 and 32—Bengal Cess Act (Bengal Act IX of 1880), section 95.

In a suit for enhancement of rent of a tenure under section 7 of the Bengal Tenancy Act, it is for the plaintiff to start his case by proving that the existing rate was below the customary rate payable by persons holding similar tenures in the vicinity, or that it was not fair and equitable, before the *onus* can be shifted to the defendant, to prove that the existing rent was fair and equitable.

A tenure was held under a *zemindari*, which originally formed one entire estate. The estate was subsequently partitioned by the revenue authorities into four several estates. The rent of the tenure was thereupon allotted proportionately to each of the four estates thus formed, although the land forming the tenure remained undivided. In a suit for enhancement of the rent of the tenure brought by the proprietor of some of the estates, *Held*, that the effect of the partition of the parent estate was to create separate and distinct tenures out of the original single tenure under the proprietors of each of the estates; that the proprietors of the several estates were not *joint* landlords of the tenure within the meaning of section 188 of the Bengal Tenancy Act; and that therefore a suit for enhancement of rent would lie by a proprietor of one of the estates in respect of the rent allotted to his estate.

Surut Soonduree Debva v. Sumneeroodeen Talookdar, (1874) 22 W. R., 530, and *Sarat Soondary Dabee v. Anund Mohun Surma Ghuttack*, (1879) I. L. R., 5 Cal., 273, followed.

Semble:—The statements made by deceased tenants in cess returns filed by them regarding assets of the tenancy are not admissible in evidence under section 32 of the Evidence Act. PERGUNNAH Pukheria Jainsahi in the District of Mymensingh, originally formed one parent estate, which was partitioned by the Revenue authorities into four several estates. One of these estates, namely, *mehal* No. 122, represents a ten annas [833] share of the original estate, each of the three others representing a two annas share of the original estate. Of these, two, namely, *mehals* Nos. 4806 and 5513, belong to the plaintiff. Within the parent estate there was an ancient tenure called *taluk* Madarjani, which comprised a number of *mouzas* and *jalkars*. This *taluk* has now become two distinct tenures, one representing a $13\frac{3}{4}$ annas share, and the other a $2\frac{1}{4}$ annas share of the original tenure. The lands of this *taluk* were never partitioned by metes and bounds, but its rent was allotted proportionately to each of the four estates aforesaid under which it was held.

These appeals arise out of suit No. 27 of 1890, brought by one Hem Chandra Chowdhry as proprietor of estates Nos. 4806 and 5513, constituting a four annas share of Pergunnah Pukheria, against the defendants as owners of $13\frac{3}{4}$ annas share of the tenure Madarjani, for enhancement of rent payable to the plaintiff. The suit was partially decreed by the Subordinate Judge, and

* Appeals from Original Decrees Nos. 391 and 392 of 1896, against the decree of Babu Krishna Chunder Chatterjee, Subordinate Judge of Mymensingh, dated the 31st of July 1896.

both the plaintiff and some of the defendants appealed from the decree of the Subordinate Judge; appeal No. 391 being preferred by the plaintiff, and appeal No. 392 by defendants Nos. 1, 2, 3, and 14.

Mr. J. T. Woodroffe, Babu Sreenath Das, and Babu Joges Chandra Roy, for the Appellant in appeal 391 and for the Respondents in appeal 392.

Sir Griffith Evans, Babu Sharada Charan Mitter, and Babu Mohini Mohan Chakrabarti, for the Respondents in appeal 391 and for the Appellants in appeal 392.

The following cases were referred to in the course of the arguments :—

For the defendants, *Gopal Chunder Das v. Umesh Narain Chowdhry*, (1890) I. L. R., 17 Cal., 695; *Panchanan Banerji v. Raj Kumar Guha*, (1892) I. L. R., 19 Cal., 610, and *Baidya Nath De Sarkar v. Ilum*, (1897) I. L. R., 25 Cal., 917.

For the plaintiff, *Surut Soonduree Debia v. Sumeeroodeen* [834] *Talookdar*, (1874) 22 W. R., 530; *Sarat Soondary Dabee v. Anund Mohun Surma Ghuttack*, (1879) I. L. R., 5 Cal., 273, and *Bissessuri Debi Chowdhraiz v. Hem Chunder Chowdhry*, (1886) I. L. R., 14 Cal., 133.

The judgment of the High Court (Macpherson and Stevens, JJ.) was as follows :—

Pergunnah Pakheria Jainsahi originally formed an entire estate, but has now by partition become four estates, one of which represents a 10 annas share and the others each a 2 annas share of the original estate. Subordinate to the original estate there was an ancient tenure called Madarjani, the rent of which was allotted proportionately to each of the four estates, the land remaining undivided. This has now become two tenures, one representing a 13 annas 15 gundas share and the other a 2 annas 5 gundas share of the original tenure. The plaintiff as proprietor of estates Nos. 4806 and 5513, each of which represents a two annas share of the Pergunnah, brought suits No. 29 of 1890 and No. 7 of 1891 to enhance the rent payable to him for his four annas share, and these suits, which were tried together and disposed of in one judgment, have given rise to four appeals, of which Nos. 391 and 392 of 1896 relate to suit No. 27, and Nos. 45 and 46 of 1897 to suit No. 7.

Enhancement is claimed under section 7 of the Bengal Tenancy Act, and the plaintiff's case substantially is that he is entitled to receive as a fair rent a greater share of the tenure-holder's profits. It is not now disputed that the rent of the tenure is enhanceable, and indeed it was held to be so by this Court in its judgment of the 30th November 1888 in suits between the parties now before us. That judgment gives also an account of the almost continuous litigation which has been going on between the proprietors of the estate and the tenure-holders on the question of enhancement. The Subordinate Judge has decreed enhancement in both suits solely on the strength of certain road cess returns put in by the plaintiff, for he has rejected as unreliable the whole of the oral evidence bearing on the rent by the *raiyats*.

[835] Appeal No. 391 is preferred by the plaintiff and appeal No. 392 by the first three defendants and defendant No. 14 in suit No. 27 for the enhancement of the rent of the 13 annas 15 gundas tenure, and we shall deal first with those appeals. The rent has been enhanced to Rs. 2,386-11-0 after allowing 5 per cent. as collection charges and 20 per cent. as the tenure-holder's profit, and half of that amount has been made payable to the plaintiff as proprietor of one estate and half as proprietor of the other; the enhancement has been graduated so as to take full effect at the end of the year 1301, and the rent has been made payable in four quarterly instalments. The main contentions of the defendants, appellants, are that section 188 of the Bengal Tenancy Act

precludes the plaintiff as one of several joint landlords from maintaining a suit to enhance his share of the rent; that the road cess returns relied on are not evidence against them, and that no ground for enhancement has been established.

We see no force in the first contention. The original arrangement by which there was one tenancy under one holding of landlords came to an end when the parent estate was partitioned, and the effect of the partitions was to create separate and distinct tenancies under the proprietors of each of the estates. It cannot be said that the proprietors of the several estates were joint landlords of the tenure, for the estates were separate and the share of the rent allotted to each formed a portion of the assets of that estate alone. This was the view taken in *Sarat Soondary Dabee v. Anund Mohun Surma Ghuttack*, (1879) I.L.R., 5 Cal., 273, and *Sarat Soonduree Debia v. Sumeeroodeen Talookdar*, (1874) 22 W. R., 530. In the cases cited for the appellants there had been no division of the tenancy consequent on the partition of the parent estate. We further think that the effect of this Court's decree of the 30th November 1888 is that the rent of the four annas share of the tenure can be enhanced, but whether the declaration in that decree was intended to relate to the whole tenure or the four annas share of it, we must hold that the suit is maintainable.

[836] The road cess returns are Exhibits 1 to 4 and 6 and 7. None of these were submitted by the appellants, and Exhibits 3, 4, 6 and 7 relate, not to the tenancy under either of the plaintiff's estates, but to the tenancy under estate No. 122, which represent the ten annas share of the pergunnah, and are, we consider on that ground, inadmissible. We cannot hold that there is a separate and distinct tenancy under the plaintiff as proprietor of one estate so as to admit of his enhancing the rent payable to him, and at the same time hold that there is one and the same tenancy under him and the proprietors of estate No. 122 so as to make a statement relating to the tenancy under the latter estate admissible. If the tenancies are distinct, the statement to be admissible must, we think, relate to the tenancy which is in question. In this view all but Exhibits 1 and 2 must be excluded, but it is upon those and exhibit No. 3 that the Subordinate Judge has acted.

Exhibits 1 and 2 are returns relating to the plaintiff's estates Nos. 5513 and 4806, respectively. They were signed and submitted by Hari Narain Ghose as *am-mukhtear* of Raja Jotindra Narain Roy, whose interest has now devolved on his widow Rani Hemanta Kumari, the 23rd defendant in the suit, but not a contesting defendant. They show that in 1884 Jotindra Narain's 11 gundas 2 karas share of the tenure was let out in *ijara* for terms of three or four years to certain persons at an aggregate rent of Rs. 54-2-4 as regards each of these estates. Exhibit 3 is a return, which as already stated relates to estate No. 122. It was signed and submitted by Harendra Kumar Bose as *am-mukhtear* of Maharani Sarat Sundari Debia, who was the mother of Jotindra Narain, and whose share has also now devolved on Hemanta Kumari, and it shows that her 1 anna 14 gundas 2 karas share of the tenure appertaining to estate No. 122 was let out to the *ijaradars* mentioned in Exhibits 1 and 2 at an annual rent of Rs. 813-13-0. Those returns have been made evidence against the appellant under clause 3, section 32 of the Evidence Act, as containing statements made by a deceased person against his pecuniary interests, and it is on them alone that the assets of the four annas share of the tenure appertaining to the plaintiff's estates have been determined and the rent enhanced. The [837] statements made in the returns were no doubt authorised by the Rani and Raja, respectively, and under the provisions of the

Road Cess Act were binding on them, but looking at the language and scope of section 32, we doubt whether they can be regarded as statements made by those persons within the meaning of the section so as to be admissible against others. It is not, we think, necessary to determine this question in the present case, because, assuming that the statements are evidence against the appellants, they do not in our opinion furnish any reliable data for ascertaining the assets of the tenure, and have been given a value far beyond what they deserve.

The statements do not purport to give the rent realized in respect of the whole tenure, or to deal with more than the small shares owned by the Raja and Rani. It was, therefore, necessary to resort to a mathematical calculation, which must have assumed two things: *first*, that the *ijaras* were not of a speculative character, and that the *ijaradars* realized from the *raiyyats* at least the amount of the rent which they paid to the superior landlord; and *secondly* that the other tenure-holders, including the appellants, realized proportionately to their shares the same amount of rent, either from the same or other *ijaradars* or from the *raiyyats* direct. We see no ground for either assumption. The returns stand by themselves, and beyond some general evidence that the *raiyyats* paid all the tenure-holders at the same rates whatever those rates were, there is no evidence in support of them. Then the Rani and the Raja occupied the double position of tenure-holder and proprietor, for they were proprietors of estate No. 122. The Subordinate Judge says that the history of the previous litigation shews a determined effort on the part of the proprietors to enhance the rent of the tenure, but that there was admittedly some decision which protected the share of the tenure subordinate to estate No. 122 from enhancement, so that the Rani and the Raja would derive no advantage as proprietors by overstating the amount of the rent received by them as tenure-holders. We do not know what that decision is, but the fact that they occupied the double position remains, and certainly detracts from the value of the statements as affecting other sharers of the tenure. The argument that the statements carry some weight from the position [838] of the persons making them, might be of some force, if it was shewn that they had personal knowledge of them. This is not shown; all that appears is that the *mukhtear* received the returns from the *amla* and signed and put them in, and it is not likely that either the Rani or the Raja would have been able to say anything about the correctness of them. The returns are certainly *prima facie* against pecuniary interest, but the pecuniary interest affected is so small that they have little value on that ground. On the other hand, notwithstanding the provisions of sections 21 and 32 of the Evidence Act, they could not under section 95 of the Road Cess Act be used as evidence in favour of the person submitting them.

As the case stands on the judgment of the Subordinate Judge, it is in the same position as if the plaintiff had put in and proved these returns, and no other evidence of any kind had been given. In our opinion this is not sufficient, and no decree for enhanced rent could be made on the strength of them. It is argued that it was in the power of the appellants to prove the amount of rent realized in respect of the tenure, but conceding that, it was for the plaintiff to start his case by proving under section 7 of the Tenancy Act that the existing rent was below the customary rate payable by persons holding similar tenures in the vicinity, or that it was not a fair and equitable rent, and statements of other persons, such as those relied on, are not sufficient to throw on the appellants the burden of proving that the existing rent is fair and equitable.

It follows, therefore, that the suit must fail, unless the plaintiff succeeds in his appeal, and shows that the evidence as to rates should be accepted so as to entitle him to the enhanced rent decreed, if not the greater enhancement claimed.

The Subordinate Judge disbelieved the evidence of the plaintiff's witnesses, because they were under the plaintiff's influence, and were not residents or *raiyats* of the villages concerning which they spoke, and because also he did not believe that they ever held land in those villages, or were in a position to speak as to the rates of rent prevailing there. The evidence has been read to us, and we need only say that we think the Subordinate Judge's view is correct, and that we are not prepared to take a different [839] view. It is not necessary under the circumstances to examine the evidence of the defendants' witnesses which has also been rejected as false.

The defendants also contended in their appeal that the enhanced rent could only be decreed prospectively from the date of the decree, and that the rent should have been made payable at the end of the year and not quarterly. In the view which we have taken it is not necessary to deal with these points. If it had been necessary we should not have been disposed to interfere with the decision of the Subordinate Judge upon them.

The result is, that the defendants' appeal No. 392 succeeds, and that the plaintiff's suit is dismissed with costs in both Courts, and that the plaintiff's appeal No. 391 is dismissed.

Appeal No. 391 dismissed ; Appeal No. 392 decreed.

M. N. R.

NOTES.

[See also (1906) 10 C.W.N., 818.]

[26 Cal. 839]

The 3rd July, 1899.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Mahomed Yusuf.....Judgment-debtor, Objector

versus

Abdur Rahim Bepari and others.....Decree-holders.*

Succession Certificate Act (VII of 1889), section 4- Right to maintain suit without certificate —Death, during execution proceedings, of the original mortgagee, and substitution of his heir.

Section 4 of the Succession Certificate Act (VII of 1889) is not a bar to execution proceedings instituted on a mortgage decree upon the application of the original mortgagee by reason of the original mortgagee having died during the pendency of the proceedings and his legal representatives who were substituted in his place not having produced any succession certificate.

Fateh Chand v. Muhammad Baksh, (1894) I.L.R., 16 All., 259, dissented from.

THIS appeal arose out of an application for execution of a mortgage decree which was passed against the defendants, including defendant No. 7, who was

* Appeal from Order No. 194 of 1898, against the order of Babu Maumathonath Chatterjee, Subordinate Judge of Dacca, dated the 26th February 1898.

made a party as being a purchaser of a portion of the mortgaged property.* As against defendant [840] No. 1 a personal decree was granted. The decree having been made absolute, an application was filed on behalf of the decree-holder for execution of the decree. During the pendency of the execution proceedings the decree-holder died and his heirs were substituted in his place. Defendant No. 7 objected to the execution of the decree (*inter alia*) on the ground that it could not proceed in the absence of a succession certificate. The lower Court disallowed the objection, holding that no succession certificate was necessary for the execution of a mortgage decree by the heirs of the original mortgagee.

Against this decision the judgment-debtor appealed to the High Court.

Mr. J. R. Perceval for the Appellant.

Bahu Horendra Narayan Mitter for the Respondents.

The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows:—

Banerjee, J.—In this appeal, which arises out of certain proceedings taken in execution of a mortgage decree, the only question raised on behalf of the appellant who was defendant No. 7 in the Court below, and was made a defendant as being the purchaser of a portion of the mortgaged property, is, whether section 4 of the Succession Certificate Act is a bar to the execution proceedings which were instituted upon the application of the original mortgagee, by reason of the original mortgagee having died during the pendency of the proceedings and his legal representatives who were substituted in his place not having produced any succession certificate.

The learned Vakil for the appellant very fairly admits that the weight of authority in this Court is apparently against his contention, but he seeks to distinguish the cases bearing upon the point, *viz.*, *Roghu Nath Shaha v. Poresb Nath Pundari*, (1887) I.L.R., 15 Cal., 54; *Kanchan Modi v. Baij Nath Singh* (1892) I. L. R., 19 Cal., 336, and *Baid Nath Das v. Shamanand Das*, (1894) I.L. R., 22 Cal., 143, from the present on the ground that in none of those cases was any personal decree against the mortgagor [841] asked for, whereas in this case such a decree was asked for and has been granted; and he relies upon the case of *Fateh Chand v. Muhammad Baksh* (1894) I.L.R., 16 All., 259, decided by a Full Bench of the Allahabad High Court, in support of his contention.

So far as the distinction sought to be drawn between the present case and the cases decided in this Court bearing upon the point now before us goes, it would be sufficient to say that the only defendant against whom a personal decree has been granted is defendant No. 1, and he is not one of the appellants before us, nor indeed did he raise any objection in the Court below to the execution proceedings; and as against the defendant No. 7 the appellant before us, the only decree made is not a personal decree, but a decree allowing the mortgagee to proceed against the mortgaged property in his hands; so that, as far as the appellant is concerned, the case is governed by the principle laid down in the cases of *Roghu Nath Shaha v. Poresb Nath Pundari*, (1887) I. L. R., 15 Cal., 54; *Kanchan Modi v. Baij Nath Singh*, (1892) I. L. R., 19 Cal., 336; and *Baid Nath Das v. Shamanand Das*, (1894) I. L. R., 22 Cal., 143. We agree with the view taken in those cases and respectfully dissent from that taken by the Allahabad High Court in the case of *Fateh Chand v. Muhammad Baksh*, (1894) I. L. R., 16 All., 259.

But there is another reason why we think that the contention of the appellant in this case should fail, and that is this, that section 4, sub-section 1, clause (b), which is the only provision of the Succession Certificate Act under

which the case could possibly come, can have no application to the present case. For that clause provides that no Court shall "proceed upon the application of a person claiming to be entitled to the effects of a deceased person" to execute against a debtor of such deceased person a decree or order for the payment of his debt. Now, in the present case, the Court was not proceeding upon the application of a person claiming to be entitled to the effects of a deceased person, but was proceeding originally upon the application of [842] the creditor himself, and it was only during the pendency of the execution proceedings, that the original mortgagee, decree-holder, died and his legal representatives, the present respondents, were brought on the record. In such a case we do not think that section 4 of the Succession Certificate Act was any bar to the Court proceeding with the execution. This view, we think, is in accordance with that indicated by this Court in the case of *Baid Nath Das v. Shamanand Das*, (1894) I. L. R., 22 Cal., 143. The appeal, therefore, fails and must be dismissed with costs.

S. C. G.

Appeal dismissed.

NOTES.

[This was followed in (1904) 29 Bom., 630; 6 Bom. L.R., 582; see also (1905) 29 Mad., 77; (1907) 12 C.W.N., 145; 7 C.L.J., 658. In (1907) 10 O.C., this was dissented from.]

[26 Cal. 842]

The 25th April, 1899.

PRESENT :

MR. JUSTICE HILL AND MR. JUSTICE RAMPINI.

Rango Roy *alias* Rung Lal Roy.....Plaintiff*versus*

Holloway and another.....Defendants*

Second Appeal—Cases cognizable in Courts of Small Causes—Civil Procedure Code (Act XIV of 1882), section 586—Landlord and Tenant—Bengal Tenancy Act (VIII of 1885), section 144.

A suit between landlord and tenant for the recovery by the tenant of excess payments taken by the landlord in respect of the rent of the holding and not exceeding Rs. 500 is a suit cognizable by the Small Cause Court, and under section 586 of the Civil Procedure Code no second appeal lies. There is nothing in section 144 of the Bengal Tenancy Act to override the provisions of section 586 of the Civil Procedure Code, as it determines only the *venue* and has no bearing upon the nature of the suit.

THIS was a suit brought under the provisions of section 75 of the Bengal Tenancy Act, for the recovery of the sum of Rs. 113-15 annas, which the plaintiff, the tenant of the defendant, claimed in respect of excess payments taken from him in respect of the rent of his holding by the defendants.

The Munsif found that the amount claimed was twice the sum realized from the plaintiff and awarded damages at 50 per cent. with proportional costs.

* Appeal from Appellate Decree No. 1671 of 1897, against the decree of C. M. W. Brett, Esq., District Judge of Bhagulpur, dated the 1st of June 1897, reversing the decree of Babu Uma Charan Kar, Munsif of Beguserai, dated the 28th of January 1897.

On appeal by the defendants the District Judge reversed the Munsif's decree and dismissed the suit with costs.

[843] From this decision the plaintiff appealed to the High Court.

Mr. P. O'Kinealy (with Babu Saligram Singh) for the defendants, took a preliminary objection to the hearing of the appeal, that the suit being to recover a sum not exceeding Rs. 500, and being also of a nature cognizable in a Court of Small Causes, and there having been an appeal already, a second appeal was barred by section 586 of the Civil Procedure Code.

Babu Jogesh Chunder Roy for the Plaintiff.—This being a suit between landlord and tenant is not cognizable by a Court of Small Causes. From section 144 of the Bengal Tenancy Act, which provides, "The cause of action in all suits between landlord and tenant as such shall, for the purposes of the Code of Civil Procedure, be deemed to have arisen within the local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the suit is brought," it is clear that all suits between landlord and tenant are to be regarded as suits cognizable by ordinary Courts as distinguished from Courts of Small Causes.

The judgment of the High Court (Hill and Rampini, JJ.) was as follows:—

A preliminary objection has been raised by the learned Counsel for the respondents to the hearing of this appeal. It is contended that the suit is a suit of the nature cognizable by a Court of Small Causes, and that by virtue of the provisions of section 586 of the Code of Civil Procedure a second appeal is barred.

In answer to this objection reliance is placed by the learned Vakil for the appellant on section 144 of the Bengal Tenancy Act, where it is provided, "The cause of action in all suits between landlord and tenant as such shall, for the purposes of the Code of Civil Procedure, be deemed to have arisen within the local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the suit is brought." And it is argued that the inference to be drawn from that section [844] is that all suits between landlord and tenant as such are to be regarded as suits cognizable by ordinary Courts as distinguished from Courts of Small Causes, and this being a suit between landlord and tenant as such must be treated as a suit not in its nature cognizable by a Court of Small Causes.

The suit is brought under the provisions of section 75 of the Bengal Tenancy Act for the recovery of the sum of Rs. 113-15 annas, which the plaintiff, the tenant of the defendant, claims in respect of excess payments made by him to or taken from him in respect of the rent of his holding by the defendant, and the suit may, therefore, no doubt be properly said to be a suit between landlord and tenant as such.

But in our opinion there is nothing in section 144 of the Bengal Tenancy Act which overrides or tends to override the provisions of the Code of Civil Procedure to which we have referred. All that section 144 does is to determine the *venue*, but it has no bearing, so far as we are able to perceive, upon the question of the nature of the suit, it determines the jurisdiction within which suits are to be instituted, but beyond that it does not go. That this is a suit which would ordinarily be regarded as in its nature cognizable by a Court of Small Causes we think there can be no doubt, and there being nothing in section 144 of the Bengal Tenancy Act to lead us to qualify that view in any respect, we think the suit is within the provisions of section 586 of the Code

of Civil Procedure, and a second appeal is, therefore, not open to the appellant. We think consequently that the objection taken by the respondents must prevail and the appeal must be dismissed with costs.

M. R. M.

Appeal dismissed.

NOTES.

[See also 23 Mad., 547.]

[846] *The 6th June, 1899.*

PRESENT :

MR. JUSTICE WILKINS AND MR. JUSTICE HANDLEY.

Raj Narain Das and others.....Plaintiffs

versus

Shama Nando Das Chowdhry and others.....Defendants.*

Declaratory decree, Suit for—Suit for declaration of title—Land not properly described—Land Registration Act (Bengal Act VII of 1876), sections 59, 62—Specific Relief Act (I of 1877), section 42—Subsequent suit for Possession—Practice—Amendment of Plaintiff.

A person is not debarred from bringing a suit for declaration of title on the ground that the land in question is not properly described, but if an order under section 59 of the Land Registration Act is made against him, he is precluded by section 42 of the Specific Relief Act from bringing a suit merely for declaration of his title without seeking to recover possession, although he may be in physical possession, the effect of such an order being to "settle the actual possession." The Appellate Court will not grant in a case of this nature an opportunity to amend the plaint if the plaintiffs had already such an opportunity and did not avail themselves of it.

Kazem Sheik v. Danesh Sheik, (1897) 1 C. W. N., 574 ; *Dwarkanath Roy v. Jannobee Chowdhraim*, (1873) 19 W. R., 81 ; *Darbaree Sayal v. Fatu Dhalee*, (1875) 23 W. R., 295 ; *Mahomed Ismail v. Lalla Dhundur Kishore Narain*, (1875) 25 W. R., 39 ; *Ajoodhia Lall v. Gumaní Lall*, (1878) 2 C. L. R., 134, and *Limba bin Krishna v. Rama bin Pimplu*, (1868) I. L. R., 13 Bom., 548, distinguished.

Ram Mundur v. Janki Pershad, (1882) 12 C. L. R., 139 ; *Omrúnissa Bibee v. Dilawar Ally Khan*, (1884) I. L. R., 10 Cal., 350, and *Krishnabhupati Devi v. Ramamurti Pantulu*, (1894) I. L. R., 18 Mad., 405, referred to and followed.

IN this suit the plaintiffs allege they are the proprietors, under a purchase made by their ancestor on 16th September 1842, of 30 *mans* of land in *mouza* Dagrajit, Patna. Of this area [846] 15 *mans* 11 *gunts* 4 *biswas* are *bahali* (or confirmed) *lakhiraj*, and the remainder is *baziafti* (or resumed) *lakhiraj*. The defendants have succeeded in getting their names registered in the Collector's books as the proprietors in possession of the *bahali* land, whilst the plaintiffs' names are registered in respect of the *baziafti* land. The plaintiffs

* Appeal from Appellate Decree No. 1415 of 1897, against the decree of F. E. Pargiter, Esq., District Judge of Cuttack, dated the 12th of May 1897, affirming the decree of Babu Lal Behary Dey, Munsif of Balasore, dated the 7th of August 1896.

bring this suit for a declaration of their title to the *bahali* land only. The whole 30 *mans* of land were properly described by boundaries ; but there was nothing to distinguish the *bahali* from the *baziafti* land.

Without deciding the issues, the Court of First Instance dismissed the suit upon the preliminary point that, admittedly and upon evidence, the *bahali* and *baziafti* lands were so mixed up as to be altogether undistinguishable, and therefore a declaratory decree would be incapable of being put into execution. The Lower Appellate Court also held the same view. From this decision the plaintiff appealed to the High Court.

Mr. W. C. Bonnerjee, and Babu Upendra Nath Mitter, for the Appellants. --There is nothing in the Code of Civil Procedure which lays down what the plaint shall contain, which justifies this finding. The case of *Kazem Sheik v. Danesh Sheik*, (1897) 1 C. W. N., 574, supports the appellants' contention. The plaintiffs, being already in actual physical possession of the whole 30 *mans*, including the *bahali* lands now in suit, had no occasion to sue for more than a declaration of their title, which was attacked by the entry in the Collector's books of the name of the defendants.

Babus Karuna Sindhu Mookerjee, and Monmathu Nath Mitter, for the Respondents.—The lower Courts are right in dismissing the suit, as the land over which the declaration of title was claimed was not properly described, and therefore the decree could not be executed ; see *Divarkanath Roy v. Jannobee Chowdhraim*, (1873) 19 W. R., 81 ; further, as the effect of an order under section 59 of the Land Registration Act is, under section 62, to settle the actual possession, the plaintiffs, against whom such an order has been made, are precluded by section 42 of the Specific Relief Act from bringing a suit merely for a declaration of title without [847] seeking also to recover possession ; see *Ram Mundur v. Janki Pershad*, (1882) 12 C. L. R., 139.

The judgment of the High Court (**Wilkins and Handley, JJ.**) was as follows :—

The plaintiffs, who are the appellants before us, claim to be the proprietors, under a purchase made by their ancestor on the 16th September 1842, of 30 *mans* of land in *mouza* Dagrajit, Patna, of this area 15 *mans* 11 *gunts* 4 *biswas* are *bahali* (or confirmed) *lakhiraj*, and the defendants, in spite of the opposition of the plaintiffs, succeeded in getting their names registered in respect thereof in the Collector's books ; the remaining portion is *baziafti* (or resumed) *lakhiraj*, and in respect of this the plaintiffs' own names are registered as the proprietors in possession. The plaintiffs bring this suit with the object of obtaining a declaration of their title 'whether by purchase or by long adverse possession to the *bahali* lands.

The defendants contest the claim ; and the nature of their case may be gathered from the issues framed, which were as follows :—

1. Is the suit barred by limitation ?
2. Whether the *kobala* (of 16th September 1842) propounded by the plaintiff is a *bona fide* and genuine document ?
3. Whether the plaintiffs have acquired a right to the lands in dispute by adverse possession ?
4. Whether the purchase set up by the plaintiff was *benami* or not ?

The first hearing of the suit was *ex parte*, and the Munsif awarded the plaintiffs a decree. That decree was set aside on appeal, and the case was remanded for adjudication upon the merits ; and the parties then adduced a large mass of evidence, both oral and documentary, in support of their respective pleas.

The first Court, however, decided the suit upon a preliminary point—a point which, we may observe, was not advanced by either of the parties, and was not raised in any of the issues framed. [848] This point was that as admittedly and on the evidence the *bahali* lands were so mixed up with the *buziafti* lands as to be altogether undistinguishable the plaintiff was not entitled to a mere declaratory decree, which would be incapable of being put into execution. This view was also held by the Lower Appellate Court on appeal; and the plaintiff now comes up to this Court in second appeal.

It is contended by Mr. *Bonnerjee* for the appellants that there is nothing in the Code of Civil Procedure, which lays down what the plaint shall contain, that justifies this finding; that the plaintiffs being already in possession, that is, actual and physical possession, of the whole 30 *mans* including the *bahali* lands now in suit, had no occasion to sue for more than a declaration of their title, which was attacked by the entry in the Collector's book of the names of the defendants in respect of these lands. And the learned Counsel relied upon the case of *Kazem Sheikh v. Danesh Sheikh*, (1897) 1 C. W. N., 574, in support of this possession. That case was heard by Mr. Justice RAMPINI, who in the course of his judgment therein remarked (at p. 576 of the report): "I am not aware of there being any provision in the Civil Procedure Code authorizing the dismissal of a suit on the ground that the land in suit cannot be identified." It is to be remembered, however, that in the case before the learned Judge, not only was a part of the land clearly identifiable, but also the whole of the land in suit was apparently capable of being sufficiently identified for the purposes of the execution of the decree, so that the learned Judge's ruling relied upon, though entitled to all respect, yet was in the nature of an *obiter dictum*. In the case now before us the lands in suit are admittedly quite inseparable and undistinguishable from the other lands included in the entire area, of which the plaintiffs say they are the proprietors.

The learned pleader for the respondents relies upon the cases cited in the judgment of the Lower Appellate Court. In the case of *Dwarka Nath Roy v. Jannabee Chowdhram*, (1873) 19 W. R., 81, the decree which was successfully objected to in special appeal was [849] a decree for a portion only of the land in suit, such portion not being specified by boundaries in the decree, which consequently was incapable of execution. But in that case, the plaintiff sued for the recovery of the land, and manifestly the decree-holder could not in execution be put into possession of that land, when there was nothing to show and no manner of ascertaining of what particular plots or area it consisted. In *Darbaree Sayal v. Fatu Dhalce*, (1875) 23 W. R., 285, the decree was also for the possession of a portion of the land in suit; and a Divisional Bench of this Court, following the case in 19 W. R., held that it was for a similar reason incapable of execution. These cases are therefore so far distinguishable from the case now before us, in that no decree has been asked for by the plaintiffs for possession of these *bahali* lands.

In *Mahomed Ismail v. Lalla Dhundur Kishore Narain*, (1875) 25 W. R., 39, the decree was also one directing that the plaintiff be put into possession of the land in suit, and it was set aside by a Divisional Bench of this Court as being incapable of execution, inasmuch as no boundaries were given of the land, which was a small area within a larger area.

The case of *Ajoodhia Lall v. Guman Lall*, (1878) 2 C. L. R., 134, is also distinguishable; for there the plaintiff claimed to have exempted from partition certain lands which it was impossible in the absence of boundaries to define and determine. The plaintiff's decree was, therefore, inoperative.

It seems, therefore, to us that the plaintiff in this case would not necessarily fail upon this ground, when they ask merely for a declaratory decree in respect of their title.

It was, however, further contended on behalf of the respondents that, as the effect of an order under section 59 of the Land Registration Act is, under section 62, to "settle the actual possession," the person against whom such an order has been made is precluded by section 42 of the Specific Relief Act from bringing a suit merely for a declaration of his title without [850] seeking also to recover possession. In *Ram Mundur v. Janki Pershad*, (1882) 12 C. L. R., 139, a Divisional Bench of this Court certainly so held, although the objection had not been taken in either of the lower Courts. It seems to us that that case is almost, if not altogether, on all fours with the case now before us. The plaintiffs, it is true, assert that they are in actual possession of these lands; but they admit that an order under section 59 of the Bengal Land Registration Act has been passed against them and in favour of the defendants, so that they must be held to be out of what may be called legal possession. Consequently, if the recovery of such possession is a "further relief" within the meaning of the proviso to section 42 of the Act, a purely declaratory decree affirming the plaintiffs' title would not in the present suit be allowed.

See also *Omururssa Bibee v. Dilawar Ally Khan*, (1884) I. L. R., 10 Cal., 350, and *Krishnabhupati Devi v. Ramamurti Pantulu*, (1894) I. L. R., 18 Mad., 405.

Now in *Fakir Chand Addhikari v. Anunda Chunder Bhattacharji*, (1887) I. L. R., 14 Cal., 586, it was held that the "further relief" referred to in section 42 was further relief in relation to "the legal character or right as to any property which any person is entitled to, and whose title to such character or right any person denies or is interested to deny," and that consequently a claim for arrears of rent did not come within the expression.

But the position seems to us to be very different in the present case; here the plaintiffs seek to obtain a decree declaring their title with the evident and avowed object of going before the Collector with that decree in their hands and asking him, upon the strength of it, to expunge the names of the defendants and substitute their own in his books, as the proprietors in actual possession of these *bahali* lands. That is to say the plaintiffs' ultimate intention is to recover that legal possession, which was declared to belong to the defendants, when the order under the Land Registration Act was made. Not only, therefore, are the [851] plaintiffs "able to seek further relief," but it is their object to do so. The two forms of relief are inseparable in this case, and the plaintiffs in omitting to sue for the "further relief" have debarred themselves from obtaining a mere declaratory decree. This appears to have been pointed out to them from the very first, and yet they failed to avail themselves of the opportunity given to them of amending their plaint. Under different circumstances, we might have been inclined to give them such an opportunity now; [*Limba bin Krishna v. Rama bin Pimplu*, (1888) I. L. R., 13 Bom., 548]. It is under the circumstances insufficient to say, as has been said on their behalf in this Court, that the suit should have been decided upon the merits and not upon a ground not taken by the defendants and in no way misleading them.

It was also argued by the learned Counsel for the appellants that the lower Courts, instead of dismissing the suit on this ground, should have treated the suit as one for declaration of the plaintiffs' title to a fractional share in an undivided *mouza*. As, however, the first Court has pointed out, this could not be done in the face of the claim set up in the plaint. That claim was for an adjudication of their right in a particular piece of land, measuring 15 *māns* odd, and situated in a *mouza* comprising 30 *māns* in all; and that being so, it was

incumbent upon the plaintiffs to specify by boundaries or otherwise the exact position of the 15 *mans* claimed.

Taking all these circumstances into consideration we think that the lower Courts rightly dismissed the plaintiffs' suit. We dismiss this appeal with costs.

M. R. M.

NOTES.

[I. Review of this decision was granted in (1900) 33 Cal., 1362, and at p. 1362 the Reporter's foot-note states, "This judgment is published as it has set aside the judgment in Second Appeal reported in I. L. R. 26 Cal., 845 and the appeal was reheard on 2nd January 1901."]

II. As regards the question of consequential relief, see also (1904) 28 Bom., 332; 6 Bom. L.R., 124; (1906) 11 C.W.N., 186; 4 C.L.J., 568; (1911) 21 M.L.J., 1022; (1909) 36 Cal., 726; 10 C.L.J., 189.]

[852] CRIMINAL REVISION.

The 14th June, 1899.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Nando Lal Basak.....Complainant, Petitioner

versus

N. N. Mitter.....Opposite Party.*

Sanction for prosecution—Sanction to prosecute a Judge—Power of High Court to revise an order as to sanction under section 197 of the Criminal Procedure Code—Criminal Procedure Code (V of 1898), section 197 and section 439—Charter Act (24 and 25 Vict., Cap. 104), section 15.

A pleader applied to the Chief Presidency Magistrate for sanction under section 197 of the Criminal Procedure Code to prosecute an Honorary Magistrate for using insulting and defamatory language towards him in the course of the trial of a case, and sanction was refused. On application to the High Court,

Held—Under the revisional powers conferred by the Criminal Procedure Code the High Court has no authority to interfere with an order made by a Subordinate Court granting or refusing sanction under section 197 of the Code, but it has sufficient authority for that purpose under section 15 of the Charter Act (21 and 25 Vict., Cap. 104).

No sanction under section 197 of the Code is necessary, unless the Judge or public servant commits an offence in his judicial or official capacity. *Reg. v. Parshram Keshav*, (1870) 7 Bom. H. C. Cr., 61; *Imperatrix v. Lakshman Sakharam*, (1877) I. L. R., 2 Bom., 481; and *In re Sreenanto Chatterjee*, (1881) December 9th (unreported) approved of. *In re Ghulam Muhammad*, (1886) I. L. R., 9 Mad., 439, dissented from.

ON the 7th of April 1899 the petitioner, who is a pleader, appeared on behalf of the prosecution in the case of *Chumroo Singh v. Beni Madhub Singh* before a Bench of Honorary Magistrates of the Calcutta Police Court, of which Mr. N. N. Mitter was the Chairman. After the examination of the complainant and three of his witnesses had been concluded, the petitioner applied for an adjournment of the case on the ground that two other witnesses, who had been subpoenaed, were not present in Court, but this application was refused. At this stage of the case [853] Mr. Mitter intimated to the petitioner that he and his colleagues were of opinion that the case ought to be dismissed, and that they were considering the propriety of calling on the complainant to show cause why he should not pay compensation to the accused. It was, thereupon,

* Criminal Revision No. 311 of 1899, made against the order passed by T. A. Pearson, Esq., Chief Presidency Magistrate of Calcutta, dated the 20th April 1899.

suggested by the pleader for the accused that instead of being required to pay compensation, the complainant should be prosecuted under section 211 of the Penal Code, and Mr. Mitter then asked the petitioner whether he had anything to submit on this question for the consideration of the Court.

The petitioner stated that, in view of the adverse opinion expressed by the Court, he considered it his duty to call the complainant's wife as a witness, whereupon Mr. Mitter addressed the petitioner as follows: "You have not properly considered the matter. The application for postponement is made simply to multiply your fees."

At this stage the complainant, who was not present when the petitioner proposed to call the wife as a witness, returned to the Court and was asked by Mr. Mitter if he would call his wife as a witness, to which he replied: "Why should she come." Then the petitioner went to the complainant and informed him of the opinion expressed by the Court during his absence and expressed to him the necessity for calling his wife as a witness, and thereupon the complainant told the Court that he now thought it necessary to call his wife. The pleader for the accused then submitted to the Court that it was highly improper that the complainant should, on his pleader's advice, unsay what he had already said to the Court, and Mr. Mitter thereupon addressed the petitioner to the following effect: "You are a dishonest man; you are a disgrace to the legal profession; you tutor witnesses. You do not know good manners; when you can tutor witnesses in the presence of three Honorary Magistrates, I do not know how much you tutor behind the back of the Court; you deal in dishonesty and chicanery. I am going to report your conduct to the Chief Presidency Magistrate. You should not be allowed, dishonest fellow as you are, to practise in this Court any longer." Mr. Mitter, after a little time, again addressed the petitioner as follows: "My fit of anger is past. Dishonest pleader though you are I pardon you this time."

[854] Under these circumstances, and in respect of the language used by Mr. Mitter, the petitioner applied to the Chief Presidency Magistrate of Calcutta for sanction under section 197 of the Criminal Procedure Code to prosecute Mr. Mitter for offences under section 500 and section 504 of the Penal Code. The Magistrate refused the application on two grounds, viz., (1) "That section 197 of the Criminal Procedure Code relates only to those acts or omissions by a Judge or public servant which are declared by any Act or Statute relating to India to be offences when they are committed by a Judge or public servant in their capacities as such;" and (2) "that in my opinion a Judge is absolutely privileged, when acting judicially, and no statement that he may make in a case however malicious or untrue it may be, can be made the subject of any proceeding against him either civilly or criminally."

On the application of the petitioner a rule was granted by the High Court for the purpose of considering the legality of the order made by the Presidency Magistrate.

Mr. Monier, and Babu Hara Kumar Mitter, appeared for the Petitioner.

The Standing Counsel (Mr. O'Kinealy) for the Crown.

Mr. O'Kinealy.—The High Court has no power to revise an order granting or refusing sanction under section 197 of the Criminal Procedure Code. Section 489, while giving the High Court, as a Court of Revision, all the powers of a Court of Appeal conferred by section 195 and other sections, makes no mention of section 197. Section 197 relates only to offences that can be committed by Judges and public servants in their official capacity. A similar construction was adopted in a Circular Order of this Court, dated the 24th October 1864, with reference to section 167 of the Code of 1861, and its principle was followed in *Reg. v. Parshram Keshav*, (1870) 7 Bom. H. C. R., 61; the same

view was adopted in *Impratrix v. Lakshman Sakharam*, (1877) I. L. R., 2 Bom., 481, a case under section 466 of the Code of 1872, and in the case of *Sreemanto Chatterjee*, (1881, unreported) 9th December 1881. The case of *In re [855] Ghulam Muhammad*, (1886) I. L. R., 9 Mad., 439, is against me, but that case was wrongly decided.

A judge is privileged, when acting judicially in the exercise of any power given to him by law; section 77 of the Penal Code. See *Scott v. Stansfield* (1868) L. R., 3 Exch., 220; *Haggard v. Pelicier Freres*, (1892) L. R., App. Cas., 61; *Royal Aquarium Society v. Parkinson*, (1892) 1 Q. B. D., 431; *Munster v. Lamb*, (1883) L. R., 11 Q. B. D., 588. The English law on the subject has been adopted in India. *Sullivan v. Norton*, (1883) I. L. R., 10 Mad., 28; *Hinde v. Baudry*, (1876) I. L. R., 2 Mad., 13; *Manjaya v. Sesha Shetti*, (1888) I. L. R., 11 Mad., 477; *Queen-Empress v. Govinda Pillai*, (1892) I. L. R., 16 Mad., 235; *Queen-Empress v. Babaji*, (1892) I. L. R., 17 Bom., 127; *Queen-Empress v. Balkrishna Vitthal*, (1892) I. L. R., 17 Bom., 573.

Mr. Momer for the Petitioner.—The High Court has under the provisions of section 439 of the Criminal Procedure Code the power to revise an order made in respect of section 197, for it has that power “in the case of any proceeding, the record of which has been called for by itself.” *Empress v. Ram Lal Singh*, (1883) I. L. R., 6 All., 40. The High Court has certainly that authority under section 15 of the Charter Act (24 and 25 Vict., cap. 104); *In re Mathuranath Chuckerbutty*, (1872) 9 B. L. R., 354.

As to the necessity for sanction the words “is accused as such judge, &c.,” in section 197 of the Code imply while sitting as a judge, and the words “any offence” would include defamation and use of insulting language. *In re Ghulam Muhammad*, (1886) I. L. R., 9 Mad., 439 Cr. Rev. No. 107 of 1882, Weir, 3rd Ed., 866 note (b). The language of the section is different from that of the correspond-[856]ing sections of the earlier Codes, and under the present section sanction is necessary.

The doctrine of the absolute privilege of Judges is foreign to section 499 of the Penal Code: see illustration to exception 7 of section 499. Section 77 of the Penal Code has no application, for uttering defamation is not an act done “in the exercise of a power which is given to a judge by law.”

The **judgment** of the High Court (**Prinsep** and **Hill, JJ.**) was as follows:—

This rule was granted for the purpose of considering the legality of an order passed by the Chief Presidency Magistrate on the 20th April 1899, by which he refused, on the application of the petitioner before us, to accord sanction for the prosecution of Mr. N. N. Mitter, an Honorary Magistrate, under sections 500 and 504 of the Indian Penal Code.

If appears from the affidavit and petition put in by the petitioner in support of the rule that he is a pleader of the Judge's Court of the 24-Pergunnahs, and that on the 7th April last he appeared on behalf of the prosecution in the case of *Chumroo Singh v. Beni Madhab Singh*, which was brought on for trial on that date before a Bench of Honorary Magistrates, of which Mr. N. N. Mitter was Chairman. When the examination of the complainant and of the witnesses for the prosecution who were present in Court had been concluded, Mr. Mitter intimated to the petitioner that he and his colleagues were agreed in thinking that the case ought to be dismissed, and were considering the propriety of calling on the prosecutor to show cause why he should not pay compensation to the accused. It was, thereupon, suggested by the pleader for the accused that instead of being required to pay compensation, the complainant should be prosecuted under section 211 of the Penal Code, and Mr. Mitter then

asked the petitioner whether he had anything to submit to the Court on this question. After this some discussion took place as to the calling of further evidence on behalf of the prosecution, and the petitioner stated, in view of the adverse opinion which had been expressed by the Court, that he considered it his duty to call the complainant's wife as a witness, where-
 [887] upon Mr. Mitter addressed the petitioner as follows: "You have not properly considered the matter. The application for postponement is made simply to multiply your fees." At this stage the complainant, who was not present when the petitioner proposed to call his wife as a witness, returned to the Court and was asked by Mr. Mitter if he would call his wife as a witness, to which he replied "why should she come?" Then the petitioner went to the complainant and informed him of the opinion expressed by the Court during his absence as to the merits of the case and explained to him the necessity for calling his wife, on which the complainant informed the Court that he now thought it necessary to call his wife. The pleader for the accused then intervened and submitted to the Court that it was highly improper that the complainant should on his pleader's advice unsay what he had already said to the Court, and thereupon Mr. Mitter addressed the petitioner to the following effect: "You are a dishonest man. You are a disgrace to the legal profession. You tutor witnesses. You do not know good manners; when you can tutor witnesses in the presence of three Honorary Magistrates, I do not know how much you tutor behind the back of the Court. You deal in dishonesty and chicanery. I am going to report your conduct to the Chief Presidency Magistrate; you should not be allowed, dishonest fellow as you are, to practise in this Court any longer." It is unnecessary to pursue the incident further, though it does appear that Mr. Mitter afterwards in according pardon to the petitioner when "his fit of anger was past," again addressed him as a "dishonest pleader." There is no denial of any of these allegations, and it was under these circumstances and in respect of the language so used by Mr. Mitter that the petitioner applied to the Chief Presidency Magistrate for sanction under section 197 of the Code of Criminal Procedure to prosecute Mr. Mitter for the offences of defamation and of provoking the petitioner by intentional insult to commit a breach of the peace.

The Chief Presidency Magistrate refused the application on two grounds: *firstly*, because he considered "that section 197 relates only to those acts or omissions by a Judge or public servant which are declared by any Act or Statute relating to India to be offences when they are committed by a Judge or
 [888] public servant in their capacities as such;" and, *secondly*, because in his opinion a "Judge is absolutely privileged when acting judicially, and no statement that he may make in a case, however malicious or untrue it may be, can be made the subject of any proceeding against him, either civilly or criminally."

Before us the order of the Chief Presidency Magistrate was supported by the learned Standing Counsel, who showed cause on the above two grounds, and he also raised the question of the competency of this Court sitting as a Court of Revision to review the order. He relied upon the language of section 439 of the Code of Criminal Procedure, where the revisional powers of the Court are specified, and pointed out, that while all the powers of a Court of Appeal under section 195 of the Code are conferred on the High Courts, there is no power given to interfere in any way with a sanction granted under section 197. To this it was replied that the Legislature, in giving the High Courts authority to exercise the power of granting or revoking a sanction to prosecute conferred on a Court of Appeal by section 195, must be taken to have given the power to grant or revoke all such sanctions without limitation—a

general power, that is, of reviewing the action of a Subordinate Court, whether the case be one that falls under section 195 or section 197 of the Code, and it was contended that since the High Court is empowered by section 435 to call for and examine the proceedings of all Subordinate Courts for the purpose of considering the legality and propriety of such proceedings, it is empowered implicitly to pass proper orders therein.

The question does not appear to us to be of any very great importance, for we entertain no doubt that whether the provisions of section 439 of the Code of Criminal Procedure are or are not wide enough to authorize our interference in the present case, we have quite sufficient authority for that purpose under section 15 of the "Charter Act" (24 and 25 Vic., 104). We may, however, say that in our opinion the contention of the learned Standing Counsel is correct. Section 439 of the Code of Criminal Procedure gives the High Courts, as Revisional Courts, authority to exercise any of the powers conferred on a Court of Appeal by section 195 among other sections of the Code. The [859] powers in this respect—Appellate and Revisional—are clearly co-extensive, and section 195 does not confer on an Appellate Court any authority in respect of an order made by a Subordinate Court under section 197. So far, therefore, as concerns the revisional powers conferred by the Code we have not this power.

The next question, namely, whether the learned Magistrate was right in holding that the present case does not fall within the purview of section 197 of the Code, is one of somewhat greater difficulty. But having given the matter careful consideration we are of opinion that the view of the learned Magistrate is correct, and that he was consequently right in refusing to grant sanction for the prosecution of Mr. Mitter.

The law relating to the prosecution of Judges and public servants, now embodied in section 197 of the Code of Criminal Procedure, has undergone modification more than once since the introduction of the Code of 1861. We do not think it necessary to refer more particularly to these changes at present, but we are unable to agree with Mr. *Monier* in his contention that they are indicative of an alteration of policy, or principle, on the part of the Legislature in the direction of an enlargement of the category of offences in respect of which the protection of a previous sanction to prosecute is afforded to the servants of Government. The changes upon which Mr. *Monier* commented appear to us to be changes of phraseology merely and not to involve any modification of principle, and we think, speaking generally, that in point of substance the scope and intention of the law as it was enacted in 1861, and as it now exists, are the same; under the Code of 1861 a Circular order was issued by this Court (C. O. 20, 1864) for the guidance of inferior Courts as to the scope of section 167 of that Code, the section corresponding to section 197 of the Code of 1898. It was then pointed out that the section related to offences which could be committed by public servants as such, and which are specified in chapter IX of the Penal Code. This explanation of the law was adopted by the Bombay High Court in the case of *Reg. v. Parshram Keshav*, (1870) 7 Bom. H. C., Cr., 61, with a modification not, however, involving any matter of principle. [860] The learned Judges said in relation to this Circular order: "If the Circular referred to be correctly quoted we cannot fully concur in it, for it seems to us impossible to hold that section 167 does not relate to such offences as those specified in sections 217 to 223 of the Indian Penal Code, which are not contained in chapter IX of the Code. But we agree with the view which was no doubt intended to be expressed in the Circular, namely, that section 167 relates only to those acts and omissions which are declared

in the Penal Code to be offences when they are committed by a public servant".— This criticism of the Circular order is no doubt correct. The case of *Reg. v. Parshram Keshav* was decided in the year 1870, and in the year 1877, the question again came before the Bombay Court. In the meantime the Code of 1861 had been superseded by that of 1872, which by section 566 altered the law by rendering it necessary to procure the previous sanction of the specified authorities, not only in the case of offences punishable under the Penal Code, but in the case of all offences committed by a public servant in his capacity of a public servant. In the case of 1877, *Imperatrix v. Lakshman Sakharam*, (1877) I. L. R., 2 Bom., 481, the principle laid down in the earlier case was followed substantially. WEST, J., in delivering the judgment of the Court said : " We are of opinion that the scope of section 466 extends to all acts ostensibly done by a public servant, i.e., to acts which could have no special signification except as acts done by a public servant." It may be remarked that in the observations, which immediately precede this passage in the judgment, where the learned Judge refers to the case of *Reg. v. Parshram Keshav*, the scope of section 167 of the Code of 1861 appears to have been overlooked, but this consideration is not really material to the present question.

Then, in the year 1881, there was the unreported case of *Sreemanto Chatterjee* in this Court (decided 9th December 1881), in which PONTIFEX and FIELD, JJ., seem to have considered the construction placed on the first paragraph of section 466 by the Bombay Court to be correct. PONTIFEX, J., there said : " Now with respect to the first paragraph of section 466 it would seem that there is room for the argument that the offences contemplated [861] by that paragraph are only the special offences which can be committed by a public servant in his capacity of a public servant, that is, offences which are peculiar to his position as a public servant, and in that view if the first paragraph only of the section were applicable the contention of the present petitioner might be correct that a sanction would not be necessary before proceeding within his particular complaint." The learned Judge then proceeded to comment on the second paragraph of the section, and by virtue of it he held that sanction was, in the particular case, necessary. The second paragraph of the section has not, however, been re-enacted either in the Code of 1882 or in that of 1898, and so far as the present question is concerned the law, as it now stands, corresponds in substance with the first paragraph of section 466 of the Code of 1872. FIELD, J., was of opinion that " the first paragraph of section 466 was intended to apply to those cases in which the offence charged is an offence which can be committed by a public servant only, cases, that is, in which the being a public servant is a necessary element in the offence."

We are not aware of any other cases of this Court or of the Bombay Court, in which the question now before us has been dealt with. Mr. *Monier*, however, relied on the case of *In re Ghulam Muhammad*, (1886) I. L. R., 9 Mad., 439, in which PARKER, J., sitting alone, held under the Code of 1882, which corresponds in material particulars with the present law, that, where a Judge was charged with using defamatory language to a witness during the trial of a suit, the complaint could not, under section 197 of the Code, be entertained by a Magistrate without sanction, the reason assigned being that the Judge was then acting in his official capacity. That, however, with every deference to the learned Judge, appears to us to be a reason which can hardly be said to throw much light on the question.

The weight of authority, as is obvious from this examination of the cases, is decidedly in favour of the view taken by the Chief Presidency Magistrate, and it is no doubt the view which has controlled the action of the Courts both

in this and the Bombay Presidencies for a long series of years. We should hesitate, therefore, even if we were disposed to take a contrary view, to disturb an interpretation of the law so long recognized. But we [862] should ourselves, in the absence of authority, have arrived at the same conclusion. The language of the section "is accused as such Judge," etc., seems to us sufficient to indicate that the offence charged must involve, as one of its elements, that it was committed by a person filling that character, and it is not apparent why, in cases outside that category, the sanction provided for by the section should be required. It is to be observed, moreover, that all public servants, who are irremovable from office without the sanction of the Government of India or Local Government, are placed on precisely the same footing as Judges. If they are to be exempted from criminal liability for all acts amounting to offences done by them, while acting in their official capacity, unless the sanction for which the section provides can be obtained, it would lead to results which cannot, we think, have been contemplated or intended by the Legislature. There is also the consideration arising from the practically unlimited control reserved to Government by the second clause of the section over the proceedings. The clause applies equally to all cases coming within the purview of the first clause, but we think it would be unreasonable to suppose that in a case such as the present, for example, it was the intention of the Legislature that the Government should determine not only the tribunal and manner of trial, but also the offence for which the trial is to take place. The existence of the power given by this clause, which, it may be remarked, is of wider scope than the corresponding clause of the earlier Codes, militates in our opinion strongly against the view for which the petitioner contends.

We would add that an order passed under section 197 supersedes all powers of transfer conferred on the High Court by section 526 (see subsection 7 of that section.)

We are then of opinion, as we have already stated, that the learned Magistrate was right in holding that sanction to prosecute under section 197 of the Code was unnecessary in the present case, and the rule must consequently be discharged.

It is unnecessary, and we think undesirable, that we should go into the further question dealt with by the Magistrate as to the immunity of judges from criminal liability for acts done in the exercise of their judicial powers.

S. C. B.

NOTES.

[In the following cases sanction was held to be unnecessary, 25 Mad., 15 (unless being a public servant was a necessary element in the offence.); 32 Mad., 255, (fabricating a record when not bound to make a record), 30 Cal., 927 (Administrator-General appointed to the management of an estate by virtue of an order of Court).]

In (1904) P.R., 29 (cases of defamation by words used in course of trial), however, this decision was dissented from. See also 2 Bom. L.R., 1079.]

[863] CRIMINAL APPEAL.

The 7th June, 1899.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Lala Ojha.....Accused

versus

Queen-Empress.....Opposite Party.*

Attempt to commit offence—Power of Appellate Court to alter charge or finding—Prejudice to the accused—Necessity for re-trial on the altered charge—Criminal Procedure Code (Act V of 1898), sections 236, 237, 238 and 423.

The accused gave his pleader a copy of a document which had been falsified by an interpolation being made in it for the purpose of its being used in the trial of his suit. *Held* that he was guilty, not of an attempt to commit an offence under section 471 of the Penal Code, but of the offence itself.

If the prosecution establishes certain acts constituting an offence and the Court misapplies the law by charging and convicting an accused person for an offence other than that for which he should have been properly charged, and if notwithstanding such error the accused has by his defence endeavoured to meet the accusation of the commission of these acts, then the Appellate Court may alter the charge or finding and convict him for an offence which those acts properly constitute, provided the accused be not prejudiced by the alteration in the finding. Such an error is one of form rather than of substance, and the alteration by an Appellate Court of the charge or finding would not necessitate a retrial expressly on a charge of that offence.

ONE Sajeewan Ojha instituted a suit in the Court of the Munsif at Buxar against the present accused Lala Ojha for the recovery of possession of a strip of land. Amongst other evidence filed by the plaintiff in that suit was a certified copy of the plaint in a previous suit instituted by the present accused Lala Ojha against his brother Dhanukdhari Ojha. The copy purported to have been issued from the copying department of the office of the District Judge of Buxar. During the course of the trial of Sajeewan Ojha this copy of the plaint in the previous suit was being referred to by his pleader when Lala Ojha's pleader objected that it was not correct, and referred to a copy also certified of the same plaint with which his client, the present [864] accused, had supplied him in support of his objection. On the comparison of the two copies it was found that in the copy supplied by Lala Ojha the words "*Wo Kharidan darakhtan muddai*" occurred in addition to what appeared in the other copy. The Munsif sent for the original plaint and came to the conclusion that it had been tampered with, the words "*Wo Kharidan darakhtan muddai*" having been interpolated, and he directed Lala Ojha to be prosecuted. He was convicted by the Sessions Judge of Shahabad, in concurrence with the assessors, of an offence under section 196 of the Penal Code and an attempt to commit an offence under s. 471. Lala Ojha appealed against the order for conviction.

* Criminal Appeal No. 274 of 1899 made against the order passed by F. H. Harding, Esq., Sessions Judge of Shahabad, dated the 20th of March 1899.

Mr. P. L. Roy, and Babu Bepin Behari Ghose, for the Appellant.

The Officiating Deputy Legal Remembrancer (Mr. Abdur Rahim), for the Crown.

The judgment of the High Court (Prinsep and Hill, JJ.) was as follows :—

The appellant was sued by Sajeewan Ojha in the Munsif's Court at Buxar for possession of a strip of land. The suit was what is known as a boundary suit, as their holdings adjoined and the appellant Lala Ojha is said to have encroached on the lands of Sajeewan. At the trial of that suit, Sajeewan produced a copy of a plaint of a suit instituted four years previously in 1892 by Lala Ojha regarding the same land so as to show that he did not then claim the land in suit. Lala Ojha's pleader disputed the correctness of this copy and asked the Munsif to send for the original and he produced another copy of the plaint given to him with his brief by Lala Ojha, purporting to show that in the former suit his client claimed these very lands as indicated by the boundary stated in the words : *Wo Khoridar darakhtan nuddar*. The plaint was accordingly sent for, and it was found that these words had been interpolated. The Munsif accordingly directed Lala Ojha to be prosecuted. He has now been convicted by the Sessions Judge, in concurrence with the Assessors, of an offence under section 196 of the Indian Penal Code, and an attempt to commit an offence under section 471.

[865] In appeal the learned Counsel relies principally on objections to the conviction of the appellant of these particular offences. There can be no doubt that the original plaint did not contain these words, and that these words were subsequently inserted. It is further clear that the introduction of these words was made recently, and certainly not during the trial of that suit, for we find in the decree of that suit a similar interpolation, and, lastly, that in his application for execution of his decree Lala Ojha did not enter these particular words. The certified copy of the plaint produced by Sajeewan Ojha, which does not contain these words, was made on the 30th January 1897, and we have the evidence of the copyist as to the correctness of that copy, as the original document was then before him. The other copy, which was produced by the appellant, was made in April. It seems, therefore, clear that the alteration of the plaint was made some time between these two dates. On these facts, it is for us to consider whether the appellant has been properly convicted. The alteration undoubtedly was for his benefit, and there can be no doubt that it was either made by him or that he caused it to be made for the purpose of the second suit. He has been convicted, first under section 196 of the Indian Penal Code of corruptly attempting to use as true and genuine evidence which he knew to be false or fabricated, and he has also been convicted under sections 511 and 471 of attempting to use fraudulently as genuine a document which he knew or had reason to believe to be a forged document. It was contended by learned Counsel on his behalf that he did not so use the plaint, inasmuch as he did not himself cause the plaint to be produced in the Munsif's Court, nor did he instruct his pleader to ask to have it sent for, the petition to that effect having been made by the pleader and not by the appellant. It seems to us, however, that having, as we find he did, given his pleader a copy of a false document, that is to say, a copy of the plaint after it had been falsified by the interpolation already mentioned, for the purpose of using it in the trial of his suit he intentionally and fraudulently made use of the fabricated plaint by misrepresenting or causing to be misrepresented in the copy that the plaint as presented by him and used in the trial of that suit, was as set out in that copy. It seems [866] to us immaterial for the purposes of the present trial whether the appellant himself asked the

Court to send for the plaint and to use it for the purposes of the suit then under trial, or whether he used it fraudulently by means of a copy given to his pleader with a brief and produced under his instructions in the course of the trial. The object was clearly by means of this copy fraudulently to use as genuine with its interpolations, knowing that in that state it was a forged document. Mr. Roy contends that if the appellant has not been properly convicted of "attempts," the findings cannot be altered, because they would be for a graver offence for which his client has not been tried, and that the appellant is entitled to a new trial.

There is no doubt some authority for this. In *In the matter of Dwarka Manjhee*, (1880) 6 C. L. R., 427 appellant had been convicted under section 143 of being a member of an unlawful assembly, and was on appeal to the Sessions Judge convicted of rioting, an offence of a graver character with which he had not been charged at the trial. The learned Judges of the High Court on revision held that this was *ultra vires* since the accused should have an opportunity of defending himself on a charge of the offence of rioting before he could be properly convicted of that offence. That was a case under the Code of 1871, in which the powers of this Court as a Court of Revision were differently expressed. As a matter of principle we agree with this view. Section 423 of the Code of 1898 declares that "on an appeal from conviction the Court of Appeal may (1) reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, &c., &c.," and the Code of 1882 was similar in this respect. It would obviously be improper and unfair to an accused that on his appeal he should be convicted of a more serious offence to which he had never pleaded on the trial, and there are many instances on which the injustice of such a course would be so patent that we need not mention them. This would particularly [867] be so if the offence which the Appellate Court might consider to be established was not cognate to the offence of which he had been tried and convicted, and it would also be so, if there were circumstances of aggravation of an offence to which the accused had not pleaded. But there are exceptions to this rule. Some of these are referred to in sections 236, 237 and 238 of the Code of Criminal Procedure, so that a person who has been charged only with theft may be convicted of receiving stolen property or criminal breach of trust or cheating though he may not have been charged with any of these offences; and if charged with any offence he may be convicted of an attempt to commit that offence though he may not have been charged with an attempt. So also if an accused has been charged with an offence in an aggravated form he may be convicted of a minor offence which is included in the more serious offence, though he may not have been charged with such offence. As another instance may be mentioned a case in which the prosecution has established certain acts constituting an offence, and the Court has misapplied the law to those acts by charging and convicting him for an offence other than that for which he should have been properly charged on proof of commission of those acts. Here, if notwithstanding this error the accused has by his defence endeavoured to meet the accusation of the commission of those acts, understanding the charge to mean an offence arising out and made up of those acts, his conviction for the offence which those acts properly constitute may be maintained, if the accused has not been prejudiced by the alteration of the finding. It seems to us that such an error is one of form rather than of substance, and the alteration by an Appellate Court of the charge or finding to the more serious offence would not necessitate a retrial expressly on a charge of that offence. And it is so in the

present case. Here the acts found by the Magistrate, for which he was committed for trial by the Sessions Court, for which he was tried by that Court, and defended himself, and which have been raised for our consideration on this appeal, are all one and the same, and on this point as the Court of Appeal we do not differ from the lower Court that the accused has committed them. The only difference is that as a Court of Appeal we think that [368] these acts constitute the substantive offence rather than an attempt of which he has formally been charged and convicted. Consequently, so far as the actual trial, the accused has not been prejudiced. He has known the acts of the commission of which he was accused, and he has endeavoured to show that they were not committed by him, and that he was in no way responsible for them, if they were committed, but he has failed. Under such circumstances no possible good could arise from a retrial. On the other hand, a retrial would be attended with much inconvenience and waste of time, and would not be necessary in the interests of a proper administration of justice. This point does not seem to have ever before been raised and fully considered in any reported case, though there are some cases which are relevant. We may refer to *In the matter of the petition of the Government Pleader*, (1874) 7 Mad. H. C., 339, where the Madras High Court held that a conviction of a particular offence under the local salt law might have been altered by the Appellate Court to a conviction under another section of that law. So in *Queen v. Tarinee Churn Chuttopadhya*, (1867) 3 W. R. Cr., 3, where the appellants had been wrongly convicted as abettors instead of as principals this High Court would not interfere.

In *Reg. v. Raghoji bin Kanoji*, (1867) 3 Bom. H. C. 42, the accused was wrongly convicted of cheating by personation, whereas he should have been convicted of furnishing false information, and the Bombay High Court refused to interfere because the accused had not been prejudiced.

The appeal is dismissed.

NOTES.

[See also 35 Mad., 243 ; 33 Mad., 264 ; 28 Cal., 293 ; 38 P.R., 1905.]

[869] CRIMINAL REFERENCE.

The 20th June, 1899.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Kailash Chunder Sen and another.....Petitioners

versus

Ram Lall Mittra.....Opposite Party.*

Nuisance—Criminal Procedure Code (Act V of 1898) section 133—Bona fide question of title—Obstruction to a public way—Jury—Verdict on inspection of locality without taking Evidence—Criminal Procedure Code (Act V of 1898), section 138—Use of discretion in nomination of jurors by Magistrate.

When the person called upon under section 133 of the Criminal Procedure Code to show cause why an obstruction should not be removed from a public way, denies that it is a public way, it is for the Magistrate to determine whether this is a *bona fide* objection, and he cannot, in spite of the objection (unless he determines that it is not *bona fide*) refer the matter to a jury.

A jury cannot decide a matter referred to them merely on inspection of the locality without taking any evidence.

In nominating the foreman and one-half of the remaining members of the jury as required by section 138 of the Criminal Procedure Code the Magistrate must exercise his own independent discretion and not appoint the nominees of the parties.

THIS case was referred to the High Court under section 438 of the Criminal Procedure Code by the Sessions Judge of Jessore with the following letter of reference :—

“ In this case there was a petition to the Sub-Divisional Officer of Narail praying that action under section 133 of the Criminal Procedure Code might be taken in respect of obstruction in a road alleged to be a public thoroughfare. A conditional order was made, and the present petitioners appeared and raised the objection (*inter alia*) that the road was not a public one. The Deputy Magistrate, instead of deciding the question whether the road was a public one or not, himself referred the question to a jury appointed under section 138 of the Criminal Procedure Code.

“ It has been held in *Nasiruddi v. Akiluddi*, (1899) 3 C. W. N., 345, that the Magistrate must himself decide the question whether the road is a public one or not, and that the decision of such a question cannot be left to the jury. The order of the Deputy Magistrate in this case is, therefore, an illegal one. He has made [879] his order absolute on the report of the jury, but as he ought himself to have decided the question whether the road was a public one or not the final order based on the jury's report is illegal, and I therefore refer the case for the orders of the High Court with the recommendation that the order complained of be set aside, and that the Magistrate be directed to proceed with the case according to law.”

The judgment of the High Court (Prinsep and Hill, JJ.) was as follows :—

The High Court regret to have to call the attention of the Sessions Judge to the manner in which this reference has been made in disregard of the orders

* Criminal Reference No. 98 of 1899, made by L. Palit, Esq., Sessions Judge of Jessore, dated the 16th of May 1899.

contained in Circular, July 22nd, 1863, General Rules and Circular Orders of the High Court (Appellate Side, Criminal, p. 124).

When the person called upon under section 133 to show cause why an obstruction should not be removed from a public way denies that it is a public way, it is for the Magistrate to determine whether this is a *bond fide* objection, and he cannot in spite of the objection (unless he determines that it is not *bond fide*) refer the matter to a jury. The jury is not competent to decide whether the way obstructed is or is not a public way. They can merely find whether the Magistrate's order is reasonable and proper, as originally made, when the matter is properly submitted to them. The Magistrate, moreover, is mistaken in thinking that a jury can decide such a matter without taking evidence and merely on inspection of the locality. They are bound to hear the parties and such witnesses as they may desire to have heard. The order of the Magistrate must be set aside.

The attention of the Sub-Divisional Magistrate is directed to section 138, which requires him to nominate the foreman and one-half of the remaining members of the jury. This, it has been held, means that he is to exercise his own independent discretion in such nomination. He has not done so in the present instance, for he reports that he appointed "one of the petitioner's nominees to act as foreman" and nominated the others, after inquiry from the mukhtears of both sides, and from the other party.

S. C. B.

NOTES.

[This was followed in 6 C.W.N., 886; but the Allahabad High Court in 30 All., 364, followed 18 All., 158, holding that there was no hard-and-fast rule that the parties and witnesses should be heard.]

[871] PRIVY COUNCIL.

The 21st June, and 8th July, 1899.

PRESENT :

LORDS WATSON, HOBHOUSE, AND DAVEY, SIR RICHARD COUCH, AND
SIR EDWARD FRY.

Diwan Ran Bijai Bahadur Singh.....Plaintiff
versus

Indarpal Singh.....Defendant.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Onus of Proof—Suit by reversionary heir—Hindu widow—Burden of proving ownership of the husband through whom title is made.

It is incumbent on a plaintiff suing as the reversionary heir of a Hindu proprietor who has died leaving a widow, to show that the property claimed in the suit, and found in her possession, has vested in the husband. There is no presumption of law arising where the late husband possessed considerable property, that property found to be in the possession of

the widow after his death must have been included in that which belonged to him unless she shows that she obtained the property from another source.

APPEAL from a decree (15th December 1891) of the High Court, [*sic*] affirming a decree (2nd January 1890) of the District Judge of Rai Bareilly.

The plaintiff, appellant, sued in 1887, as the next reversioner, to be declared entitled, after the interval of the widow's estate, to succeed to the inheritance from the last male owner Randhir Singh, deceased in 1858, whose widow, Thakurain Ajit Kunwar, was the first defendant in this suit, with a co-defendant, Indarpal Singh, now the respondent. She died pending this suit.

The plaintiff claimed to establish a right to succeed to property scheduled to his plaintiff after the death of the widow. The general contents of the three schedules are stated in their Lordships' judgment.

Thakurain Ajit Kunwar, with whom settlement had been made in 1858 of a talukhdari, and who had received a sanad in 1859, made a document, on the 17th October 1885, whereby she declared Indarpal Singh to be the heir of all her property. This the plaintiff sought to have declared void. Among other defences [872] the ancestral character of some of the property claimed, and the details of other property, were denied.

Almost all the questions in the case were of fact, and were disposed of by the concurrent judgments of the Courts below, adversely to the plaintiff. The question now decided was whether the following was a sound contention: That where a husband has died possessed of considerable estate, and where property has been found to be in the possession of his widow, the presumption, in regard to Hindu law, is that the property in her possession is part of the estate that belonged to her husband, unless the contrary should be shown.

Mr. A. Cohen, Q. C., and Mr. J. D. Mayne, for the Appellant, in support of this proposition, referred to *Bindoo Bashinee Debee v. Pearee Mohun Bose*, (1866) 6 W. R., 312; *Chunder Nath Moitro v. Krishto Komul Singh*, (1871) 15 W. R., 357; *Nobin Chunder Chowdhry v. Dokhobala Dasi*, (1884) 1 L. R., 10 Cal. 686; and the Evidence Act (I of 1872), sections 110 and 114.

Mr. M. Crackanthorpe, Q. C., Mr. C. W. Arathoon, and Mr. De Gruyther, for the Respondent, were not heard.

The judgment of their Lordships was delivered by

Sir Edward Fry.—The plaintiff and appellant Diwan Ran Bijai Bahadur Singh is the head of the elder branch of a family descended from Sanbar Singh. The original first defendant, Ajit Kunwar, was the widow of Randhir Singh, the head of the younger branch of the same family. The present respondent, Indarpal Singh, claims under a will or other document executed by the late Ajit Kunwar. The original plaintiff in the suit now under appeal sought a declaration that Ajit Kunwar was entitled only for life in three classes of property mentioned in schedules A, B and C to the plaintiff, and that the document under which Indarpal Singh claims was inoperative as against the plaintiff.

The first class of property to which the suit related consisted of certain talukhdari estates in respect of which a sanad was granted to Ajit Kunwar: and it was contended for the appellant in the Courts below that by virtue of certain documents Ajit Kunwar [873] had, subject to a life interest to herself, constituted herself trustee for the appellant of his property. But the District Judge and the Judicial Commissioner's Court unanimously held all these documents to be forgeries, and Counsel for the appellant with great propriety declined to argue against these concurrent findings.

The second class of property consisted of certain non-talukhdari lands mentioned in schedule B to the plaint, and the third class of property mentioned in schedule C consisted of certain moveables, which belonged to Ajit Kunwar at the time that the suit was brought. The plaintiff claimed the land in schedule B in more than one way. First he said in his plaint that it was "immoveable property which had been purchased from time to time out of funds derived from the ancestral estate," *i.e.*, the talukhdari, and that it was "considered as a part and parcel thereof" (paragraph 10). In this point of view it is evident that this non-talukhdari property will follow the fate of the talukhdari in respect of which the appellant's claim has failed. But the plaintiff also claimed it on the ground that the property belonged to Randhir Singh in his life-time and that the plaintiff was the next reversioner to Randhir Singh. There is some conflict of evidence as to whether this property was originally acquired by Randhir Singh or his wife Ajit Kunwar, but Counsel for the appellant, admitting that both the Courts below were adverse to the plaintiff's contention on the evidence, elected to treat the case as if there were no evidence one way or the other, and to base their client's claim on the following proposition of law. They alleged that when a widow is found in possession of property, of the acquisition of which no account is given, and it is shown that her husband died possessed of considerable property, then there is a presumption of law that the property found in the widow's possession was originally that of her husband. No authority was cited at the bar which supports this proposition, and their Lordships are not prepared to adopt it or to lay down anything inconsistent with the general rule that he who claims property through some other person must show the property to have been vested in that person. But even if the proposition contended for were valid, it does not apply to the present case; for there [874] is no evidence that Randhir Singh, the husband of Ajit Kunwar, died possessed of considerable or any property, and the inference to be drawn from some of the facts in evidence tends in the contrary direction. The plaintiff's claim to the real estate mentioned in schedule B therefore falls to the ground.

The third class of property mentioned in schedule C consists of moveables some of them clothes and ornaments of a lady's person, and there being no evidence to show whether these were originally acquired by Ajit Kunwar or her husband, the plaintiff's claim to them was supported only on the same proposition of law with which their Lordships have already dealt.

In every particular, therefore, the appellant's case fails, and their Lordships will humbly advise Her Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the Appellant : Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent : Messrs. *Young, Jackson, Beard & King.*
C. B.

NOTES.

[There is no presumption of law that property in possession of a widow was her husband's, even where no account is given as to how she acquired the property and it is shown that her husband died possessed of considerable property.]

The onus of proving that the estate in the hands of the widow formed part of the estate of him whose reversioner the plaintiff claims to be, is upon the plaintiff :—(1899) 26 Cal., 871; (1899) 3 O.C., 89; (1910) 33 Mad., 112; (1897) 2 C.W.N., 197; 15 C.W.N., 706; (1911) 11 I.C., 434; Cf. (1907) 29 All., 244 at 248 *per* BANERJI, J.]

CRIMINAL REVISION.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Soonderjee Nanjee.....Petitioner

versus

Maylon.....Opposite Party.*

Revision—High Court's power of revision—Withdrawal of the operation of the Criminal Procedure Code—Scheduled Districts Act (XIV of 1874), section 6—Assam Frontier Tracts Regulation, 1880, section 2—Jurisdiction of the High Court—Power of the Supreme Council.

The effect of the rules laid down by the Chief Commissioner of Assam under section 6 of the Scheduled Districts Act (XIV of 1874), taken in conjunction with the notification issued by him in the exercise of the powers conferred by section 2 of the Assam Frontier Tracts Regulation, 1880, directing that the Criminal Procedure Code should cease to operate [875] in the North Cachar Hills from the date of the notification, is to supersede all previously existing criminal authority in that district by that of the Chief Commissioner.

The power of the Supreme Legislative authority of India to remove any place or territory from the jurisdiction of the High Court is, as was said in *Empress v. Burah*, (1878) I. L. R., 4 Cal. 172 : L. R., 5 I. A., 178, "expressly authorized and contemplated" by the Statutes and Letters Patent which affect the constitution and jurisdiction of the Court.

Semle :—Notwithstanding the withdrawal of the operation of the Criminal Procedure Code from a certain district the High Court may continue to exercise appellate and revisional powers over that district.

ON the 19th of May 1899 the petitioner was arrested under a warrant of arrest issued by the Sub-Divisional Officer of the North Cachar Hills in the Assam Frontier Tracts on a charge of criminal breach of trust in respect of moneys entrusted to him for the purposes of certain works in connection with the Assam-Bengal Railway in the year 1897, at a place called Haflong in the North Cachar Hills. On the 22nd of May the petitioner applied to the High Court for a rule calling on the Deputy Commissioner of Cachar to show cause why the proceedings then pending in the Court of the said Sub-Divisional Officer against the petitioner should not be quashed, or in the alternative why the case should not be transferred to the Court of some other competent Magistrate for disposal on the ground that the said Sub-Divisional Officer had no jurisdiction, and that the petitioner had a reasonable apprehension that he would not get a fair trial in the hands of the said Sub-Divisional Officer.

A rule was issued calling on the Deputy Commissioner to show cause why the proceedings in question should not be quashed, or such other order passed with respect thereto as to the High Court might seem fit, and the records were sent for. The Deputy Commissioner of Cachar replied to the High Court's requisitions that "the North Cachar Hills are not within the jurisdiction of the High Court," and abstained from sending the records of the case as well as from showing cause against the rule.

Mr. P. L. Roy, Babu Atulya Charan Bose, Babu Shama Prosunno Mozumdar, and Babu Soshi Shekhar Bose, for the petitioner.

[876] Mr. Henderson, and Babu Prosunno Gopal Roy, for the Crown.

* Criminal Revision No. 386 of 1899 made against the order passed by E. C. S. Baker, Sub-Divisional Officer of North Cachar, dated the 6th of May 1899.

The judgment of the High Court (Prinsep and Hill, JJ.) was as follows:—

This was an application made on the 22nd May 1899 on behalf of one Soonderjee Nanjee for a rule calling on the Deputy Commissioner of Cachar to show cause why certain proceedings, then pending in the Court of the Sub-Divisional Officer of the North Cachar Hills against the petitioner, should not be quashed, or in the alternative why the case should not be transferred to some other competent Magistrate for disposal.

It appears that on the 19th May the petitioner was arrested under a warrant issued by the Sub-Divisional Officer on a charge of criminal breach of trust in respect of moneys said to have been entrusted to him for the purposes of certain Railway works in progress in the year 1897, at a place called Haflong in the North Cachar Hills.

There being in our opinion matter stated in the affidavit sworn by the petitioner sufficient to justify us in granting the application, we issued a rule on the 22nd May calling upon the District Magistrate to show cause why the proceedings in question should not be quashed, or such other order passed with respect thereto as to this Court might seem fit. We at the same time sent for the records of the case.

On the 2nd June the Deputy Commissioner of Cachar replied to the Court's requisitions that "the North Cachar Hills are not within the jurisdiction of the High Court," and he abstained from sending the records of the case as well as from showing cause against the rule. Subsequently the question thus raised was argued before us by Counsel on behalf of the Crown as well as of the petitioners, and we took time to consider our judgment. This was unavoidable, as the law affecting the question was not fully laid before us at the hearing, and we were consequently obliged to pursue our researches further.

The learned Counsel for the Crown in support of the position taken by the Deputy Commissioner relied exclusively on a notification issued by the Chief Commissioner of Assam on the 6th May 1884, in exercise of the powers conferred on him by [877] section 2 of the "Assam Frontier Tracts Regulation, 1880," by which he directed that the Code of Criminal Procedure (among other enactments) should cease to be in force in the North Cachar Hills from the date of the notification. It was conceded that prior to this notification the North Cachar Hills were within the jurisdiction of this Court, but the contention was that by virtue of the notification they were removed from it.

The power of the Supreme Legislative authority of India to remove any place or territory from the jurisdiction of this Court is, as was said in *Empress v. Burah*, (1878) I. L. E., 4 Cal., 172: L. R., 5 I.A., 178, "expressly authorized and contemplated" by the Statutes and Letters Patent which affect the constitution and jurisdiction of the Court. But the notification of the Chief Commissioner does not purport to affect the jurisdiction of this Court over the North Cachar Hills, and it is quite conceivable that, notwithstanding the withdrawal of the Code of Criminal Procedure, this Court might continue to exercise appellate and revisional powers over the district in question. Indeed, under the Regulation, in pursuance of which the notification of the Chief Commissioner was issued, any alteration of the territorial limits of the Court's jurisdiction would present this difficulty, that the powers vested in the Chief Commissioner by section 2, under which the notification was issued, are to be exercised so as not to affect the criminal jurisdiction of any Court over European British subjects.

The argument, then, founded on the notification appears to us to be incomplete and inconclusive.

The Chief Commissionership of Assam in which the North Cachar Hills are situated has, however, been brought under the operation of the Scheduled Districts Act (XIV of 1874), by section 6 of which the Local Government is empowered from time to time to appoint officers to administer civil and criminal justice within the Chief Commissionership, to regulate the procedure of such officers, and to direct by what authority any jurisdiction incident to the operation of any enactment for the time being in force within the Chief Commissionership shall be exercised. By a notification issued on the 31st July 1884 in [878] exercise of these powers, the Chief Commissioner laid down rules for the administration of justice in the North Cachar Frontier Tract, which includes the North Cachar Hills. By rule 12 the ordinary administration of criminal justice is vested in the Deputy Commissioner, the Sub-Divisional Officer, and the chief village authority duly authorized in this behalf. Succeeding rules provide for appeals from the decision of the chief village authority and the Sub-Divisional Officer, and then rule 24 provides as follows: "No appeal shall lie as a matter of right from any sentence of the Deputy Commissioner of less than three years imprisonment. All sentences of three years imprisonment or more are appealable to the Chief Commissioner. Appeals to the Chief Commissioner must be preferred within ninety days. It shall be competent to the Chief Commissioner at any time to call for and revise, modify, or reverse, any proceedings of the Deputy Commissioner or his subordinates in any case in which it may seem necessary to do so."

Subject to the limitation in respect of European British subjects, to which class the petitioner does not belong, placed upon the powers of the Chief Commissioner by section 2 of the Assam Frontier Tracts Regulation, 1880, we think the effect of these rules, taken in conjunction with the notification of the 6th May 1884, was to supersede in the North Cachar Hills all previously existing criminal revisional authority by that of the Chief Commissioner. Assuming, therefore, as was argued for the petitioner, that there still resides in this Court, notwithstanding the annulment of its powers of revision, a power of interference with the proceedings of the Sub-Divisional Officer (a question on which we think it unnecessary to express an opinion), we think that the powers we were, in the first instance, asked to exercise in this case, and in the supposed exercise of which we issued the rule, are non-existent, and we therefore discharge the rule.

Rule discharged.

S. C. B.

NOTES.

[The Privy Council decision in *The Secretary of State for India v. Moment*, (1912) 40 Cal., 391 is the leading case on the competency of Indian Legislatures to affect the jurisdiction of the High Courts.]

[879] PRIVY COUNCIL.

The 26th and 27th April, and 18th May, 1899.

PRESENT :

LORD HOBHOUSE, LORD MACNAGHTEN, AND SIR RICHARD COUCH.

Hasan Jafar and others.....Representatives of Plaintiff

versus

Muhammad Askari.....Representative of Defendant.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Oudh Estates Act (I of 1869)—Settlement of Estate—A talukdar settled with on terms imposing a trust on him—Second summary settlement, 1858—Effect of the confiscation—Rights of the Government.

A sanad-holding talukhdar, whose name has been entered in lists I and II, made in conformity with the Oudh Estates Act, 1869, holds the talukh subject to such trusts as have been validly created.

At annexation, four descendants of a Muhammadan proprietor were entitled in equal shares to the ancestral estate, which, in 1858, at the second summary settlement, was settled with the only one of the four who presented himself to the Settlement Officer. The settlement with him as talukhdar which was then made was, however, made upon terms providing that the absent co-sharers on their return should obtain their shares. This accorded with his application expressing his willingness.

Held, that the question whether the talukhdar had become a trustee for the plaintiff in respect of his share depended on the terms on which the estate had been granted to the talukhdar by the Government at the second summary settlement, it having been at their absolute disposal as a consequence of the confiscation of March 1858. The trust was not affected by the sanad. No special provision as to the co-sharers' return, or admission to share, had been deemed necessary by the Chief Commissioner, who authorized the settlement with the talukhdar in reliance on his assurance. The right of the co-sharer, who returned in 1859, was accordingly established.

APPEAL from a decree (7th October 1895) affirming a decree (1st May 1893) of the District Judge of Lucknow.

The appellants were the grandsons of the plaintiff, Mir Sadik Husain, who died pending the suit, which was brought on the 9th June 1888, for a one-fourth share of a talukh in the Bara Banki District, named Goothia Zaidpur, formerly the talukhdari estate of Hakim Karam Ali, deceased in 1879. The daughter of Karim Ali, named Afzal-un-Nissa, was entered in the revenue [880] records as proprietor in his place; and on her death in 1887, the defendant, Muhammad Askari, a collateral relation, claiming under her alleged will, obtained entry of his name.

At the first summary settlement (1856-57) the estate was settled with Mir Sadik Husain, and his cousin Ali Meddi. These two, with two other cousins, Karam Ali and Abu Ali, were descended from a common grandfather Muhammad Hanif. All the four were entitled, in equal shares, to the ancestral estate.

At the second summary settlement in 1858, Karam Ali alone presented himself, and with him settlement was made. Sadik Husain was absent. In 1861 Karam Ali obtained a sanad as talukhdar. He was afterwards entered

in the lists I and II under the Oudh Estates Act, 1869. On the 18th April 1859 Mir Sadik Husain returned, and received an allowance for his maintenance from Karam Ali.

The main question decided on this appeal was whether Karam Ali had held the talukh in trust for himself and Sadik Husain, who in 1888 claimed his one-fourth share from Muhammad Askari in this suit, or had held the talukh for himself alone.

The facts are stated in their Lordships' judgment.

The defendant in his written statement admitted that when Karam Ali applied to have the talukh settled with him at the second summary settlement, he offered to give to the plaintiff and Ali Mehdi their shares, on their coming back and paying what was due to him for payments of revenue made on their account. But the defence was that the settlement was in the end unconditionally made with Karam Ali, the offer on his part never having been accepted by either of them.

The principal issue raised the question whether settlement was made with Karam Ali on his own behalf exclusively, or for himself and as trustee for Sadik Husain.

The District Judge held that Karam Ali accepted a conditional trust on Sadik Husain's behalf, but the condition (which was that of satisfying the authorities as to his conduct, and paying the money due to Karam Ali) had not been fulfilled by Sadik Husain, nor had the condition been waived. The judgment said: "It [881] was of course necessary for him, if he wished to be admitted, to apply to the authorities, and satisfy the condition, or ask to have it waived. He did neither the one nor the other." The dismissal of the suit was affirmed by the Appellate Court, their reasons being given as follow by the Additional Commissioner :—

"The circumstance that Karam Ali expressed his willingness, if the whole talukh were settled with him, to give the other co-sharers their shares when they returned, cannot be regarded as one which of itself constituted him a trustee for them, and that is the only circumstance which can be pointed to in connection with Karam Ali's conduct at the time of the settlement. Karam Ali did not express this willingness as the result of an agreement or arrangement with the other co-sharers, that he should claim the settlement of the entire property and give them their shares subsequently. Karam Ali's willingness to give the other co-sharers their shares did not induce the Settlement authorities to settle the whole talukh with him. What induced them to settle the property with Karam Ali was the fact that the former lambardars, Ali Mehdi and Sadik Husain, had not taken advantage of the proclamation of the 15th March 1858 and promptly come forward and given to the Chief Commissioner their support in the restoration of peace and order, while Karam Ali had done so. The Settlement authorities did not impose any trust on Karam Ali in respect of the shares of the plaintiff and Ali Mehdi. They did not say to Karam Ali, 'we settle the whole estate with you, as you desire, but we do so on the understanding that the settlement is made with you for your co-sharers as well as for yourself.' They said, on the contrary, 'we settle the whole estate with you, but you must not understand that because we do so your co-sharers have forfeited all claim to the restitution of their former rights. If they explain their conduct later on their former rights will be restored to them.' I think that this was the only condition upon which the settlement of the entire property was made with Karam Ali, and the only condition which he accepted, and I cannot agree with the learned District Judge that it may be said that Karam Ali accepted a conditional trust on behalf of the plaintiff, on the conditions referred to by the learned District Judge, when the settlement was made with him. On the contrary, I think that at the time of the settlement Karam Ali imposed upon himself no trust of any kind, and accepted from the Settlement authorities no trust of any kind in favour of the plaintiff."

* As to the establishment of a trust against a *sanad*-holder, they referred to *Ram Singh v. Deputy Commissioner of Bara Banki*, (1889) I. L. R., 17 Cal., 444; L. R., 17 I. A., 54.

On this appeal,—

[882] Mr. A. Cohen, Q.C., and Mr. C. W. Arathoon, for the appellants, argued that there was error in the judgment of the Courts below. The summary settlement was made with Karam Ali upon his consent given and the entry made by the Settlement Officer as to the return of the absent co-sharers. It was recorded that the names of the latter should be entered in the *khewat*, or register of shares, in which the names of those entitled to shares in village lands are always inserted. Karam Ali by his admissions and conduct in those proceedings placed himself in the position of a trustee for others entitled as co-sharers with him. In his admission of the 8th November 1858 he did not stipulate that the co-sharers were to return within any certain time; and the absence of the plaintiff until April 1859 did not deprive him of his right. The exclusion of the plaintiff had not been directed by the authorities; and on this point the Courts below had not correctly understood the order of the Special Settlement Commissioner, read with that of the Chief Commissioner; for in fact the order of the latter did not insist on any condition to be complied with by Sadik Husain before he could be allowed to get his share. It was sufficient for the plaintiff's case to rely on the entries in the record; and these were in accordance with Karam Ali's application and admissions. As to the constitution of a trust to be fulfilled by a *talukhdar*, reference was made to *Thukrain Sookraj Koowar v. The Government*, (1871) 14 Moore's I. A., 112, and to the cases cited in *Ramanand Kuar v. Raghunath Kuar*, (1881) I. L. R., 8 Cal., 769; L. R., 9 I. A., 41, and *Ram Singh v. Deputy Commissioner of Bara Banki*, (1889) I. L. R., 17 Cal., 444; L. R., 17 I. A., 54.

From the report of the Commissioner, who examined the accounts, and the evidence connected with it, the inference was to be drawn that Sadik Husain after his return received an income proportioned to his share, and that this was accorded to him not merely as a favour, but as a right.

Mr. J. D. Mayne, and Mr. G. E. A. Ross, for the respondent, contended that the judgment of the Appellate Court below was right. There had been no absolute recognition by Karam [883] Ali of any proprietary, or beneficial, interest in the family estate as having been secured at settlement to Sadik Husain, nor was there any distinct evidence that Karam Ali intended to take the estate subject to any trust for his cousin. Also, the contention was that, as between Karam Ali and the Government, the settlement of 1858-59 was absolute when the proceedings ended. That closed the "open door" mentioned by Major Barrow. The only question that should now be raised would be this, was there a concession as between Karam Ali and Sadik Husain that would constitute the acceptance of a trust by the former for the latter? On the evidence taken altogether, the real state of things was that Karam Ali, though he admitted the relationship of his cousins, and former family rights, petitioned for and obtained the settlement of the estate with himself, that implying a grant by the Government. Disappearance prolonged through the month of settlement meant that Sadik Husain had joined the insurgents. In order to get the advantage of the entry in their favour, the absentees should have come back before the proceedings at settlement were concluded. It was not to be inferred that the right to return, and to be admitted to share, was extended for an indefinite period. At the settlement Sadik Husain did not return, and as the result, when he did return, in April 1859, Karam Ali had obtained the whole *talukhdari*. Subsequent issue of a *sanad*, the long acquiescence of Sadik Husain, and other

circumstances, confirm this view. As to the maintenance accepted by him from Karam Ali, there were concurrent judgments to the effect that this subsequent treatment of the plaintiff, both by the talukhdar and by his daughter Afzul-un-Nissa, was not a recognition of any proprietary right in the plaintiff. There had not been an accounting to him as for the aliquot share of the profits, to which he would have been entitled if he had been dealt with as a co-sharer. On this point reference was made to the judgment in *Hyder Hossein v. Mahomed Hossain*, (1871) 14 Moore's I. A., 401 (407).

Mr. A. Cohen, Q.C., replied.

Afterwards, on the 18th May 1899, their Lordships' judgment was delivered by

[884] Lord Macnaghten.—This appeal relates to a claim by the appellants to one-fourth share of an Oudh estate which comprises the talukh of Goothia with certain villages in Zaidpur in the district of Daryabad and is now apparently known as talukh Goothia Zaidpur.

The appellants are the representatives of one Sadik Husain, the original plaintiff, who died after the suit had been disposed of in the Court of First Instance.

The respondent derives title under the will of the only child and sole heiress of one Karam Ali. Karam Ali died in 1879. His daughter died in 1887—on her death the dispute arose which led to the present litigation.

It is common ground that on the re-occupation of the Province of Oudh after the mutiny the three-year summary settlement of the estate was made with Karam Ali alone, and that the talukhdari sanad was afterwards granted to him as sole owner. The case on behalf of the appellants is that, although Karam Ali thus acquired the legal ownership of the entire estate, he became in the events which happened and was at the time of his death trustee as to one-fourth of the estate for Sadik Husain.

It appears that in September 1858 when the three-year summary settlement was in progress Karam Ali applied to have the settlement of the estate made with him. He stated that the estate was ancestral property in which he was a co-sharer. The first summary settlement on the annexation of the Province had been made, he said, with his co-sharers Ali Mehdi and Sadik Husain, but they had absconded, fearing that they would be called upon to pay what they had collected in excess during the mutiny. Search had been made, but no clue or trace of them had been found as yet. He offered to pay what was due to Government in respect of the whole estate. At the same time he declared that if his co-sharers re-appeared and paid up what he might have paid to Government they should get their shares. In these circumstances the Settlement Officer entered the name of Karam Ali alone as mal-guzar and sent the papers up to the head office in Lucknow for confirmation. They came in the first instance before Major Barrow, the Special Commissioner of **[885] Revenue**. His note so far as material was in these words: "Correct, but I would leave a door open to admit the other sharers if they explain their conduct by and bye." The papers then went to the office of the Chief Commissioner, Sir Robert Montgomery. His observation on Major Barrow's note written against it in the margin was this: "The man agrees to this, R. Montgomery, Chief Commissioner, Oudh." The papers were then returned to the Settlement Officer who accordingly retained the name of Karam Ali as sole mal-guzar recording in the column of the summary settlement statement headed "Abstract of the Case," an abstract in English of Karam Ali's statement which so far as is material is as follows: "I am entitled to half and those

two," that is, Ali Mehdi and Sadik Husain, "to the remaining half . . . I want the settlement of the whole talukh. When the sharers come back if they pay up what they owe me I will willingly give up their share."

Sadik Husain seems to have come back in April 1859. It is beyond dispute that he returned openly on the invitation or by the written permission of the Government. The record contains a letter from the Commissioner at Lucknow to Daroga Wazid Ali, dated the 18th of April 1849, which, so far as material, is in the following terms: "I am in the receipt of your letter relating to the return of Sadik Ali," that is Sadik Husain, "and your request to permit him to settle himself, 'so I write to you that under the terms of the Queen's Amnesty Proclamation he can settle down and you are permitted to help him in doing so.'" There is also in the record a parwana of the same date addressed to Sadik Husain by the Deputy Commissioner assuring him that if he had committed no offence punishable under the Queen's Amnesty Proclamation he would not be called upon to account for himself because he had not presented himself within the period specified in it. This parwana proceeds to say "you may present yourself without the least anxiety and show your loyalty and attachment to the British Government."

Following the summary settlement the sanad was granted to Karam Ali in 1862, and his name was entered in Lists I and II, referred in the Oudh Estates Act (I of 1869).

[886] The question whether Karam Ali became a trustee of one-fourth of the estate for Sadik Husain upon his return depends, as it seems to their Lordships, upon the terms on which the Government made over the estate to Karam Ali. Owing to the confiscation of the province under Lord Canning's Proclamation the property was at the absolute disposal of the Government. Whatever Karam Ali took under the summary settlement and the sanad which followed it he took as a gift from the Government. It was of course competent for the Government when making the gift to impose upon the recipient of their bounty any terms they pleased not inconsistent with the law. If the intention of the Government is clear it cannot make the least difference whether the terms were imposed by the Government of its own motion or suggested by the grantee and assented to by the Government. Karam Ali did not found his claim to the favour of the Government on the misconduct of those who had been his co-sharers. In his view they were co-sharers still, but they had gone away or disappeared. He was on the spot a loyal man and ready to pay to the Government every farthing of its dues. He asked to have the whole estate settled with him undertaking that if his co-sharers re-appeared, that is, of course, if they came back openly, he would give them their shares. When the papers went before Major Barrow he seems to have thought that some special arrangement ought to be made with a view to the restoration of the co-sharers if they should succeed in explaining their conduct to the satisfaction of the Government. But that was not the view of the Chief Commissioner. His note is very brief, but it is tolerably plain. He differed from Major Barrow. In his view no special provision was necessary. The applicant had undertaken to re-admit the co-sharers if they re-appeared. The Chief Commissioner thought that enough. On that undertaking or agreement, as he calls it, the settlement might be made as the Settlement Officer proposed with Karam Ali alone. And in the result the matter was carried out on that footing.

Their Lordships have dwelt at some length on this part of the case because it appears to them that both the Courts below misapprehended the effect of what took place when the settlement papers of 1858 came before the authorities at Lucknow. [887] Both Courts seem to have thought that certain

conditions were prescribed by Major Barrow, and that it was incumbent on Sadik Husain to show compliance with those conditions. The fact, however, seems to have been that the Chief Commissioner put aside Major Barrow's suggestions and authorised the settlement with Karam Ali in reliance on his assurances and representations.

If Karam Ali became a trustee for Sadik Husain on his return the fact that the sanad was granted to Karam Ali alone would not deprive Sadik Husain of his rights. It is not necessary to refer to authority for the purpose of establishing the proposition that the grantee under a sanad of this description takes subject to trusts which have been validly created.

It does not appear that Karam Ali or his daughter and heiress, who succeeded him, ever disputed Sadik Husain's right to share in the estate. It is satisfactory to find a statement made by Karam Ali himself after the sanad was granted to him to the effect that he was not sole and absolute owner of the whole estate. In 1862 the Government called on the talukhdars of Oudh to make a return of their history and services. In May of that year Karam Ali filled up the form which had been sent to him and stated distinctly that he had co-partners. Whether the word translated "co-partners" ought to have been translated subordinate co-partners or not the statement so far as it goes is consistent with Sadik Husain's claim, and at any rate it shows that Karam Ali did not even then consider himself to be absolute owner to the exclusion of everybody else.

The rest of the case may be disposed of very briefly. Sadik Husain alleged that he was admitted to share in the management of the estate. In that contention he failed. But it appears that from his return until the death of Karam Ali's daughter, he received a large and liberal allowance from the family estate. It was not contended by the Counsel on behalf of the respondent that the fact that he received less than one-fourth was conclusive against his present claim or operated to bar the suit.

On the whole, their Lordships are of opinion that the appellants have made out their case as to one-fourth of the estate. They will therefore humbly advise Her Majesty that the appeal [888] should be allowed. The decree of the District Judge and the decree of the Judicial Commissioner and Additional Judicial Commissioner must be set aside with costs in the Court of the Judicial Commissioner and the costs paid under either of those decrees repaid, and it should be declared that in the events which happened Karam Ali became and was as to one-fourth of the estates comprised in the sanad granted to him trustee for Sadik Husain, and that the appellants as representatives of Sadik Husain are now entitled to recover one-fourth of those estates. Their Lordships think that each party ought to bear their own costs in the Court of First Instance, as those costs were largely increased by certain unfounded claims on the part of the plaintiff.

The respondent will pay the costs of the appeal.

Appeal allowed.

Solicitors for the Appellants: Messrs. *Barrow, Rogers & Nevill.*

Solicitors for the Respondent: Messrs. *T. L. Wilson & Co.*

C. B.

NOTES.

[In *Muhammad Bakar v. Mahammad Ali Khan*, (1910) 33 All., 125, the Privy Council distinguished this case. "*Hason Jafar v. Muhammad Askari*, 26 Cal., 879, the settlement was effected with the person who took it on a distinct understanding which, in their Lord-

ships' Judgment, constituted him a trustee for his co-sharers who were not present at the time.

In the present case, the settlement officer's proceedings can bear no such meaning. The Nawab was in possession of the villages by virtue of some arrangement regarding the exact nature of which there is no evidence. At the time of the settlement he or his agent opposed the claim of Wazir-un-nissa to have the properties settled with her, on the ground that he was entitled to remain in possession until the moneys he had disbursed on her account were paid off. That objection was upheld, and the Settlement was made with the Nawab 'in accordance with possession' and the lady was directed to proceed by separate application to get her property released by payment of the money due by her. In their Lordships' judgment there is no warrant for the contention that the correlative obligation that lay on the Nawab to release the property on payment of the money created a trust or constituted him a trustee for Wazir-un-nissa."]

[26 Cal. 889]
APPELLATE CIVIL.

The 28th April, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Napol Chandra Sadookhan.....Judgment-Debtor
versus
Amrita Lall Sadookhan and anotherDecree-holders.*

Limitation Act (XV of 1877), Schedule II, Article 179, clause (4)—Step in aid of execution—Application for execution "not in accordance with law"—Subsequent application for execution—Objection to the previous application.

An application for partial execution of a decree is a step in aid of execution within the meaning of clause 4, article 179† schedule II of the Limitation Act (XV of 1877).

A judgment-debtor, who did not appeal against a previous order for execution of a portion of the decree and who did not dispute the validity [889] of such order, cannot, in the matter of a subsequent application for execution of the remaining portion of the decree, contend that the first application was not "in accordance with law," and that the subsequent application being presented after the lapse of three years from the date of the decree was barred by limitation.

Dulichand Bhudar v. Bai Shivkor, (1890) I. L. R., 15 Bom., 242, followed.

* Appeal from Order No. 37 of 1898, against the order of A. E. Staley, Esq., District Judge of Hooghly, dated the 3rd of December 1897, affirming the order of Babu Nalini Nath Mitter, Munsif of Howrah, dated the 30th of August 1897.

† [Art. 179, Cl. (4) :—

Description of Application.	Period of limitation.	Time from which period begins to run.
For the execution of a decree or order of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure, section 230.	Three years; or where a certified copy of the decree or order has been registered, six years.	(Where the application next herein-after mentioned has been made) the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution, of the decree or order.]

THIS appeal arose out of an application for execution of a decree. One Amrita Lall Sadookhan obtained a decree for recovery of possession of certain immoveable property, as well as for costs, on the 15th March 1891. On the 10th December 1894, the decree-holder applied for execution of the decree in respect of the costs. In that application the decree-holder stated that he would apply for delivery of possession of the land afterwards. No objection was taken by the judgment-debtor as to the procedure adopted by the decree-holder, and the amount was realized. On the 21st April 1897, the present application for execution of the decree for delivery of possession of the land was made, and the judgment-debtor objected to it, on the ground that it was barred by limitation, inasmuch as the decree-holder did not execute the whole decree which he ought to have done when he applied for the execution of decree for costs in 1894. The Court of First instance over-ruled the objection and allowed execution to proceed.

On appeal to the District Judge the decision of the first Court was upheld.

Against this decision the judgment-debtor appealed to the High Court.

Babu Kuruna Sindhu Mookerjee and Babu Purna Chandra Shome, for the Appellant.

Babu Brojo Lal Chuckerbutty, for the Respondents.

The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows:—

Maclean, C.J.—The first objection taken by the appellant is that the present application for execution of the decree is [890] out of time. I do not think it is. The decree was for costs and for delivery of possession of certain immoveable property. The decree was made on the 15th March 1891, and an application for execution of the decree in respect of the costs was made on the 10th December 1894. The application for execution, on the face of it, distinctly stated that the decree-holders would afterwards apply for delivery of possession of the land. No objection was taken by the judgment-debtor at the time to this method of procedure on the part of the decree-holder, or that he ought not to be allowed, for execution purposes, to split up his decree, or rather execute it piecemeal. Execution for costs was proceeded with, and the amount realised. The present application for execution of the decree for possession of the immoveable property was made on the 21st April 1897, and the judgment-debtor contends that the whole decree, not having been executed when the decree-holders in December 1894 took out execution for costs, the present application for recovery of possession is too late. I do not think it is. The application for execution for the costs was one to take some step in aid of execution, and seeing that the judgment-debtor raised no objection at the time to the decree being executed piecemeal—not, I admit, a desirable way of executing a decree—it does not now lie in his mouth to say that that application was not in accordance with law. This view is in accordance with that expressed by the Bombay High Court in the case of *Dulichand Bhudar v. Bai Shivkor*, (1890) I. L. R., 15 Bom., 242.

The first point fails.

As regards the other two points, *viz.*, that the property is not properly described, and that the decree is incapable of execution, I do not propose to say anything more than that I agree with the view taken of them by both the lower Courts. The appeal must be dismissed with costs.

Banerjee, J.—I concur.

S. C. G.

Appeal dismissed.

[891] ORIGINAL CIVIL.

The 14th June, 1899.

PRESENT :

MR. JUSTICE STANLEY.

Nistarini Dassi

versus

Nundo Lall Bose and another.

Fraud—Pleading Fraud—Power of Court at instance of innocent party to treat decree of another Court obtained by fraud as a nullity—Jurisdiction—Administration suit—Acts of mal-administration regarding immoveable property outside jurisdiction—Power of Court to set aside leases of immoveable property outside its jurisdiction—Leave to sue—Letters Patent, High Court, clause 12—Misjoinder of causes of action—Code of Civil Procedure (Act XIV of 1883), section 44, Rule A.

An innocent party may be allowed to prove in one Court that a decree obtained against him in a different proceeding in another Court of concurrent jurisdiction was obtained by fraud, and if the Court be of opinion that such decree so obtained in the other Court cannot stand it has jurisdiction to treat that decree as a nullity and render its effect nugatory.

In an administration action the fact that amongst other things leases of immoveable property granted by the executors to themselves are sought to be set aside on the ground that such leases are acts of mal-administration does not make the action one for the recovery of immoveable property, and leave under section 44* Rule A is not necessary. If the High Court has jurisdiction to entertain such an administration action the fact that the property comprised in the leases complained of is wholly outside the limits of its ordinary original civil jurisdiction does not preclude it from setting aside such leases, and leave for that purpose under clause 12 of the Charter is not necessary. The Court assumes jurisdiction in regard to immoveable properties situate outside the jurisdiction in cases where it can act *in personam* either to compel the owner to give effect to legal obligations into which he has entered or to a trust reposed in him.

Where the suit is one to administer the assets of a deceased person, and in the claim various dealings by the executors of the estate are complained of as acts of mal-administration and sought to be redressed, such dealings do not constitute separate causes of action, and such a suit is not multifarious.

ONE Rai Mohendra Nath Bose died on 16th August 1874, leaving him surviving his widow, the plaintiff Nistarini Dassi, his mother Thakurani Dassi, his sister Kadumbini Dassi, and two brothers, Nundo Lall Bose and Pashupati Nath Bose. Mohendra Nath by his will, dated 9th August 1874, bequeathed one-third of his estate to his brother Nundo Lall Bose, one-third [892] to his brother Pashupati Nath Bose, and, after bequeathing various legacies and annuities, including one of Rs. 100 per month to his widow Nistarini Dassi, directed that the surplus income of the remaining one-third

Only certain claims to be joined with suit for recovery of land. * [Sec. 44 A. :—No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, or to obtain a declaration of title to immoveable property, except—

- (a) claims in respect of mesne profits or arrears of rent in respect of the property claimed,
- (b) damages for breach of any contract under which the property or any part thereof is held, and
- (c) claims by a mortgagee to enforce any of his remedies under the mortgage.]

should be applied in the purchase of Government securities, the interest whereof was to be paid to his widow Nistarini Dassi for her life, and after her death such securities were to go to the person or persons who might then be the heir or heirs of the testator. Mohendra Nath Bose appointed his brothers, Nundo Lall Bose and Pashupati Nath Bose, and one Kali Churn Bhattacharji, executors of his will.

Probate of the will was taken out by Nundo Lall Bose and Pashupati Nath Bose, on 4th September 1874. Kali Churn Bhattacharji did not take out probate of the will, nor did he take any part in the administration of the testator's estate.

By an Indenture, dated 24th May 1877, and made between Nundo Lall Bose and Pashupati Nath Bose of the first part, the same persons, as the executors of the will of Mohendra Nath Bose, of the second part, Kadumbini Dassi and Thakurani Dassi of the third part, Nundo Lall Bose and Pashupati Nath Bose, in their private capacity and in their capacity as executors, purported to convey all their property to Kadumbini Dassi and Thakurani Dassi, as trustees to hold it subject to certain trusts declared in the Indenture.

In 1889 a reference was made to certain arbitrators, who by an award, dated 16th July 1889, purported (*inter alia*) to partition the family property. The award was signed by Nundo Lall Bose, Pashupati Nath Bose, Thakurani Dassi, Kadumbini Dassi, and the plaintiff. After the award was made Nundo Lall Bose applied to the Subordinate Judge at Alipore to make the award a decree of Court, the plaintiffs amongst others being made a party to such application. A petition, bearing amongst others the signature of the plaintiff, was filed in that Court, consenting to the application, and the award was made a decree of Court by the Subordinate Judge at Alipore, the decree being dated the 12th September 1889. In accordance with the award Nundo Lall Bose and Pashupati Nath Bose, as executors of the will of Mohendra Nath Bose, purported to grant, with the privity [893] and concurrence of the plaintiff, two *mukurrari* leases, one to Nundo Lall Bose, and the other to Pashupati Nath Bose, of certain immoveable property allotted by the arbitrators to the residuary estate of Mohendra Nath Bose. Both leases were dated 1st March 1891, and both bore the signature of the plaintiff.

The plaintiff, who was thirteen years old when her husband Mohendra Nath Bose died, brought this suit as the widow and heiress of her husband against Nundo Lall Bose and Pashupati Nath Bose in their private capacities and as the executors of the will of her husband, and Kadumbini Dassi, the surviving trustee of the deed of trust of 24th May 1877. In her plaint the plaintiff alleged that her signature had been obtained by the defendant Nundo Lall Bose, to various documents in connection with the reference, the award, the decree made on the award, and the leases, without her knowing the nature and meaning of such documents, and that she had had no independent legal advice with respect to such documents. She charged the defendants, the Boses, with various breaches of trust in their conduct as executors, and in addition to asking for the construction of her husband's will and the administration of his estate and for accounts from the defendants, the Boses, she prayed that the deed of trust, the award, the decree made on the award, and the leases, be declared to be fraudulent and void as against her, and in no way binding upon her, and so far as they purported in any way to deal with her husband's residuary estate, be set aside and cancelled. At the filing of the plaint leave to institute the suit in the High Court under clause 12 of the Charter had been obtained on the ground that the plaintiff's cause of action arose partly within and partly without the local limits of the ordinary original civil jurisdiction of that Court.

The defendants, Nundo Lal Bose and Pashupati Nath Bose, filed separate written statements. Kadumbini Dassi did not enter appearance to the suit. In his written statement Nundo Lal Bose admitted that the plaintiff had had no independent legal advice, but took several preliminary objections to the suit. He pleaded (a) that in so far as the suit sought to set aside the decree of the Alipore Court the High Court had no jurisdiction to entertain it; (b) that as the immoveable property covered by the leases was [894] wholly outside the local limits of the ordinary original civil jurisdiction of the High Court, the suit, in so far as it sought to set them aside, did not lie in that Court, and it had no jurisdiction to entertain it; (c) that the suit was bad for multifariousness, misjoinder of causes of action and parties, and for joinder of claims against the defendants, the Boses, as executors of the will of Mohendra Nath Bose, and against them personally, in that it wrongly joined claims for the construction of the will and the administration of the estate of Mohendra Nath Bose with claims to avoid the trust deed, award, decree, and leases; (d) that all the *cestuis qui trustent* under the trust deed ought to be parties to the suit; (e) that on account of the award the claim for the construction of the will of Mohendra Nath Bose, as regards any rights of the plaintiff thereunder, was *res judicata*; (f) that the suit included causes of action in respect to moveable property and to immoveable property, and as no leave had been obtained under section 44, Rule A of the Civil Procedure Code the suit was not maintainable; (g) that as part of the immoveable property the subject matter of the suit was outside the ordinary original civil jurisdiction of the High Court, and as no leave had been obtained in respect thereof under clause 12 of the Charter, the suit was not maintainable in that Court.

When the suit came on for hearing Counsel for the defendant Nundo Lal Bose took these preliminary objections by way of demurrer, and the following preliminary issues were framed:—

1. Has this Court jurisdiction in this suit to set aside the decree of the Subordinate Judge of Alipore, dated the 29th August 1889?
2. Is that decree binding on the plaintiff?
3. Has this Court jurisdiction under the Charter to set aside leases of immoveable property outside the local limits of its ordinary civil jurisdiction?
4. Is the plaintiff entitled in the absence of all the persons beneficially interested under the deed of trust, dated 24th May 1887, to a declaration that it is fraudulent and void as against her, and to have it set aside as against her?
5. Can the plaintiff maintain this suit without having [895] obtained leave under section 44, Rule A of the Code of Civil Procedure?

Is the suit defective by reason of misjoinder of different causes of action?

The *Officiating Advocate-General* (Mr. J. T. Woodroffe), Mr. W. C. Bonnerjee, Mr. Dunne, Mr. J. G. Woodroffe, and Mr. K. S. Bonnerjee, for the Plaintiff.

Mr. Hill, Mr. O'Kinealy, Mr. Chackravarti, and Mr. B. C. Mitter, for the Defendant Nundo Lal Bose.

Mr. Jackson, and Mr. Allen, for the Defendant Pashupati Nath Bose.

Mr. Hill.—The first point that arises is whether, when *A* and *B* are parties to a decree, *B* in a subsequent suit can impeach that decree on the ground of its being fraudulent and ask for it to be treated as a nullity. A decree cannot be treated as a nullity until it is set aside. It would impede justice, if while a Court was executing its decree another Court of concurrent jurisdiction was deciding that the decree was a nullity. A decree can only be set aside by a bill impeaching it in the Court which pronounced that decree.

In *Mussel v. Morgan*, (1790), 3 Bro. Ch. C., 73 (78), the only question decided was that a decree obtained by fraud cannot be set aside by a petition, but the remarks of the Lord Chancellor dismissing the petition clearly show that when a suit is brought to set aside a decree obtained by fraud, it must be brought in the Court which passed the decree complained of. *Aushootosh Chandra v. Tara Prasanna Roy*, (1884) I. L. R., 10 Cal., 612 (614). *Meadows v. Kingston*, (1775) 2 Amb., 756 (762), shows the difference between a stranger and a party to a decree. A stranger cannot set aside the original decree, and is therefore allowed to impeach it in a subsequent proceeding, but a party to a decree must go to the Court which passed it. Kerr on Frauds, pp. 326-327. I am not aware of any case in which a party was allowed to set aside a decree in a subsequent proceeding in another Court. [STANLEY, J., referred to the case of **[896]** *Priestman v. Thomas*, (1884) L. R., 9 P. D., 70, 210.] In *Bandon v. Becher*, (1835) 3 Cl. & Fin., 479 (509), the person seeking to impeach the decree was not a party to it. Lord BROUGHAM's language at p. 509 of that report, though very vague, must be taken to refer only to the facts before him: the person in that case seeking to impeach the decree was not a party to the suit, but a remainderman. [STANLEY, J.—Suppose A and B, parties to a suit, collude to defraud C, an infant also a party, and get a guardian *ad litem* who is in league with them appointed for C and obtain a decree and thereby defraud C. Do you say C cannot go behind that decree?] No, he may do so, but not in another Court. Besides an infant in that case is not really a party. The guardian *ad litem* does not really represent him if he is in league with others to defraud him. But an adult is in a totally different position, *Flower v. Lloyd*, (1877) L. R., 6 Ch. D., 297 (302). The old practice was to file a bill in the Court in which the original decree was passed to set aside the decree. To ask this Court to set aside the decree would be treating this Court as a Court of Appeal from the Alipore Court: *Allen v. McPherson*, (1847) 1 H. L. C., 191, (224, 234); (1841) 5 Beav., 469. *Priestman v. Thomas*, (1884) L. R., 9 P. D. 70, 210, does not touch the point I am dealing with, namely, that one Court will not set aside the decree of another Court of concurrent jurisdiction. [STANLEY, J.—Surely setting aside a decree in its entirety and declaring it not binding as regards a particular individual are two different things.] As far as that individual is concerned it would be setting aside the decree *quoad* him. In the case of a party he must go to the Court which passed the decree. In *Priestman v. Thomas*, (1884) L. R., 9 P. D., 70, 210, the Court of Chancery only set aside the compromise. [STANLEY, J.—Was not the effect of that to set aside the whole proceedings? What did the Probate Court do when the parties came back?] The Court set aside the decree as the Alipore Court can in this case. It would be a great scandal if the Alipore Court could execute the decree, while his [this?] Court was setting it aside, and neither Court could stop the **[897]** other. In *Solomon v. Abdool Aziz*, (1879) 1 C. L. R., 366, it was held that as the former suit was had in this Court, and proceeded to a decree, and as the principal portion of the prayer was to set aside the decree, this Court alone had jurisdiction. [STANLEY, J.—Referring to *Shelden v. Patrick*, (1854) 1 Macq., H. L. C., 607, my recollection of that case is that it is there stated that any Court, however inferior, may go behind a decree even of the House of Lords, if such decree has been procured by fraud.] The question is as between whom? It may be by a person not a party, but not by a party. Persons not parties may treat the decree as a nullity, but parties to it may not. *Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy*, (1882) I. L. R., 6 Bom., 703 (707). The Court will have to deal with the question as to what effect the Evidence Act has on this. See Evidence Act, section 44, *Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy*, (1882) I. L. R., 6 Bom., 703 (714, 715); Phipson on Evidence,

p. 382, and Stephen's Digest on Evidence, p. 55, article 46. Till the decree is set aside it cannot be treated as a nullity between the parties. It would be a monstrous position, if a person who had obtained a decree by fraud, should be allowed to set up that fraud in a subsequent proceeding. But the words in section 44 of the Evidence Act seem wide enough to admit of this being permitted. The Evidence Act, however, does not of itself confer any rights. In *Shedden v. Patrick*, (1854) 1 Macq., H. L. C., 607, there was no real suit and no real representation of the infant; the guardian *ad litem* colluded with the other party to defeat the infant. With regard to jurisdiction there is a distinction between setting aside a decree and enquiring into the proceedings of another Court. *Gunnesh Pattro v. Ram Nidhee Koondoo*, (1872) 22 W. R., 361, has no bearing on this case. There the Revenue Court, into whose proceedings the Civil Court made an enquiry, had no jurisdiction to entertain a suit for title. A decree that is still subsisting and has not been set aside cannot be treated as a nullity by a party to it. *Bansi Lal v. Ramji Lal*, (1898) I. L. R., 20 All., 370; *Morrison [898] v. Morrison*, (1838) 4 My. and Cr., 215 (228). In Taylor on Evidence, p. 1132, section 1713, it is stated that a party can apply to the Court which passed the decree to vacate it. Can the plaintiff, being a party to the suit in the Alipore Court, claim in this suit to treat the decree in that suit as a nullity? *Unnoda Dabee v. Stevenson*, (1874) 22 W. R., 290; *Hoghton v. Fidley*, (1874) L. R., 18 Eq., 573.

In *Priestman v. Thomas*, (1884) L. R., 9 P. D., 70, 210, the Court had no reason to enquire into the compromise, the plaintiffs simply withdrew their opposition. The Alipore Court by its decree has turned the award into a decree of Court. The Probate Court did not by granting probate make the compromise a decree of Court. In the suit in the Alipore Court the award has become merged in the decree. In this case, while the Alipore Court's decree stands, this Court cannot treat it as a nullity. The fraud in *Priestman v. Thomas*, (1884) L. R., 9 P. D., 70, 210, was the forgery. The fraud here is not the award but the way in which it was obtained.

The leases were from the defendants to themselves, but the plaintiff was a party to them. Under those leases, the defendants, the Boses, are in possession. To set aside the leases brings the plaintiff into possession. This is a suit for possession, and therefore a suit for land. It cannot be said that, although this is an administration suit, the plaintiff is entitled to sue for land outside the jurisdiction without leave. *Jairam Narayan Raje v. Atmaram Narayan Raje*, (1880) I. L. R., 4 Bom., 482. Though she does not ask for possession the result is to take the possession from one and give it to another. Has this Court ever attempted to set aside a lease of lands outside its jurisdiction? (STANLEY, J.—In a case of a lease of land by a trustee to himself your proposition is that if the lands are outside the jurisdiction you cannot bring a suit in this Court to set aside the lease although the trustee is subject to the jurisdiction of this Court?) Yes, it is a suit for the declaration of title. A Court of Chancery will not make a declaration of title to lands outside its jurisdiction. [899] It may take away a personal right, such as right of redemption. It is submitted that this Court cannot compel the defendants to re-assign the leases. *Delhi and London Bank v. Wordie*, (1876) I. L. R., 1 Cal., 249, (262); *In re Hawthorn*; *Graham v. Massey*, (1883) L. R., 23 Ch. D., 743. In *Kellie v. Fraser*, (1877) I. L. R., 2 Cal., 445 (463), the question of title did not arise. So far as this suit seeks to set aside the leases, it is a suit affecting the title of land, and is therefore a suit for land. The relief sought

cannot be granted in this suit, without leave under the Charter, and the plaintiff cannot now ask for leave.

As to the question of nonjoinder, this is a case between the *cestuis qui trustent* themselves; a trustee cannot represent them. Section 437 of the Civil Procedure Code does not apply to a case like this. See rules of the Supreme Court, Order XVI, rule 8. *Hamond v. Walker*, (1857) 3 Jur. N. S., 686; *Read v. Prest*, (1854) 1 K. & J., 183; all the *cestuis qui trustent* must be joined, or that portion of the claim must be struck out. The defendant Kadumbini Dassi has executed a release and is no longer a trustee.

A suit to set aside a deed of trust is a purely personal matter and stands on a totally different footing from a suit for the general administration of an estate. There are different parties concerned, and two such claims cannot be joined in one suit. The plaintiff in this suit is seeking to have her title declared to immoveable property acquired subsequent to the death of her husband, and to the premises, No. 13, Mohendra Bose's Lane, on behalf of her husband's estate, also to recover personal property said to have been misappropriated by the executors. She cannot join such claims, except with the leave of the Court. Such leave must be obtained before she brings her suit. She cannot bring her suit first and then make it good by obtaining leave afterwards. Civil Procedure Code, section 44, rule (a): *Lutifunmissa Bibi v. Nazirun Bibi*, (1884) I.L.R., 11 Cal., 33; *The Oriental Bank Corporation v. Gobind Lall* [900] *Seal*, (1883) I. L. R., 19 Cal., 604 (608). See the judgment of TREVELYAN, J., 21st May 1891, in *Soshi Bhusan Sreemani v. Kali Kristo Sreemani*, an unreported case, and *Pilcher v. Hinds*, (1879) L. R., 11 Ch. D., 905 (907).

The *Advocate-General*, *contra*.—I will deal with the objections in the reverse order in which they have been argued. This is in the nature of an administration suit, the object being the due administration of the estate, which was of Mohendra Nath Bose. Section 44, rule 4, deals with claims to moveable and immoveable property based on the same title. *Guyana Sambandha Pandara Sannadhi v. Kandasami Tamburan*, (1886) I. L. R., 10 Mad., 375 (506). That case I submit furnishes the law as to that section. In order to make out that section 44, rule 4 applies, the defendants have to make out that this is a suit for the recovery of immoveable property or declaration of title to immoveable property. It is submitted that it is not so. The Madras case shows that no leave is necessary, and there is no decision to the contrary. As regards leave having to be obtained at the time of filing of this suit, there is no such hard and fast rule. There is nothing to prevent the Court from granting the leave now. *Clark v. Wray*, (1885) L. R., 31 Ch. D., 68. The plaintiff says there has been mal-administration. Her title to both moveable and immoveable property is one and the same. Section 44, rule 4 does not apply to a case like this, where the title is the same and the wrong or infringement of right is the same.

With regard to the non-joinder of the *cestuis qui trustent* under the trust deed of 24th May 1877, there is nothing in the Indian Code analogous to order XVI, rule 8, Annual Practice, 1898. The defendant's case is that the trust deed has been wiped out, and by the parties interested in it. They say they have nothing to do with it. If that is so, well and good. But they have treated it to a certain extent as governing this suit. They say if you set aside the award and decree you revive the trust deed. If so, among whom would it be revived? If it is shown that the deed does affect the plaintiff's husband's estate, then she asks that it be [901] set aside so far as it does affect that estate. If the trust deed can be revived it may stand perfectly good as regards the trustees and the parties to it. But if it is shewn that it does affect the residuary estate, the plaintiff

says that it is an act of mal-administration, and asks that it be set aside so far as it is shewn to affect that estate. It is in no way necessary to have all the beneficiaries before the Court.

With regard to clause 12 of the Charter it is submitted that leave has been obtained, and the defendants do not say it was improperly obtained. Such leave having been obtained the Court now has jurisdiction to determine all the issues arising in this suit. *Jairam Narayan Raje v. Atmaram Narayan Raje*, (1880) I.L.R., 4 Bom., 482; *Prasannamay Dasi v. Kadambini Dasi*, (1868) 3 B.L.R., O. C., 85. The immoveable property in this suit is partly within and partly without the local limits. Leave was applied for and obtained.

The Bombay case was cited to show that where immoveable property was wholly without the local limits, leave could not be given, but that is wholly outside this case. Is this a suit for land? A suit for land has been construed as a suit for the possession of land. This is not a suit for the possession of land. The residuary estate of Mohendra Nath Bose and the legal title to it is vested in the defendants, the Boses, as his executors. Whatever property may in the course of the administration of that estate be found to belong to it will vest in them. There will be no change of title and no taking away the possession of any part of the estate from the persons in whom it is vested. In a suit of this nature the Court proceeds *in personam*. *Bagram v. Moses*, (1862) 1 Hyde, 284; section 16 of the Civil Procedure Code; *Juggodumba Dossee v. Puddomoney Dossee*, (1875) 15 B.L.R., 318; *Land Mortgage Bank v. Sudurdeen Ahmed*, (1892) I.L.R., 19 Cal., 358; *Kellie v. Fraser*, (1877) I.L.R., 2 Cal., 445; *Ramdhone Shaw v. Nobumoney Dossee*, (1865) Bourke, 218. This is not a suit for land. When the law allows a suit to be [902] brought in a particular Court, you cannot pick out a specific item in order to try to make out that the suit is not maintainable in that Court. As to the order which can be made with regard to these leases, the Court could declare them acts of mal-administration, and that they impede the due administration of the estate. The defendant may be directed not to set them up, or to execute a reconveyance. The possession of the lands will not be changed in any way, nor do we ask that it should be changed. With reference to the issue of jurisdiction what is the nature of this suit? I have submitted it is a suit for administration. The answer of the defendants is you can only get partial administration, as it has already been administered to a certain extent. They are setting up the decree and the award in answer to the plaintiff's claim. To go to the Alipore Court would only be delaying the evil day.

The question in *Solomon v. Abdool Aziz*, (1879) 4 C.L.R., 366 (369) was whether that particular plaint could remain on the files of this Court, and has no bearing on this case. It has not been suggested that it has been anywhere actually decided in England that an innocent party to a decree obtained by fraud cannot obtain relief except by bringing a suit to set aside the decree in the court which passed it. *Mussel v. Morgan*, (1790) 3 Bro. Ch. C., 73, is one of the class of cases deciding procedure. There was no question there as to the jurisdiction of any Court. The only question was could you come in by the cheaper method of a motion? In *Miralu Rahimbhoy v. Rehmoobhoy Habibbhoy*, (1891) I. L. R., 15 Bom., 594, the question was also one of practice not of jurisdiction. In neither of these cases did the question arise whether one Court could interfere with the decree of another Court. In *Aushootosh Chandra v. Tara Prasanna Roy*, (1884) I. L. R., 10 Cal., 612, the only question was whether the proper course was to proceed by review or by a regular suit. Fraud vitiates all proceedings. When a decree is set forward as a bar, it

may be shewn that it was obtained by fraud. [903] *Shedden v. Patrick*, (1854) 1 Macq. H.L.C., 607; *Price v. Dewhurst*, (1837) 8 Sim., 279 (304); *Bandon v. Beecher*, (1835) 3 Cl. & F. 479 (509). In the case of *Allan v. McPherson*, (1847) 1 H. L. C., 191 (209); (1841) 5 Beav., 469, the plaintiff brought his suit in Chancery, alleging that in the Ecclesiastical Court he had not been allowed to adduce evidence regarding undue influence on the testator. That case is quite distinct from this case. The only remedy for the plaintiff there was to appeal on the ground that evidence had been improperly rejected or accepted. The assistance invoked here is wholly different. To make that case applicable the defendants must show the plaintiff is seeking relief against the decree of the Alipore Court on the ground that it had improperly rejected or admitted certain evidence, which is not the case. *Flower v. Lloyd*, (1877) L. R., 6 Ch. D., 297, was a motion in the Appeal Court asking that Court to set aside the decree made by the Appeal Court after they had heard the matter. The Appeal Court said they had no original jurisdiction and were *functus officio*. When the matter came before the Appeal Court again [*Flower v. Lloyd*, (1878-79) L.R., 10 Ch.D., 327,] the only question to be decided was whether, owing to the alleged fraud of one of the parties, imperfect evidence had been adduced, and the Appellate Court held on the facts that no fraud had been practised. At no stage has that case any bearing on this. If evidence has been improperly admitted or rejected the proper procedure is to go to the Court of Appeal: but in this case the fraud the plaintiff alleges goes to the root of the matter, there being no real contest in the former proceeding; *Gunnesh Pattro v. Ram Nidhee Koondoo*, (1874) 22 W. R., 361; *Unnoda Dabee v. Stevenson*, (1874) 22 W. R., 290; *Mewa Lall Thakur v. Bhujhun Jha*, (1874) 13 B. L. R., App. 11: 22 W. R., 213. The cases cited under section 295 of the Code of Civil Procedure have a useful bearing on this point. It has been decided that when an application has [904] been made by a decree-holder it is competent for the Court executing the decree to enquire whether the holders of decrees for money are holders of real decrees; *In re Sunder Dass*, (1844) I. L. R., 11 Cal., 42, and *Chhaganlal v. Fazarali*, (1888) I.L.R., 13 Bom., 154. The Court has power to see whether a holder of a decree for money has obtained it *bonâ fide* or by fraud; *Subramanian Patter v. Panjamma Kunjamma*, (1881) I. L. R., 4 Mad., 324; *Chogalal v. Trueman*, (1883) I. L. R., 7 Bom., 481; *In re South American and Mexican Co.*, (1895) L. R., 1 Ch., 37 (47); *Huddersfield Banking Co. v. Lister and Son*, (1895) L. R., 2 Ch., 273 (281).

An order or decree passed by consent may be set aside formally or treated as of no account, if it can be shown that the compromise upon which the consent decree was passed has been entered into by mistake. Was the plaintiff a party to the suit? Was she sufficiently and properly represented in the case? The argument proceeds on the facts stated by us, and that is that the plaintiff, a *purdah* lady, knew nothing of these matters; she was admittedly without independent legal advice.

As to the position of *purdah* women—*Manohar Das v. Bhagabati Dasi*, (1867) 1 B. L. R., O. C., 28, and *Kanai Lal Jowhari v. Kamini Debi*, (1867) 1 B. L. R., O. C., 31, note,—it is a recognised rule that *purdah* ladies must be most carefully protected. It is admitted in this case that the plaintiff had no independent legal advice; *Ashgar Ali v. Detroos Banco Begum*, (1877) I. L. R., 3 Cal., 324; *Buzloor Rulceem v. Shumsoonnissa Begum*, (1867) 11 Moo. I. A., 551 (585), *Behari Lal v. Habiba Bibi*, (1886) I.L.R., 8 All., 267.

The Court has power, and if the facts the plaintiff alleges are proved, will set aside and treat as a nullity the Alipore Court's decree so far as the plaintiff's

husband's estate is affected. The Court has full power to entertain the suit. *Kali Prosanno Ghose v. [905] Rajani Kant Chatterjee*, (1897) I. L. R., 25 Cal., 141. In this connection it may be noted that although section 522 of the Civil Procedure Code lays down that no appeal shall lie against a decree passed on an award, except in so far as it is in excess of or not in accordance with the award, yet it has been held that under certain circumstances an appeal does lie from such a decree, although it was not in excess of and was in accordance with the award.

Mr. Hill in reply.—An administration suit does not stand on any particular footing. If in the course of administration there is an attempt to include property, which another person claims, it is a suit for land. There can be no question of curtailing the Court's jurisdiction. Leave under section 44, rule A, can always be asked for. Whatever the form of the suit may be, if in fact you are seeking to recover property for an estate, it is, even if that matter be ancillary, nevertheless a suit for land. It is submitted leave under section 44, rule A, is necessary. Leave cannot be given afterwards. See the judgment of TREVELYAN, J., dated 21st May 1861, in the unreported case of *Soshi Bhusan Sreemani v. Kali Kristo Sreemani*. As regards land wholly outside the jurisdiction no leave can be obtained. The conveyances pass the title to such lands. The plaintiff joined in the conveyances. A *cestuis qui trust* can join with one trustee in conveying to another trustee to express his concurrence. As regards the deed of trust, if they say it affects them, the other *cestuis qui trustent* must be made parties. Kadumbini, the trustee, does not properly represent the other *cestuis qui trustent*.

As regards the main point my argument is not that a decree obtained by fraud cannot be set aside, but the question is by what Court? It is submitted that it must be by the Court which pronounced the decree. The case of *Huddersfield Banking Co. v. Lister and Son*, (1895) L. R., 2 Ch., 273, does not help the other side. It shows that a regular suit may be brought, but it does not say in what Court the decree must be set aside by an action, *Flower v. Lloyd*, (1877) L.R., 6 Ch. D., 297, and the question is in what Court does such an action lie. The [906] argument of inconvenience is one of a very strong character. Suppose this Court makes its decree, and the Alipore Court in a subsequent proceeding holds the decree to be fraudulent and therefore invalid, and this Court sends the decree down to the Alipore Court to be executed; the Alipore Court would have to execute it; and the inconvenience would be enormous.

Price v. Dewhurst, (1837) 8 Sim., 279 (304), dealt with foreign judgments. These stand on their own footing and are not on the same footing as judgments of a Court in this country. In this country the Courts derive their power from the English Crown. Section 14 of the Code of Civil Procedure recognizes this distinction. When a fraud has been practised on a Court and a decree is made in consequence of the fraud the decree is a nullity. But where there has been a real suit, and one of the parties has been defrauded, then the decree subsists until it is set aside. The argument on section 44 of the Evidence Act by the *Advocate-General* has never suggested itself to any one else; that section has never been so construed by any Court in the country. When you have to construe a section you have to see whether the construction sought to be put upon it will lead to an uprooting of the common principles of equitable jurisdiction or not. "Party" in that section must be read as meaning "party in that proceeding against whom the judgment is set up" and not "a party to the proceeding in which the judgment was made," otherwise there would be no such thing as *res judicata*.

The judgment of the Court was as follows :—

Stanley, J.—A number of preliminary objections to the maintenance of this suit have been raised by the defendant Nundo Lall Bose. The first and most serious of them is that this Court has no jurisdiction to set aside the decree of the Alipore Court. The plaintiff in her statement of claim alleges that the joint property of her late husband Mohendra Nath Bose, and of the first and second defendants, which was undivided joint family property, was partitioned by arbitrators under an agreement to which her consent was fraudulently obtained, and that by the fraud of the same defendants, a decree upon the award was subsequently passed by [907] the Subordinate Judge of the 24-Pergunnahs. In her claim, which is for the administration of the estate of the late Mohendra Nath Bose, the plaintiff seeks among other things a declaration that the award and the decree made thereon are fraudulent and void, as against her, and in no way binding upon her, and so far as they purport in any way to deal with the residuary estate of Mohendra Nath Bose that the same may be set aside and cancelled. For the purpose of the objection the defendant Nundo Lall Bose admits that the award and decree were fraudulently obtained, but his Counsel contends that, even admitting this, inasmuch as the plaintiff was a party to the decree-proceedings in the Court at Alipore, she is estopped by that decree, and cannot in this Court set it aside; that whatever relief she may be entitled to in respect of the decree, proceedings must be taken in the Court which pronounced the decree, and the relief which she claims cannot be granted in this Court, and that a bill to set aside a decree for fraud is in the nature of a bill of review, and must be filed in the Court in which the decree was obtained.

A number of text books and authorities have been cited, and as is not unusual opinions and decisions somewhat conflicting are to be found as to whether or not an innocent party would be allowed to prove in one Court that a judgment against him in another Court was obtained by fraud. It is clear that a guilty party would not be permitted to defeat a judgment by showing that in obtaining it he had practised an imposition on the Court; but can an innocent party, who may apply directly to the Court which pronounced the judgment to vacate it, apply to another Court to set it aside? The author of Taylor on Evidence suggests a doubt as to this, p. 1133, 9th edition, as does also the author of Kerr on Frauds. In the case of *Aushutosh Chandra v. Tara Prassanna Roy*, (1884) I. L. R., 10 Cal., 612, the Court held that for the purpose of setting aside a decree passed in pursuance of a compromise come to out of Court there were two available modes of procedure—(1) by suit; (2) by a review of the judgment sought to be set aside, the latter being the more regular mode of procedure. In that case WILSON, J., abstained from saying whether, if a suit were brought, [908] it ought to be brought in the Mofussil where the decree was obtained, or on the Original Side of this Court. The principle upon which judgments are set aside for fraud is tersely and forcibly stated by Lord Chief Justice DE GREY in *Meadows v. Kingston*, (1775) 2 Amb., 756, thus: "Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of Justice." In the *Queen v. Saddlers Company*, (1863) 10 H.L.C., 404(431), WILLES, J., says: "A judgment or decree obtained by fraud upon a Court binds not such Court nor any other, and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding." In applying this rule it matters not whether the impeached judgment has been pronounced by an inferior tribunal or by the highest Court of Judicature in the realm: in all cases alike it is competent for every Court, whether superior or inferior, to treat as a

nullity any judgment which can be clearly shown to have been obtained by manifest fraud, *Shedden v. Patrick*, (1854) 1 Macq. H. L. C., 607, *Fabula, non iudicium hoc est, in scena non in foro res agitur*. In the case of *Bandon v. Escher*, (1835) 3 Cl. & Fin., 479, where sales of estates had fraudulently taken place under decrees of the Court of Exchequer in Ireland obtained by collusion between the tenant-for-life, the mortgagor, the person in whose favour a charge had been created, and the purchaser, and where the interests of the tenant in remainder had not been protected, the Court of Chancery in Ireland on the tenant in remainder coming into possession granted him relief on a bill filed to redeem. The House of Lords affirmed that decree, and held that though the Court of Chancery cannot review or correct a decree of the Court of Exchequer, yet where such decree has been obtained collusively and fraudulently a party whose interests are affected by it may raise in the Court of Chancery either as actor or defender a question as to its validity. In this case the remainder man was not a party to the collusive proceeding; the tenant-for-life represented the estate of the mortgagor.

[909] In the case of *Flower v. Lloyd*, (1877) 6 L. R., Ch. D., 297, which is relied on by the defendant, where final judgment had been pronounced by the Court of Appeal dismissing an action with costs, it was held that the plaintiff was not entitled by motion in that action to apply to the Court of Appeal for leave for the rehearing of the appeal on the ground of the subsequent discovery of facts showing or tending to show that the order of the Court of Appeal was obtained by fraud practised on the Court below. That application was, however, refused on the ground that the Court of Appeal having once determined an appeal was *functus officio* and had no further jurisdiction in the matter. The Court, however, intimated that the plaintiffs had another proceeding open to them, namely, to bring an independent action to set aside the decree for fraud. Such action was subsequently brought before Vice Chancellor BACON, who gave judgment for the plaintiffs. On appeal the Court of Appeal was of opinion that fraud was not proved, and dismissed the action: *Flower v. Lloyd*, (1878-79) L. R., 10 Ch. D., 327. On this appeal a doubt was expressed by JAMES, L.J., as to whether or not an action was maintainable to impeach a judgment on the ground alleged by the plaintiffs, namely, falsehood and fraud practised upon an expert named by the plaintiffs and not objected to by the defendants for the purpose of inspecting the defendants' process for printing on metal plates.

"Where" said he (JAMES, L.J.) "is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arms length could be set aside by fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories."

BAGGALLAY, L.J., declined to express an opinion on this question, and stated that he should much regret to feel himself "compelled to hold that the Court had no power to deprive the successful but fraudulent party of the advantages to be derived from what he had so obtained by fraud." BRETT, L.J., [910] in a later case commenting on the doubts expressed by JAMES, L.J., in *Flower v. Lloyd*, (1878-79) L. R., 10 Ch. D., 327, says: "It seems to me the fraud alleged in that action was probably fraud on the part of certain servants of the party and not fraud brought home to the party himself; *Abouloff v. Oppenheimer & Co.*, (1882) L.R., 10 Q. B. D., 295 (307)." It is to be observed in passing that in the case of *Flower v. Lloyd*, (1878-79) L. R., 10 Ch. D., 327, the plaintiff and the defendant were at arms length fighting out a real suit.

In the present case the fraud alleged is the fraud of the first defendant in procuring the plaintiff's consent to the agreement to refer to arbitration and her consent to a decree upon the award, the true fact being that she was a mere puppet in the hands of the defendants and knew not what she was doing; that in fact the defendants deceived the Court by their fraudulent conduct. I have been referred by Counsel for the first defendant to the statement of Phipson in his useful book on Evidence, where he says: "Proof of fraud however can in general only be taken advantage of by a stranger to the judgment who is in no way privy to the fraud, and not by a party, since if the latter were innocent he might have applied to vitiate the judgment and if guilty he cannot escape the consequence of his own wrong." This no doubt, as a general proposition, is true. The judgment of a Court of competent jurisdiction is in general undoubtedly conclusive proof in subsequent proceedings between the same parties or their privies of the matter actually decided. Likewise foreign judgments *in personam* are, subject to certain grounds of impeachment, conclusive between parties and privies, yet it has been held that a foreign judgment obtained by the fraud of a party to the suit in the foreign Court cannot be enforced by him in an action brought in an English Court. In the case of *Abouloff v. Oppenheimer & Co.*, (1882) L. R., 10 Q. B. D., 295 (307), to which I have referred, it was held that even although the question whether the fraud had been perpetrated was investigated in the foreign Court, and it was then decided that the fraud had not been committed, the judgment would not be enforced in England. In that case to an [911] action claiming the value of goods and brought upon a foreign judgment whereby the defendants were ordered to return to the plaintiff the goods or to pay to her their value, the defence was that the judgment was obtained by the false representation to the foreign Court by the plaintiff that the goods were not then in her possession and by fraudulent concealment by the plaintiff from the Court that the goods then were in her possession. Lord COLERIDGE, C.J., commenting on the argument, that upon the pleadings in that case it must be taken that the allegations of fraud were brought before the foreign Court and that the foreign Court came to a conclusion against the defendants, and that whether this conclusion was right or wrong on the matters of fact the question of the plaintiff's alleged fraud could not be tried in the Courts of this country, says: "I may state the arguments for the plaintiff also in somewhat different words, namely, that although the Russian Courts at Tiflis were led to decide against the defendants through believing a false state of facts to exist owing to the fraud of the plaintiff, nevertheless the defendants are not now at liberty to say that the judgments against them were procured by that fraud. Certainly this contention seems unreasonable. Many authorities from *Meadows v. Kingston*, (1775) 2 Amb., 756, down to our own time have been cited during the argument, but not one of them throws a doubt on the broad proposition that where a judgment has been obtained by the fraud of a party to a suit in a foreign country, he cannot prevent the question of fraud from being litigated in the Courts of this country, when he seeks to enforce the judgment so obtained." BRETT, L.J., in that case says: "I cannot help thinking that the same doctrine which is now asserted with regard to a foreign judgment would be applicable to an action brought on a judgment obtained in an English Court other than the Court in which the action is brought. There may be a difference where it is sought to enforce by the process of a Court a judgment of that very Court, because if that judgment has been obtained by improper means the objection does not arise in a new action brought on that judgment, but it arises with regard to the process [912] of the Court to enforce a judgment

of its own. In a case of that kind it was perhaps formerly necessary to proceed in a Court of Equity in order to get rid of the judgment, but I doubt whether it was necessary, because, at least in my opinion, a Court of Common Law would have in the exercise of its own jurisdiction set aside a judgment procured from it by deception." And again: "With one exception none of the authorities cited before us in the least militate against our decision; they all seem to show that the fraud of a party to a suit is an extrinsic and collateral act which will vitiate the judgment. That exception is to be found in the doubts expressed by JAMES, L.J., with the assent of THESIGER, L.J., in *Flower v. Lloyd*, (1878-79) L. R., 10 Ch. D., 327. It seems to me that the fraud alleged in that action was probably fraud on the part of certain servants of the party, and not fraud brought home to the party himself. Moreover it was, as I understand, fraud committed, not before the Court itself at the trial of the action, but previously to the case being brought to a hearing before the Court. If it is to be taken that the doubts of JAMES and THESIGER, L.JJ., related to a fraud of a party to the action, committed before the Court itself for the purpose of deceiving the Court, I cannot, after having heard the present argument, agree with the doubts expressed by them. These doubts are not binding, and no decision as to the effect of fraud was pronounced by these Lords Justices in *Flower v. Lloyd*, (1878-79) L. R., 10 Ch. D., 327."

Again in the case of *Vadala v. Lawes*. (1890) L. R., 25 Q. B. D., 310, in which an action was brought by the plaintiff in the English Courts upon a judgment obtained in the Court of Palermo, the Italian action was brought upon certain bills of exchange, and the defence raised in the Italian action was that the bills were given in respect of gambling transactions by an agent of the defendant without his authority. It was held that the defendant might raise the defence that the judgment was obtained by the fraud of the plaintiff, even though the fraud alleged was such that it could not be proved without retrying the question adjudicated upon by the foreign Court. LINDLEY, L.J., in the course of his [913] judgment says: "But we now come to another and a more difficult question, and that is whether this defence can be gone into at all. There are two rules relating to these matters which have to be borne in mind, and the joint operation of which gives rise to the difficulty. First of all there is the rule which is perfectly well established and well known that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English Court or of a foreign Court does not matter; using general language, that is a general proposition unconditional and undisputed. Another general proposition which, speaking in equally general language, is perfectly well settled, is that when you bring an action on a foreign judgment you cannot go into the merits which have been tried in the foreign Court. But you have to combine those two rules and apply them in the case where you cannot go into the alleged fraud without going into the merits."

The case of *Carew v. Johnston*, (1805) 2 Sch. and Lef., 280, is an instructive illustration of the power which a Court of concurrent jurisdiction will assume in a matter of this kind. In that case a decree for foreclosure on sequestration in 1777 against an absent mortgagor known by the plaintiff to be of weak and feeble understanding and incompetent to conduct his affairs, where advantage had been taken in the account of the estate of the defendant and of his absence and of his having no one to manage his defence, and a sale had in 1780 in pursuance of such decree to the person under whose directions the proceedings were taken, were set aside as fraudulent on an original bill filed for that purpose by the heir of the mortgagor in 1785. Lord REDESDALE,

in the course of his judgment says : " On the whole I think it is impossible for me to hold the decree, which has been pronounced, conclusive on the party. If I should be of opinion that the party has brought himself completely within the saving of the Act I cannot pay any attention to the decree, I must treat it as a nullity ; but if I should think that he has not brought himself precisely within the saving of the Act by the allegation in his bill, then I must decide on the ground of unconscientious advantage being (by means of a Court of Justice) taken [914] of the imbecility and of the absence of this man, by which gross injustice has been done, and in fact a fraud practised on the Court. That would not be a ground for relieving against trifling errors or little inaccuracies, but it will be a ground for relieving against palpable injustice, such as could not have existed, if anybody had appeared for this man to state his rights, and the Court or the Master had entered into considerations of the subject, and acted upon the instruments which were the foundations of the proceedings."

The statement of LINDLEY, L.J., in *Vadala v. Lawes*, (1890) L. R., 25 Q. B. D., 310, is consistent with the view of Vice-Chancellor SHADWELL expressed in the case of *Price v. Dewhurst*, (1837) 8 Sim., 279, namely : " The Court by means of the injunction set aside the judgment of a foreign Court, and the ground on which the Court proceeded was that the foreign judgment had been obtained by fraud." " Now I take that to be quite consistent," says the Vice-Chancellor, " with the principles on which this Court acts ; and it is of no consequence where the judgment is given if it appear to have been obtained by fraud ; in every such case the Court will consider it as a nullity." In *Cole v. Langford*, (1898) 2 Q. B., 36, a judgment which had been obtained by fraud was set aside in an action brought for that purpose. In *Priestman v. Thomas*, (1884) L. R., 9 P. D., 70, 210, which was an action in the Probate Division, in which C. Thomas and E. Gunnell propounded an earlier and H. W. Priestman propounded a later will, the action was compromised and by consent a verdict and judgment were taken for establishing the earlier will. Priestman discovered that the earlier will was a forgery, and in an action in the Chancery Division, to which Thomas and Gunnell were parties, obtained the verdict of a jury to that effect, and judgment that the compromise should be set aside on the ground that the compromise was obtained by the fraud of Thomas and that the will was a forgery. In another action in the Probate Division for revocation of the probate of the earlier will, it was held affirming [915] the decision of the President of the Probate Division that Thomas and Gunnell were estopped from denying the forgery.

In the case of *Eshan Chunder Safoor v. Nundumoni Dasse*, (1884) I. L. R., 10 Cal., 357, it was held that where a person acting for a minor has fraudulently withdrawn the minor's suit under section 97 of Act VIII of 1859 without obtaining leave to bring a fresh suit, and by such withdrawal an absolute statutory prohibition is imposed on the minor from bringing a fresh suit, it was open to the minor to relieve himself from the consequences of the fraud in one of three ways : (1) by an application to the Court in the suit in which the withdrawal took place ; (2) by a regular suit to set aside the judgment founded upon the withdrawal ; or (3) by bringing a fresh suit for the same purpose and setting up the fraud as an answer to the statutory bar.

The latest English case on the subject is that of *Wyatt v. Palmer*, W. N. (20 May 1899) p. 74., where LINDLEY, L. J., says : " The proposition that an action would not lie to set aside a judgment by default on the ground that it had been obtained by fraud could not be sustained. There was no reason for saying that because the rules (that is the English Judicature rules) provided a summary

method of setting aside such a judgment, it was no longer possible to have recourse to the older method of setting it aside by action. This procedure did not interfere with the old jurisdiction of the Court of Chancery, under which a decree or judgment might be impeached on the ground of fraud by filing a bill."

Nowhere, however, is there to be found a clearer exposition of the law on this subject than in the judgment of Lord BROUGHAM in *Bandon v. Becher*, (1835) 3 Cl. & Fin., 479. "The first ground," says he, "of objection assigned appears to be one of form, but in fact it is one of substance, for it goes to the jurisdiction. It is said that the whole of these proceedings spring from a decree of the Court of Exchequer in Ireland, and that that decree being pronounced by a Court of competent jurisdiction, upon parties legally before it, [916] cannot now be questioned in another Court of co-ordinate jurisdiction; but if brought into dispute at all, should be brought into dispute in the Court where it was originally pronounced. I agree generally to the proposition, but I must add to it this one qualification, that you may at all times in a Court of competent jurisdiction,—competent as to the subject matter of the suit itself—where you appear as an actor, object to a decree made in another Court, upon which decree your adversary relies; and you may, either as actor or defender, object to the validity of that decree, provided it was pronounced through fraud, contrivance or covin of any description, or not in a real suit; or if pronounced in a real and substantial suit, between parties who were really not in contest with each other. That it is undeniably true that the Court of Chancery has no right to review a decree of the Court of Exchequer: that nothing but a Court of Appeal can give redress if such decree is erroneous, is clear, and indeed nothing can be more true than such a proposition; but it is equally true, that if the decree has been obtained by fraud it shall avail nothing for or against the parties affected by it, to the prosecution of a claim, or to the defence of a right. These two propositions are undeniably true; they are recognised in practice: they are independent of each other, and they stand well together." And then he quotes the language of Mr. Solicitor-General Wedderburn summing up all the authorities, viz.: "A sentence is a judicial determination of a cause agitated between real parties upon which a real interest has been settled; in order to make a sentence there must be a real interest, a real argument, a real defence, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit; there is no Judge, but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question."

I should refer to the case of *Allen v. Macpherson*, (1841) 5 Beav., 469; (1847) 1 H. L. C., 191, which has been strongly relied upon by the defendant's Counsel. That was the case of a will in which the Ecclesiastical [917] Court had exclusive jurisdiction. The Courts of Equity were bound to receive as testamentary a will in all its parts which had been proved in the proper spiritual Court, though in certain cases they might affect with a trust a particular legacy or residuary bequest which had been obtained by fraud. Also where probate has been obtained by fraud on the next-of-kin, Equity interferes and either converts the wrong-doer into a trustee in respect of such probate or obliges him to consent to a revocation of the grant of probate in the Court in which it was obtained (Mitford's Pleas of the Crown, 257, 4th edition). In *Allen v. McPherson*, (1841) 5 Beav., 469, (1847) 1 H. L. C., 191, the plaintiff unsuccessfully resisted the admission to probate of a codicil, which revoked a bequest to him on the ground that the codicil had been obtained by fraud. He thereupon filed a bill in Chancery to set aside the probate. A majority of

the House of Lords held that this was in effect an attempt to review the decision of a Court of Probate by the Court of Chancery, and that the proper course would have been to appeal to the Judicial Committee of the Privy Council. If there had been an appeal to the Privy Council the Judicial Committee of the Privy Council might have been put in conflict with the House of Lords, they both being Courts of the last resort.

Now, the fraud charged in this action being admitted for the purposes of this preliminary objection, let us see how the facts alleged which constitute the fraud stand. The plaintiff is a *purdanashin* lady, wife of the deceased Mohendra Nath Bose and sister-in-law of the first and second defendants. She lived with the defendants and Nundo Lall Bose had and exercised considerable influence over her. While she was living under his care and guardianship he both personally and through his son induced her to put her name to documents, the purport and effect of which were not explained to her, and none of which she understood. Nundo Lall Bose was a man who professed to lead a strictly religious life, and the plaintiff was under the belief that he was incapable of doing anything to hurt her interest. She had entire confidence in him, and relied upon his assurances that he would properly safeguard her rights, and that the documents and papers did not in any [918] way injuriously affect her interests. Her signature to the agreement to refer to arbitration and to the petition upon which the decree was granted was thus obtained, and she had no independent advice or assistance. The matters dealt with in the award were of an involved and intricate nature and required a knowledge of the circumstances of a large family estate.

In consequence of their helpless and dependent position the Courts of this country have found it necessary to extend special protection to *purdanashin* women. In the case of *Kanai Lal Jowari v. Kamini Debi*, (1867) B. L. R., O. C., 31 note, Mr. Justice PHEAR says at p. 32: "I may remark that I have more than once felt myself obliged to hold that a Hindu *purda*-woman is entitled to receive in this Court that protection which the Court of Chancery in England always extends to the weak, ignorant, and infirm, and to those who, for any other reason, are specially likely to be imposed upon by the exertion of undue influence over them. The undue influence is presumed to have been exerted unless the contrary be shown. It is, therefore, in all dealings with those persons who are so situated, always incumbent on the person who is interested in upholding the transactions to show that its terms are fair and equitable. The most usual mode of discharging this *onus* is to show that the lady had good independent advice in the matter, and acted therein altogether at arm's length from the other contracting party."

The position of the plaintiff, if her case be true—and I must assume for the purposes of this argument that her case is true—is much the same as that of the party of weak intellect referred to in the case of *Carew v. Johnston*, (1805) 2 Sch. and Lef., 280, whose helplessness was taken advantage of by the mortgagee and his estate foreclosed. No intelligent consent was given by her to the institution or carrying out of the award or to its embodiment in the decree of the Alipore Court.

If the plaintiff's case be true, I am of opinion that a decree so obtained cannot stand, and that this Court has jurisdiction if not [919] to set it aside at least to treat it as a nullity and render its effect nugatory.

There is another aspect of the question. Can it be said that there was, so far as the plaintiff is concerned, any real suit between her and the defendants? The matters in difference were between Nundo Lall Bose and Pasupathi Nath Bose. This is so recited in the agreement to refer to

arbitration. The plaintiff took no active part in the arbitration proceedings. She was not represented at them by any adviser. She lent her name to the proceedings by signing documents at the instance of the defendant Nundo Lal Bose, and without understanding their import. Was this a real proceeding between her and the defendants, or was it a sham? An interesting case having a bearing on this question is the case of *Girdlestone v. Brighton Aquarium Co.*, (1878) L. R., 3 Exch. D., 137. In that case the defendants kept open the Brighton Aquarium on a Sunday, and so incurred a penalty under the Statute, 21 Geo. 3, chap. 49. One Rolfe, at the request of the defendants, their object being to protect themselves from all actions in respect of penalties, brought an action against the Company, at the same time verbally agreeing that the defendant Company should be at liberty to make any use they pleased of the action, and that he would not issue execution or claim penalties. Judgment was obtained in Rolfe's action. In a subsequent action by Girdlestone against the Company for penalties, the Company pleaded in bar the previous judgment, and the plaintiff replied that the judgment was obtained by fraud and collusion. It was held that the first judgment was obtained by covin and collusion, and that such a fictitious judgment is no judgment at all to affect the rights of third parties. In the Court of appeal [*Girdlestone v. Brighton Aquarium Co.*, (1879) L. R., 4 Exch. D., 107], it was held that the judgment recovered was no bar to an action for the same offence by a different plaintiff, by THESIGER, L.J., on the ground that it was procured by covin and collusion, by BRETT, L.J., on the ground that the judgment had been recovered in an action in which the defendants were in truth both plaintiffs and defendants, and by COTTON, L.J., on both grounds.

[920] In the course of his judgment BRETT, L.J., says: "The defect in the judgment which was obtained seems to me to have arisen from the over-caution of the defendant's solicitor. If he had asked the person Rolfe to bring the action, and if Rolfe had instructed a solicitor to bring the action, and he had brought it, although he had bound himself, as it is said, in honor not to insist upon the payment of the penalty, in the absence of a finding of any fraud by the jury. I should have thought that judgment was valid, and that it could not have been set aside under a plea of covin and collusion, because the plea of covin and collusion is not proved in its legal effect, unless the jury find there was something wrong in the mind of the parties who had agreed to the judgment. I should think the jury would have to find that there was something wrong in the minds of both the parties. The defendant's solicitor asked Rolfe to allow him, the defendant's solicitor, to bring an action against the defendants using Rolfe's name, and the supposed plaintiff did not exercise any judgment upon the action. He exercised no control. He did not instruct anybody, he did not become liable to anybody for what was done; he did not know of the course of the action, he did not, in fact, so far as I see, know whether the action was brought or not. The only thing that happened was that he was asked whether he would lend the defendant's solicitor his name in order that the defendant's solicitor might bring an action against the defendants. It shows to my mind that Rolfe never was a plaintiff, and that the only plaintiff in that suit was the defendant's Company. Therefore the defendant's Company were the plaintiffs in that suit, and they were also the defendants; therefore the judgment recovered in form was no judgment—no judgment which can be said to have been recovered by a third party."

It appears to me that there is some analogy between that and the present case. The plaintiff was in truth no party to the proceedings. So far as she

was concerned there was no matter of difference ; there was " no real argument, no real prosecution, no real defence, no real decision. *Fabula non iudicium hoc est, in scena non in foro, res agitur.*" I am of opinion, for the foregoing reasons, that the defendant's contention is wholly unsustainable.

[921] I now come to the other preliminary objections which have been raised.

It is objected that no leave under section 12 of the Charter can be obtained to set aside leases of property situate outside the jurisdiction of this Court, the suit being one for land outside the jurisdiction. This has reference to the allegation in the plaint that the defendants Nundo Lall Bose and Pasupathi Nath Bose made leases to themselves of portion of the estate of Mohendra Nath Bose, and to the claim that these leases were irregular, and as against the estate of Mohendra Nath Bose should be set aside. Mr. Hill contends that the relief so sought converts this suit into one partly for immoveable property, or at any rate for a declaration of title to immoveable property outside the jurisdiction. This is not so in my opinion. The suit is one for the administration of the real and personal estate of Mohendra Nath Bose, a portion of whose immoveable property is without the jurisdiction, while other portions are within the jurisdiction of this Court. The suit is merely to have this property administered under the direction of the Court, and for this purpose, if it be found that the trustees or executors have been guilty of misappropriation of assets or mal-administration of the estate, to compel them personally to make amends. This does not turn the suit into one for the recovery of immoveable property. If the trustees had assigned some of the properties to a stranger, and recovery of the property from such stranger had been sought in the action, a question of jurisdiction might arise ; but here it is the executors, in whom the property was vested by the will of the deceased, who are alone sought to be made responsible for an alleged act of mal-administration, namely, the granting of leases of part of the trust estate to themselves. Counsel for Nundo Lall Bose points out that the plaintiff was a party to the leases, and that this alters the complexion of the matter. It is true that she was a party to the leases, but she says that her concurrence was obtained by fraud of the defendants, and, if this be so, the defendants cannot rely upon her concurrence. The Court assumes jurisdiction in regard to immoveable properties situate outside the jurisdiction in cases where it can act *in personam*, either to compel the owner to give effect to [922] legal obligations into which he has entered or to a trust reposed in him. All that is sought here is that the Court in administering this estate shall act *in personam* and compel the trustees and executors to fulfil their obligations. This objection, therefore, in my opinion is unsustainable.

The next objection is that the plaintiff's claim to set aside the trust deed of 1877 is bad on the ground of non-joinder of the parties beneficially entitled under the deed. The surviving trustee is a party to the action, as are also two beneficiaries, namely, the defendants. This deed purports to deal with the estate of Mohendra Nath Bose, but is very obscure in its language. It may be necessary for the Court to determine whether or not the estate is affected by it, and possibly it may be necessary hereafter to direct an independent action to be brought to have it set aside. I fail to see, however, that there is any substance in the objection as to non-joinder now raised.

The next question is that leave under section 44 of the Code has not been obtained to join the several causes of action. Such leave, in my opinion, is entirely unnecessary. There are not several causes of action ; the suit is one to administer the assets of a deceased person, and the fact that in the

claim acts of mal-administration are complained of, and sought to be redressed, does not render it multifarious.

In the case of *Pointon v. Pointon*, (1871) L. R., 12 Eq., 547, where three out of four testator's children, residuary legatees (the fourth being out of the jurisdiction) filed a bill against their mother, the tenant-for-life, and their uncle (who had carried on business in partnership with their father) and who were executrix and executor and trustees of the will, alleging that the uncle had possessed himself of and employed the estate of the testator and had occasioned great loss to it; that he had mismanaged the partnership business; that he intended to get in and to apply the outstanding debts to his own use; and that he had bought at a valuation a portion of the estate, but had not paid the purchase-money; and praying for accounts of the estate of the testator, and of what the uncle had or but for his wilful default and neglect might have received; [923] and that he might be charged with what was now due from him in all respects, and with all losses occasioned by his mismanagement, and for a receiver and for an injunction, a demurrer by the uncle for multifariousness and for want of parties was overruled.

The frame of that suit is not unlike that of the present suit.

In the course of his judgment the Vice-Chancellor says: "Next, as to the question of multifariousness, I think that there is no more in the objection on that ground than there is in that for want of parties. There are three analogous vices to which bills in equity are subject—misjoinder of plaintiffs, misjoinder of defendants, and multifariousness or misjoinder of subjects of suit. It is the last which is imputed to this bill. Multifariousness, properly so called, exists when one of the defendants is not interested in the whole of the relief sought, as the old form of the demurrer for multifariousness shows. Misjoinder of subjects of suit is where two subjects distinct in their nature are united in one bill, and for convenience sake the Court requires them to be put in two separate records. The case of *Salvidge v. Hyde*, (1821) Jacob, 151; 5 Mad., 138, in which the bill was for the administration of a testator's estate, and to set aside a sale made of part of it by the executor, was an instance of this. There the Court refused to allow the two subjects to be united, although the plaintiff was interested in each, and the defendants were liable in respect of each. In the present case the misjoinder is of this nature; the suit is first an ordinary suit against the devisees in trust and executors for the administration of the real and personal estates of the testator, and, secondly, the plaintiffs claim to have the partnership accounts taken as between the testator's estate and the defendant William Pointon the testator's partner and one of the executors and trustees; and then the suit is further complicated in this way: It is alleged that William Pointon has sold to himself or taken possession of the partnership assets at a valuation under a power in the will, and that he has not paid for them. It is suggested that not only is the price of such assets in his hands, but that he having sold to himself without payment, what was purported to be [924] sold remains assets of the testator till the price is paid. If a trustee, who is entitled to take property at a valuation has a valuation made, but does not pay the money, nothing passes; until the money has been paid he has no interest in the property. It is not necessary to consider whether the plaintiffs are or are not entitled to all the relief which they ask; but the question is whether the various subjects as to which relief is sought are such as if fit for discussion can be properly dealt with in one suit. This is, of course, a matter of discretion. The Court will not allow distinct subjects to be mixed up in one suit when it would be inconvenient to the Court or unfair to some one or more of the parties to it; but not one of these

considerations or of those mentioned in the case of *Campbell v. Mackay*, (1837) 1 My. and Cr., 603, applies to the present case."

Again in *Coates v. Legard*, (1874) L. R., 19 Eq., 56, the same principle is laid down.

I have now dealt with all the preliminary objections. As to the costs of the arguments it seems to me that it would be wrong to make the estate bear these costs, and I, therefore, order the first defendant to pay the plaintiff the costs of this argument and to abide his own costs. The costs of the second defendant I reserve.

Attorney for the Plaintiff: Babu Romesh Chandra Basu.

Attorney for the Defendant Nundo Lall Bose: Babu Hirendro Nath Dutt.

Attorney for the Defendant Pasupati Nath Bose: Messrs. G.C. Chunder & Co.

D. S.

NOTES.

[The Privy Council in *Benode Behari Bose v. Nistarini Dassi*, (1905) 33 Cal., 180 on appeal from (1902) 30 Cal., 369 (which itself was an appeal from this decision), held that the High Court had jurisdiction both to entertain the suit as framed and to set aside leases in the Mofussil fraudulently obtained as alleged.

Upon the subject of jurisdiction, these decisions were prior to that of the Privy Council:— (1899) 23 Mad., 216; (1904) 26 All., 272; (1903) P.R., 37; (1903) 31 Cal., 233; (1901) 29 Mad., 239; (1903) 27 Mad., 157; (1904) 28 Mad., 216.

As regards fraud, see also (1902) 24 All., 242; (1902) 25 All., 48; (1901) 5 C.W.N., 559; (1907) 6 C.L.J., 404; (1912) 16 O.L.J., 552; (1910) 8 I.C., 1178 (Nagpur).]

[925] APPELLATE CIVIL.

The 28th April, 1899.

PRESENT:

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,

AND MR. JUSTICE BANERJEE.

Durga Charan Naskar.....Defendant

versus

Dookhiram Naskar.....Appellant.*

Pauper Suit—Application for leave to appeal as a pauper—Time of presentation of memorandum of appeal—Consent of the applicant to pay sufficient Court fee after the Statutory period of limitation—Sufficient cause—Limitation Act (XV of 1877), section 5—Civil Procedure Code (Act XIV of 1882), section 582A.

A suit was brought in *forma pauperis* on behalf of a minor represented by his next friend in the Court of the Munsif, and it was dismissed under some alleged compromise. An appeal was preferred to the District Judge within time, but the memorandum of appeal was insufficiently stamped. An application was also filed with the memorandum of appeal for leave to appeal in *forma pauperis*. At the time of the hearing of the said application objection having been taken by the respondent that the minor had become entitled to certain immoveable property, those representing the minor offered to pay proper Court fees on the memorandum of appeal within a month. The Court allowed that to be done in the presence of both parties

* Appeal from order No. 390 of 1898, against the order of Babu Balloram Mullick, Subordinate Judge of 24-Pergunnahs, dated the 28th of July 1898, reversing the order of Babu Boshi Kumar Ghose, Munsif of Alipur, dated the 2nd of September 1897.

and admitted the appeal. The Court fees were also paid within the time allowed. On an objection by the defendant, appellant in the High Court, that the appeal by the plaintiff in the Lower Appellate Court was out of time,

Held, that, inasmuch as the appeal was admitted by the District Judge without any objection from the defendant, the case came either under section 5 of the Limitation Act or under section 582 A of the Civil Procedure Code, and, therefore, the appeal was not out of time.

THIS appeal arose out of an action brought by the plaintiff, a minor, *in forma pauperis* for recovery of possession of certain immoveable property which was sold by his mother to defendant No. 1, on the allegation that the *kabala* executed by her was a fraudulent and collusive document, and that she had no legal necessity for the said sale. After the trial had gone on to a considerable length the suit was dismissed under some alleged compromise by [926] the Munsif on the 2nd September 1897. The decree was passed on the 13th September. Against this order an appeal was filed on the 25th September 1897 by a different guardian of the minor appointed under the order of the District Judge, but the memorandum of appeal was insufficiently stamped. With the memorandum of appeal an application was also filed for leave to appeal *in forma pauperis*. At the time of the hearing of this application before the District Judge, an objection having been taken on behalf of the defendant that the minor had become entitled to certain immoveable property, the guardian offered to pay the proper Court fees on the memorandum of appeal within a month. The Court allowed that to be done in the presence of both parties and admitted the appeal. The Court fees were paid within the time allowed. The appeal was transferred from the file of the District Judge to the Subordinate Judge. A preliminary objection was taken on behalf of the respondent to the hearing of the appeal on the ground that it was filed out of time. The Subordinate Judge overruled this objection, and on the merits he found in favour of the plaintiff and remanded the case to the Court below for proper trial.

Against this order of remand the defendant appealed to the High Court.

Dr. Ashutosh Mookerjee for the Appellant.

No one appeared for the Respondent.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.):—

Maclean, C.J.—This is an appeal from a decision of the Subordinate Judge of the 24-Pergunnahs, dated the 28th July 1898, and the only point discussed before us is that of limitation, in other words, was the appeal out of time?

The following are the admitted facts. The decree in the suit, in which the present appellant, a minor, suing by a next friend and *in forma pauperis*, was plaintiff, was passed on the 13th September 1897, and the suit under some alleged compromise, was dismissed. The memorandum of appeal was filed on the 25th September 1897, and the memorandum was stamped, but not [927] sufficiently stamped. With this memorandum was filed an application on behalf of the appellant for leave to appeal *in forma pauperis*. There appears to have been some delay, or perhaps negligence, on the part of those acting for the minor in bringing on this application, and it was not heard until the 23rd December 1897, when notice was ordered to be served upon the defendants, including the present appellant. Notice was served, but they did not appear until the 12th March 1898, when they alleged that the infant had become entitled to certain immoveable property, and that consequently he ought not to be allowed to prosecute the appeal *in forma pauperis*. The matter came on for hearing on the 21st March 1898, before the District Judge, when those

representing the minor, not desiring, possibly, to contest the allegation as to the infant having property, offered to pay the proper Court fees on the memorandum of appeal within a month, and, in the presence of both parties, the Court allowed that to be done, and admitted the appeal, and the Court-fees were actually paid on the 19th April 1898.

It is now said that the appeal is out of time, and that it must be taken to have been filed as on the date when the Court-fees were actually paid, i.e., on the 19th April 1898, which would be out of time, and not on the 25th September 1897, when the memorandum of appeal was filed.

There is some conflict of view upon the point in the reported cases in the various High Courts. The appellant is supported by the cases of *Abbasi Begam v. Nanhi Begam*, (1896) I. L. R., 18 All., 206 (208), and *Balkaran Rai v. Gobind Nath Tiwari*, (1890) I. L. R., 12 All., 129 (144), and also relies upon the case of *Duncan v. Bhoyro Prosad*, (1895) I. L. R., 22 Cal., 891. The respondent is not represented before us, but the case of *Bai Ful v. Desai Manorbhai Bhavanidas*, (1897) I. L. R., 22 Bom., 849 (855), has been referred to by the learned Vakil for the appellant as a distinct authority in his favour, whilst possibly he may place some reliance upon the principle of the Privy Council case of *Skinner v. Orde*, (1879) L. R., 8 I. A., 126 : I. L. R., 2 All., 241. But having regard [928] to the particular circumstances of this case, I scarcely think it is necessary to go into these cases. We are here dealing with the case of a minor not of an adult litigant. A minor of tender years—in the present case it does not appear what his age is, though it is said he is near his majority—can know nothing about his property, and those acting for him may not know much more. Here the minor had been allowed to conduct the suit *in forma pauperis*, and there is nothing to show that those acting for him knew that he had come into any property when the appeal was presented. It is not unreasonable that his advisers, seeing he had been allowed to sue in the first Court *in forma pauperis*, may have supposed that the same liberty would be given as regards the appeal, and that the memorandum of appeal was insufficiently stamped on this view. Again, the District Judge has admitted the appeal without any objection from the present appellant. No objection was then taken that the appeal ought not to be admitted on the ground that it was out of time. Under these circumstances it must, I think, be taken that the District Judge thought that the appeal ought to be admitted, and that a case had been made out under section 5 of the Limitation Act of 1877 for its admission, or that it came within the purview of section 582A of the Code of Civil Procedure. Under these circumstances I am not disposed to hold that the appeal was out of time. The present appeal must be dismissed.

Banerjee, J.—I am of the same opinion. The only point urged before us is that the appeal before the Lower Appellate Court was barred by limitation. The ground upon which the learned Vakil for the appellant contends that that appeal was barred is, that the appeal was originally presented upon an insufficiently stamped paper, along with an application for leave to appeal *in forma pauperis*, and the deficiency in the Court fee stamp was not supplied until after the time for appealing had expired.

I do not consider this contention sound. For, though the Lower Appellate Court had not, under the present law, the same power that a Court of Appeal had under section 371 of Act VIII [929] of 1859, of allowing an applicant for leave to appeal *in forma pauperis*, after the application was rejected, a reasonable time for preferring the appeal on a proper stamp, it had power, under section 582A of the present Code of Civil Procedure, to grant such

reasonable time, when the insufficiency of the stamp upon the memorandum of appeal was caused by mistake on the part of the appellant. It had power also under section 5 of the Limitation Act to admit the appeal out of time if there was sufficient cause shewn for the delay. And the question is, whether it can be said that, in the present case, the insufficiency of the stamp was caused by a mistake on the part of the appellant, or whether it can be said under the circumstances of the case that there was sufficient cause shewn for the delay.

Now this is how the facts stand. The appellant in the Court below, who is a minor represented by his next friend, and who was the plaintiff in the first Court, was allowed to sue *in forma pauperis* in that Court. He preferred the appeal on an insufficient stamp, along with an application for leave to appeal *in forma pauperis*; an objection was taken by the other side against his being allowed to do so, on the ground of his having acquired some property subsequent to the institution of the suit; he then offered to put in the necessary Court fee; and time was allowed to him to do so. The insufficiency of the stamp upon the memorandum of appeal was evidently caused in this instance by the appellant thinking, erroneously as it now turns out to be, that he was entitled to appeal *in forma pauperis*, and I do not see any reason why a case like this should be deemed not to come within the scope of either section 582A of the Code of Civil Procedure or of section 5 of the Limitation Act. As I understand those provisions of law, they are evidently intended to cover a case like this, as well as other cases, where the insufficiency of the stamp upon the memorandum of appeal is due to mistake, or where there is other good and sufficient cause for not presenting an appeal in proper form in time. For if the case of an unsuccessful application for leave to appeal *in forma pauperis* were held to be outside the scope of these provisions, the result will be this, that, however honest the impression of an applicant for leave to appeal *in forma pauperis* [930] may be, that he ought to be allowed to appeal as a pauper, unless his application is either granted or rejected before the time for appealing expires, his appeal will be altogether barred by limitation and he will have no chance of preferring an appeal upon a proper stamp. It would be unreasonable to hold that every applicant for leave to appeal as a pauper must anticipate the decision of the Court, and that he must lose his right to appeal altogether unless he can be sure that his application for leave to appeal as a pauper will be granted. The case, therefore, comes either under section 582A of the Code of Civil Procedure or under section 5 of the Limitation Act.

It was lastly argued that the Lower Appellate Court has not found that the insufficiency of the stamp on the memorandum of appeal was in this case caused by mistake; or that there was sufficient cause shewn for the delay in presenting the appeal on a proper stamp. To that the answer is, that the appeal was admitted by the District Judge in the presence of the pleaders of both parties, and no exception was then taken. The Court admitting the appeal had power to do so under section 582A of the Code of Civil Procedure, or under section 5 of the Limitation Act; and under the circumstances of this case I do not think it is open to the appellant before us now to contend that, because the Lower Appellate Court has not expressly found that the insufficiency of the stamp was caused by mistake, or that there was sufficient cause shewn for the delay in presenting the appeal on a proper stamp, we are to hold that the appeal was barred.

There is no suggestion, nor can there be any, that the appeal was presented on an insufficient stamp, on behalf of the minor appellant, otherwise than under an honest mistake. We must take it that in admitting the appeal, the District

Judge exercised the power that he possessed under section 582A of the Code of Civil Procedure or under section 5 of the Limitation Act. The view I take is to some extent supported by the case of *Bai Ful v. Desai Manorbhai Bhavanidas*, (1897) I. L. R., 22 Bom., 849. The case of *Aubhoya Churn Dey v. Bissesswari*, (1897) I. L. R., 24 Cal., 889, cited for the appellant, is distinguishable from the present, as that was a case not of an appeal, but of a suit to which the provisions [931] of section 582A of the Civil Procedure Code, and of the second paragraph of section 5 of the Limitation Act do not apply. The same remarks apply to the case of *Abbasi Begam v. Nanhi Begam*, (1896) I. L. R., 18 All., 206, cited for the appellant. And as regards the case of *Balkaran Rai v. Gobind Nath Tiwari*, (1890) I. L. R., 12 All., 129, cited for the appellant, I would observe that that was decided before section 582A was enacted, and the facts of that case were such as excluded the application of the second paragraph of section 5 of the Limitation Act to it.

S. C. G.

Appeal dismissed.

NOTES.

[The following decisions were similar :—(1898) 22 Bom., 849 ; (1904) P.R., 84 ; (1904) 26 All., 329 ; (1911) 13 I.C., 73. See also (1910) 13 C.L.J., 78.]

A wide discretion is given to the Courts to permit the making up of deficiency in Court fees in sec. 149 of the Civil Procedure Code, 1908.]

[26 Cal. 931]

The 16th June, 1899.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE STEVENS.

E. Christien.....Plaintiff

versus

P. J. Delanney.....Defendant.*

Foreign Court, Jurisdiction of—Private International Law—Suit in British Court on foreign judgment—Territorial jurisdiction—British subject—Domicile—Nationality—Indian Evidence Act (I of 1872), section 38—Decree of Foreign Court, as Evidence in Court in British India—Civil Procedure Code (XIV of 1862), section 13.

A foreign Court has no jurisdiction over a person who is a British subject domiciled and residing in British India, who was not within the territorial jurisdiction of that Court either at the time when a suit was brought against him or previously, and who never subjected himself by any act of his, such as by appearing and defending the suit, to the jurisdiction of that Court. A decree passed by a foreign Court against such a person cannot be given effect to in a Court in British India.

Even if there be in such a case any special territorial legislation giving jurisdiction to the foreign Court, such legislation cannot be recognised by a Court in British India.

Nationality is determined by birth on the soil and not by citizenship by descent.

* Appeal from Appellate Decree No. 36 of 1898, against the decree of B. G. Geidt, Esq., District Judge of Tipperah, dated the 18th of November 1897, reversing the decrees of Babu Gopal Chunder Banerjee, Subordinate Judge of that District, dated the 26th of March 1895,

A statement contained in an unauthorised translation of the Code Napoleon as to what the French law is on a particular matter, is not relevant under section 38 of the Evidence Act.

There is a distinction between a case in which a defendant puts forward a foreign judgment as a bar to a suit under section 13 of the Code of Civil [932] Procedure, and a case in which a plaintiff seeks to enforce a foreign judgment. In the former, it may fairly be supposed that the parties submitted to the jurisdiction of the foreign Court.

Gurdial Singh v. Raja of Faridkot, (1894) I. L. R., 22 Cal., 222 : L. R. 21 I. A., 171, followed.

JOSEPH PIERRE DELANNEY, son of a French subject, who had come to the district of Comilla and acquired property in that district, was born and resided permanently in the same district. His father died in Comilla, but was buried at Chandernagore, a French territory. Joseph Pierre Delanney died in France, to which country he had proceeded for a cure, but his body was brought to Chandernagore and buried beside that of his father. He died on the 23rd December 1876, having made a will and a codicil, whereby he appointed his wife Eleanor Jessie Delanney, executrix, and Mr. J. S. Thorpe, executor thereof, and probate of the same was granted by the High Court at Calcutta on the 4th April 1877, to the said Eleanor Jessie Delanney alone. The testator left a son, Pierre Joseph Delanney, the defendant in the present suit, and two daughters. The son was born in Comilla, and has been permanently living there. He calls himself a British subject, and does not, it appears, even know the French language. Although it was provided in his father's will that he was to be appointed executor on his attaining his 22nd year, and although he was 29 years of age at the time of the suit, no probate was granted to him, and his mother was still acting as executrix, though he was managing the estate for her.

By the said will, the testator directed the payment of the sum of Rs. 100 per month to Madam Verjine Montie, a lady residing at Chandernagore, for her life. Madam Montie died in July 1893, and at that time there was due to her the sum of Rs. 2,500, on account of the annuity payable under the will.

The plaintiff, Emilie Christien, a resident of Chandernagore, brought a suit against the present defendant in the French Court at Chandernagore, for the said sum of Rs. 2,500, on the allegation that she was the universal legatee of the said Madam Montie under a will made by her. The defendant was served with a summons, but did not appear, and judgment was given against [933] him in his absence on the 16th September 1893 for the sum claimed with interest and costs.

Upon this judgment and decree passed by the French Court at Chandernagore, the plaintiff instituted the present suit in the Court of the First Subordinate Judge of Tipperah for recovery of the sum of Rs. 2,727-10-0 from the defendant. The defendant, amongst other things, contended that the Chandernagore Court had no jurisdiction to make the said judgment, which was not binding on him, and that no decree could be passed against him, as he was not yet legally in actual possession of the estate left by his father. The Subordinate Judge decreed the suit, holding that the French Court had jurisdiction to make the said judgment, which was binding on the defendant, but disallowed the interest decreed by the French Court.

Thereupon the plaintiff appealed to the District Judge against the order disallowing interest, and the defendant also preferred a cross-appeal on the main ground that the decree of the French Court was made without jurisdiction. The District Judge decreed the cross-appeal and dismissed the plaintiff's appeal, holding on the facts that "the defendant is a British subject, and

that therefore any jurisdiction which the French Courts assume to exercise over him while outside their territory, cannot be recognised in our Courts."

The plaintiff appealed to the High Court.

Babu Nil Madhub Bose, and Babu Shib Chunder Palit, for the Appellant.

The *Officiating Advocate-General* (Mr. J. T. Woodroffe), and Babu Baikant Nath Dass, for the Respondent.

In the course of the arguments, Babu Nil Madhub Bose relied upon articles 10, 15 and 17 of an English Translation of the Code Napoleon, by Robert Samuel Richards, Esq., M.A., Barrister-at-law, published in London, but not under the authority of the French Government.

The *Officiating Advocate-General* objected that, under section 38 of the Evidence Act, the book could not be referred to in Court.

[934] The judgment of the High Court (Macpherson and Stevens, JJ.) was as follows:—

This suit was brought to enforce a judgment which the appellant had obtained against the respondent in the French Court at Chandernagore. The District Judge, reversing the decision of the Subordinate Judge, dismissed the suit on the ground that the Chandernagore Court had no jurisdiction over the respondent, who is a resident of the Tipperah district.

The appellant and her aunt Madame Montie resided in Chandernagore, which is a French territory. Madame Montie was entitled under the will of the respondent's father to a monthly allowance of Rs. 100, and at the time of her death Rs. 2,500 was due to her on that account. The appellant, claiming to be entitled to that sum under her aunt's will, brought an action against the respondent in the Chandernagore Court and obtained the judgment which it is sought to enforce in the present suit. The respondent was served with a summons, but did not appear in the Chandernagore Court and the judgment was given against him in his absence.

The respondent never resided in the French territory at Chandernagore or subjected himself by any acts of his to the jurisdiction of the French Court established there, and he is, the Judge finds, a British subject domiciled in British India. It is found that the respondent's grandfather was a French subject, who came to Comilla, acquired property in the Tipperah district, and died there, but was buried at Chandernagore; that the respondent's father was born and permanently resided in the Tipperah district, but died in France, to which country he had proceeded for a cure, and that his body was at his own request brought to Chandernagore to be laid beside that of his father; that the respondent was born and lives permanently in Comilla, does not even know the French language, and calls himself a British subject.

On these facts we think the District Judge was right in finding that the respondent was a British subject domiciled in British India. In Westlake on Private International Law, 3rd Edition, page 323, it is said: "British nationality results from birth in the [935] British dominions, except in the case of a child born to an enemy father at a place in hostile occupation." Birth on the soil and not citizenship by descent determines the nationality. It is argued, however, that the respondent, although he may be a British subject, is still a Frenchman, who owes allegiance to the French Government, and that as such the French Court at Chandernagore had jurisdiction over him, wherever he resided. In support of the contention that he is still a Frenchman we were referred to a passage in an unauthorized translation of the Code Napoleon. This is not a work to which under section 38 of the Evidence Act we are in a position to refer, and no

authorised edition of that Code has been put before us. Assuming, however, that according to French law he is still a Frenchman owing allegiance to the French Government, he is domiciled in British India and is, according to the passage quoted from Westlake, a British subject. No authority has been shown us for the contention that the Chandernagore Court has jurisdiction over him, even if he is a Frenchman residing in British India, much less if he is a British subject domiciled there. We do not know what the French law on the subject is, as there is no evidence about it. The respondent was not within the territorial jurisdiction of the Chandernagore Court, either at the time when the suit was brought or previously, and if there is any special territorial legislation giving jurisdiction to the Chandernagore Court over persons permanently residing in foreign territory, it has not been brought to our notice, and it would, moreover, be a legislation which could not, we think, be recognized by a foreign Court within the jurisdiction of which the respondent resided.

Section 13 of the Code of Civil Procedure enacts that where a foreign judgment is relied on the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction. That section relates to matters of *res judicata*, and there is, we think, a distinction between a case in which a defendant puts forward a foreign judgment as a bar to a suit and a case in which a plaintiff seeks to enforce a foreign judgment. In the former it may fairly be supposed that the parties submitted to the [936] jurisdiction. But even if there is any presumption in the present case in favour of the jurisdiction of the Chandernagore Court, that has, we consider, been sufficiently rebutted by the facts found.

This case is undistinguishable from the case of *Gurdyal Singh v. Raja of Faridkot*, (1894) I. L. R., 22 Cal., 222 : L.R., 21 I. A., 171, in all respects save this, that in the latter case the defendant was unquestionably not a subject of the Foreign State, in the Court of which the judgment sought to be enforced was passed. We think that on the facts found in this case and in the absence of any evidence to prove that the French Court had jurisdiction over the respondent, there is no ground for drawing any distinction. It is difficult, moreover, apart from all other considerations, to understand how the Chandernagore Court had any jurisdiction over the cause. The obligation under which the money was payable was not incurred in the Chandernagore territory, and it cannot be said that the money was payable there merely because the donee resided there. We may add also that the decree is not one which a Court in British India could properly have made against the respondent. His mother was executrix of his father's will; she had taken out probate of it, was still living in the Tipperah district, and apparently acting as executrix. The respondent was only one of the beneficiaries under the will, and if he was assisting his mother in the management of the property or even actively managing it, he was not the person who was in law responsible for the debt.

It is enough, however, to confirm the judgment of the District Judge on the ground on which it proceeded, viz., that the Chandernagore Court had no jurisdiction over the respondent, or at least no jurisdiction which a Court in British India would recognize.

The appeal is dismissed with costs.

M. N. R.

NOTES.

Appeal dismissed.

* [See the Notes to 22 Cal., 222.

In (1901) 28 Cal., 641, the jurisdiction of English Courts over natives of British India was recognised as having the express authority of the British Parliament which has legislative authority over them. See, however, *Taruri Viswanatha v. Keymer* (1914) 27 M.L.J., 670,

As regards the case of enforcement of a foreign decree by execution upon transfer, see also 27 M.L.J., 535.

As regards what constitutes submission to jurisdiction, see also 37 Mad., 163.

As regards *Nationality* in its relation to jurisdiction of Civil Courts, see also 26 I.C., 367 (Madras).]

[937] *The 30th June, 1899.*

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE STEVENS.

Sadagar Sircar and another.....Principal Defendants

versus

Krishna Chandra Nath.....Plaintiff.*

Sale for arrears of Rent—Bengal Tenancy Act (VIII of 1885), Chapter XIV and sections 65, 188—Sale of occupancy-holding in execution of decree for rent by one of several joint landlords—Arrears of rent of separate share—Execution of decree for rent—Joint landlords—Transferability of occupancy-holding—Bengal Act VIII of 1869, sections 59, 64—Landlord and tenant—Want of saleable interest in judgment-debtor—Rights of purchaser.

The Bengal Tenancy Act does not contemplate or provide for the sale of a holding at the instance of one only of several joint landlords who has obtained a decree for the share of the rent separately due to him; such a sale must be under the provisions of the Civil Procedure Code, and would not carry with it the special incidents attaching to a sale under the Bengal Tenancy Act.

When, therefore, an occupancy-holding, not transferable by custom or local usage, is sold in execution of a decree obtained by one of several joint landlords for the share of the rent separately due to him, the purchaser acquires nothing by his purchase, the judgment-debtor having no saleable interest in the holding.

Beni Madhub Roy v. Jaod Ali Sircar, (1890) I. L. R. , 17 Cal., 390, followed.

Jamadal Huq v. Ram Das Saha, (1896) I. L. R. , 24 Cal., 143, distinguished.

Bhiram Ali Shaik Shukdar v. Gopi Kanth Shaha, (1897) I. L. R., 24 Cal., 355, and *Har Charan Bose v. Runjit Singh*, (1896) I. L. R., 25 Cal., 917 note, referred to.

AN estate in the District of Mymensingh, Pargana Hossain Shahi, belonged to five proprietors, and two persons, Nilmohun Nath and Nilkomul Nath, had an occupancy-holding in the estate. One Harro Kishore Dey held an *ijara* lease of a 13-anna and odd gunda share under some of the proprietors of the estate. He obtained a decree against the Naths for arrears of rent due on account of his share, and in execution of the decree the said [938] holding was sold and purchased by one Krishna Chandra Nath in the name of the said Harro Kishore, on the 28th January 1889, corresponding to the 16th Magh 1295.

The plaintiff Krishna Chandra Nath instituted three suits, out of which these appeals arise, in the Court of the Munsif of Kishoregunge, against several defendants, on the allegation that he was dispossessed on different dates by the defendants from three out of the seven plots of land composing the entire

* Appeal from Appellate Decree No. 1590 of 1897, against the decree of Babu Gopal Chunder Bose, Subordinate Judge of Mymensingh, dated the 15th of May 1897, reversing the decree of Babu Tincori Chowdhry, Munsif of Kishoregunge, dated the 15th of June 1896.

holding he had purchased, and of which he had obtained possession. Each suit related to one plot of land, and the dispossessions were alleged to have been effected, in suit No. 155, in Baisak 1297, in suit No. 156, in Bhadra 1298, and in suit No. 74, in Falgun 1300. The plaintiff prayed for declaration of his title and recovery of possession of the disputed lands. The suits were instituted on the 18th Bhadra 1302, corresponding to the 4th September 1895.

The contesting defendants in the several suits alleged, amongst other things, that the suits were not tenable in the absence of the landlords who were not made parties; that the *jote* was not saleable either by custom or by law; that the plaintiff's purchase was never acknowledged by the landlords; and that they, the defendants, held the lands under settlements made by the landlords. In suits Nos. 155 and 74, the further defence was made that they were barred by limitation. The plaintiff in the course of the pleadings further alleged that his purchase had been recognised by the landlords prior to the several dispossessions, and that they had received rent from him.

All the suits were dismissed by the Munsif, who held that although the suits were not barred by limitation, they must fail, as the plaintiff was unable to prove that he purchased in auction the right of the Naths to the lands in dispute, and that he was recognized by the landlords, as the occupancy-holding in dispute was not transferable by custom or usage, and as the landlords had not been made parties to the suits.

The plaintiff appealed to the Subordinate Judge of Mymensingh, who set aside the decrees of the Munsif and decreed the [939] suits on the grounds mentioned in the judgment of the High Court.

The defendants appealed to the High Court.

Babu *Dwarkanath Chakravarti*, and Baba *Joggopal Ghosa*, for the Appellants.

Babu *Gobind Chunder Day Roy*, for the Respondent.

The judgment of the High Court (**Macpherson** and **Stevens, JJ.**), was as follows:—

The respondent in each of these cases claimed a plot of land which formerly formed a part of the holding of persons called Naths who had a right of occupancy in it. The holding appertained to an estate, of which there were five proprietors having different shares. The *jaradar* of a 13-anna odd gunda share belonging to some of those proprietors got a decree against the Naths for the rent due on account of his share, and in execution of that decree the holding was sold on the 28th January 1889 (16th Magh 1295) and purchased, as the Subordinate Judge finds, by the respondent. The respondent said he got into possession of these plots and held possession as a recognised tenant till he was dispossessed by the appellant and others in one case in Bysack 1297, and in the other in Bhadra 1298. The suits were instituted on the 18th Bhadra 1302, but none of the landlords of the holding are parties to them. The appellants claimed to be in possession under settlements obtained from the landlords and denied the respondent's alleged possession or dispossession. They also said that the respondent having purchased a non-transferable holding had acquired nothing by his purchase; that the landlords were necessary parties to the suits; and that the suits not having been brought within two years of the alleged date of dispossession were barred by limitation under article 3, schedule III of the Bengal Tenancy Act.

The Munsif dismissed the suits, but the Subordinate Judge has reversed his decision and given the respondent a decree in each case, holding that the suits were within time; that the landlords were not necessary parties; and

that the respondent, although he purchased at a sale in execution of a decree obtained by one of several joint landlords for a fractional share of the rent, [940] purchased the occupancy-holding and got a good title to it. The correctness of his decision in all these points is now questioned.

We must take it that the Natha had no transferable right in the holding in question. The Munsif found this on an issue raised. The Subordinate Judge says the question is immaterial and does not deal with it, but we gather from his judgment that he did not intend to disturb the Munsif's finding, and it is not at all clear that the correctness of this was challenged. The case seems to have been argued on the assumption that the holding was not transferable by custom or local usage.

It is hardly necessary to cite authority for the general proposition that an occupancy-holding only becomes transferable by custom or local usage, but we may refer to the recent case of *Bharam Ali Shaik Shikdar v. Gopi Kanth Shaha*, (1897) I. L. R., 24 Cal., 355, in which a non-transferable holding was sold in execution of a decree for money, not rent, obtained by a creditor against the tenant. That case does not, however, touch the question now raised as to the effect of a sale of a non-transferable occupancy-holding in execution of decree obtained by one of several joint landlords against the tenant for the share of the rent separately payable to him in respect of the holding. If this was a sale under the Tenancy Act authorized by section 65 of that Act, the purchaser undoubtedly purchased the holding and got a good title to it. If it was not such a sale the purchaser is, it seems to us, in the same position as any other person who purchases at an auction-sale a property in which the judgment-debtor to whom it belonged had no transferable interest.

There may be cases in which all the persons under whom a raiyat holds land are not joint landlords within the meaning of the Tenancy Act, but this is not one of them, and no such question has been raised. The circumstances that the *jaradar* collected separately from the raiyats his share of the rent did not have the effect of creating a separate and distinct tenancy under him. The holding, notwithstanding that, continued to be one entire holding on all the joint landlords. This principle was recognised [941] in the recent case of *Hari Charan Dose v. Rungit Singh*, (1896) I.L.R., 25 Cal., 917, note, and there is apart from that case ample authority for it. Under the former Tenancy Act (Bengal Act VIII of 1869) an occupancy raiyat could be ejected from his holding in execution of a decree for arrears of rent due in respect of it. Sections 59 and 64 of the same Act made under-tenures which were transferable by the title-deeds or custom of the country saleable in execution of decrees for arrears of rent due in respect of them; but section 64 expressly provided that when such an under-tenure was sold in execution of a decree obtained by a fractional shareholder for money due to him on account of his share of the rent, it should be sold not under the provisions of the Act, but under the ordinary procedure of the Court, and that the sale should have all the incidents attached to such a sale. Section 65 of the present Tenancy Act prohibits ejectment for arrears in the case of a tenant who is a permanent tenure-holder, a raiyat holding at fixed rates, or an occupancy raiyat, and enacts that "his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon." Chapter XIV contains provisions for the sale of tenures and holdings in execution of such decrees, and undoubtedly, we think, relates only to sales of the kind authorized by section 65. This section makes no distinction between transferable and non-transferable holdings and tenures, and the Act contains no special provisions for the sale of a tenure or holding in execution of a decree obtained by one of several joint landlords for

money due to him in respect of his share of the rent of such tenure or holding. Section 188 enacts, however, that when there are several joint landlords they must all join in doing anything which under the Act a landlord is authorized or required to do. Reading this section, as we consider it must be read, in connection with section 65 and Chapter XIV, it follows that the sale authorized by section 65 is a sale of the tenure or holding at the instance of all the joint landlords in execution of decree obtained by them for the rent of it, and that the proceedings required to be taken under Chapter XIV must similarly be proceedings taken by all of them. The Act does not, we think, contemplate or provide for the sale [942] of a tenure or holding at the instance of one only of several joint landlords, who has obtained a decree for the share of the rent due to him. Such a sale must, it seems, be under the provisions of the Civil Procedure Code, which by section 143 are applicable to all suits under the Act except when declared inapplicable, and it would carry with it all the incidents attached to such a sale, and not the special incidents attaching to sale under the Act.

This view of the law seems also consistent with the general scope and policy of the Tenancy Act, which is to make all the joint landlords act together, and not to allow any one of them to act as if he was the sole landlord. The construction which the Subordinate Judge has put upon section 65 would lead to much litigation and many difficulties.

The decision of the Full Bench of this Court in *Beni Madhub Roy v. Jaod Ali Sincar*, (1890) I. L. R., 17 Cal., 390, has also an important bearing on this case. There a fractional co-sharer attached a tenure in execution of a decree which he had obtained for his share of the rent of it, and it was held that the attachment was not one contemplated by section 170 of the Tenancy Act. PETHERAM, C.J., said, citing section 188, "where landlords are seeking to take the benefit of this Act, they must act in concert, and where one of several co-sharers in a zemindari thinks fit to pursue his remedies to recover his share of the rent, he must pursue them under the ordinary law of the country, and independently of the Bengal Tenancy Act." It must follow that a sale in execution of such a decree is not a sale under the Act. We say nothing, it not being necessary, as to the possible effect of a decree obtained by one of several joint landlords in the presence of all of them for the entire rent of a holding or tenure.

The Subordinate Judge has cited as an authority in support of his view the case of *Jawadul Huq v. Ram Das Saha*, (1896) I. L. R., 24 Cal., 143, and it has also been referred to here. That was not a Full Bench case, but it was decided by a Bench of five Judges. All that was decided was that if one of several co-proprietors of an estate purchased an occupancy-holding, that occupancy-right ceased to exist by the operation of section 22, sub-section 2 of the Bengal Tenancy Act, [943] but that the holding was not annulled. That case has no application to the present one. It was never suggested in that case that the occupancy-holding, which had been sold in execution of a decree obtained by the purchaser for his share of the rent was not a transferable one.

We find then that this holding was not and could not have been sold under the provisions of the Tenancy Act in execution of the decree which the *ijaradar* had obtained against the tenant for his share of the rent. It was sold in the same way that any other property would be sold in the execution of a decree of a Civil Court, and as the judgment-debtor to whom it belonged had no transferable right, the purchaser acquired nothing by his purchase. It may be said of course that the *ijaradar* by causing the holding to be sold consented to the sale, but the consent of one of several joint landlords cannot

bind the others or persons claiming under them, and it is not even found that in such a matter and in this case the consent of the *ijaradar* would bind his lessors, some of whom, so far as we can gather from the confused facts, appear to be supporting the defendants.

We cannot on the facts as found interfere with the Subordinate Judge's decision on the question of limitation, but we must say that it is not easy to understand what really happened on the position of the parties with reference to the landlords, and also that he has dealt rather summarily with the evidence which was criticised at great length and disbelieved by the Munsif. The landlords are not necessary parties in the sense that the suit could not be tried in their absence, but if the defendants are in possession under a settlement secured from the landlords a decree against the defendants alone may not be of much use.

Although the plaintiff's title by purchase fails the Munsif says he claimed also under a settlement obtained from the landlords. This was considered at some length and found not to be proved. The Subordinate Judge has not gone into this part of the case. He found a title by purchase, and said that the question of recognition or non-recognition by the landlords was immaterial. Apparently, however, judging from what he says on the question of limitation, he considered that there had been some sort of recognition on the part of some of the landlords or their agents, [944] but by whom, or what this amounted to, it is impossible to say. We think the plaintiff is entitled to have his decision on this part of the case. If before any settlement was made with the defendants his tenancy under the purchase was recognized by all the landlords, or if a settlement was made with him by the landlords on the strength of his purchase, he may be entitled to a decree against the defendants who, the Subordinate Judge says, turned him out before they became themselves tenants. We think it right, however, to say that the mere "inducing some of the landlords' agents to receive rent" is not sufficient proof of recognition by the landlords, and that the question which we now direct to be tried must be decided on the whole evidence, the Court not being bound by the Subordinate Judge's decision or opinion on subordinate facts bearing on the question of limitation. We set aside the decree and remand the case for a decision on the question of title by recognition or settlement. As the appeal succeeds the appellant must get his costs in this Court.

M. N. R.

Appeal allowed : case remanded.

NOTES.

[This was followed in (1899) 3 C.W.N., 747 ; (1905) 10 C.W.N., 176 ; 4 C.L.J., 68.

See also (1904) 1 C.L.J., 500 ; (1901) 29 Cal., 54 ; (1910) 37 Cal., 687 ; 14 C.W.N., 779 ; (1910) 14 C.L.J., 620.

The Full Bench decision in *Dayamai v. Ananda Mohan Roy Chowdhri*, (1914) 42 Cal., 72, is the final and authoritative decision on the consequence of a transfer of occupancy holdings, after a full and exhaustive review of the case-law.]

[26 Cal. 944]

The 19th June, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,
AND MR. JUSTICE BANERJEE.

Amrita Lal Ghose.....Petitioner

versus

Shrish Chunder Chowdhry and others.....Opposite Party.*

Appeal—Indian Companies Act (VI of 1882), section 58—Appeal in a case where no issue as to title was raised.

An appeal lies from an order passed under section 58 of the Indian Companies Act (VI of 1882), although no issue has been directed upon a question of title.

THIS appeal arose out of an application made by one Amrita Lal Ghose under section 58 of the Indian Companies Act. The allegation of the petitioner was that he had purchased certain shares in the Mohesh Chunder Land Reclamation and Agricultural Improvement Company, Limited, from one Tara Podo Chowdhry, the executor and residuary legatee to the estate of the late Mohesh Chunder Chowdhry, in whose name the [945] shares stood; that he having applied to the Directors of the said Company to enter his name as a member and share-holder in the register of members kept by the said Company, they refused to do so, and hence this application was made. The Directors of the Mohesh Chunder Land Reclamation and Agricultural Improvement Company, Limited, contested the application mainly on the ground that the said Tara Podo Chowdhry, being only one of the executors of the will of the late Mohesh Chunder Chowdhry, had no power to transfer the shares without the consent of the other co-executor, who had served a notice on the Company and published a public notice denying the vendor's authority to do so. The District Judge declined to interfere and dismissed the application.

Against this order the petitioner appealed to the High Court.

Dr. Ashutosh Mookerjee for the Appellant.

Mr. B. C. Mitter, and Babu Mammatho Nath Mitter, for the Respondent.

Mr. B. C. Mitter, for the respondent, took a preliminary objection to the hearing of the appeal on the ground that no appeal lay, inasmuch as under section 58 of the Indian Companies Act no issue was directed upon a question of title.

The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows :—

Maclean, C.J.—On the preliminary question whether an appeal lies, I see no reason for confining the last sentence of section 58 of the Companies Act, 1882, to the case suggested by respondent's Counsel, namely, the case in which an issue has been directed upon a question of title. The words apply to the whole section. The case of *In the matter of the petition of Luchmee Chand*, (1882) I. L. R., 8 Cal., 317, was a case of an appeal, and it was not suggested that an appeal did not lie. I admit that is not an authority against the present respondent, as the point was not raised. In my opinion the appeal lies.

* Appeal from Order No. 71 of 1898, against the order passed by F. F. Handley, Esq., District Judge of 24-Pergunnahs, dated the 4th of December 1897.

Upon the merits, I think that, without deciding upon this appeal^{*} any question of title one way or the other, the learned [946] Judge in the Court below, in the exercise of his judicial discretion, was amply justified in refusing the application. He could only make the order asked for, if satisfied "of the justice of the case," and, I think, there was quite sufficient upon the undisputed facts to throw doubt upon that. In this view, it is unnecessary to go into the facts which are set out in the petition of the Directors of the Company—facts as to which there is apparently no substantial dispute. The Judge was right in refusing the application to register, and the question of title must be fought out in a regular suit. The appeal is dismissed with costs.

Banerjee, J.— I concur.

S. C. G.

Appeal dismissed.

[26 Cal. 946]

The 15th May, 1899.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE STEVENS.

Nil Kamal Mukerjee and others.....Plaintiffs

versus

Jahnabi Chowdhurani.....Defendant.

Civil Procedure Code (Act XIV of 1882), sections 13, 244—Question for Court executing decree—Execution of decree—Plea taken by defendant in separate suit—Res judicata.

When an issue arising out of the execution of a decree has not been raised and determined under section 244 of the Civil Procedure Code, there is nothing in that section to prevent a defendant, in a separate suit subsequently brought, from raising that issue in that suit.

Bhiram Ali Shah Shukdar v Gopi Kanth Shaha, (1897) 1. L. R., 24 Cal., 355, followed.

NILKAMAL MUKERJEE and Saroda Prosad Ganguli, plaintiffs Nos. 1 and 3, in the present suit, as trustees to the estate of the late Babu Dwarka Nath Tagore, brought a suit No. 82 of 1883, in the Court of the Subordinate Judge of Mymensingh, against the present defendant Jahnabi Chowdhurani and others for recovery of possession of lands which they alleged had reformed on the original site of *mouza* Argoyla, belonging to their zemindari, Dehi, Shahazadpore, and from which they had been dispossessed by the defendants. The plaintiffs obtained an *ex parte* decree which was in these terms :—

[947] " That the suit be decreed ; that the plaintiffs do obtain possession of the remaining portion of *mouza* Argoyla which the Civil Court Amin has marked in the map prepared by him, and get the cost of Court from the defendants, etc."

*Appeal from Original Decree No. 76 of 1898 against the decree of Babu Dwarka Nath Bhattacharjee, Subordinate Judge of Mymensingh, dated the 31st of December 1896.

The map, which was prepared by the Amin in suit No. 82 of 1883, did not make any allowance for the magnetic variation of the compass, and accordingly gave an incorrect boundary line of *mouza* Argoyla, represented by the blue dotted line in the map prepared in the present suit, the true (Revenue Survey) boundary line being represented by the red dotted line in the latter map. When, however, the Amin, in execution of the decree in suit No. 82 of 1883, proceeded to give delivery of possession to the plaintiffs, it struck him that his map was wrong and he asked instructions from the Court as to how he should proceed. Thereupon the Court passed the following order on the 5th February 1886:—

"It is needless now to discuss previous matters. The Amin shall do as he thinks proper, looking into the maps, other papers, as also the state of things on the spot. There is no necessity for any instructions from the Court."

The Amin, however, gave possession of some 148 and odd *bighas* of land, which lay outside the boundary line fixed by him. They were marked in the map prepared for the present suit by the letters A, B and C, lying beyond the blue dotted lines, but within the red dotted lines. Subsequently on the 10th June 1886, the Court passed the following order on the application of the plaintiff for the rectification of the map of the Amin.

"The decree holder's prayers for rectifying the former map of the Amin, according to which a decree has already been passed, cannot be granted in the Execution Department, but, as the decree-holder has taken possession of less quantity of land, I see no objection to the same."

It was not shown that these orders were passed, or that the execution proceedings were taken, in the presence of the defendant in the present suit or in that of any of her servants who knew that the plaintiffs were taking possession of lands not covered by the decree. On the other hand, in a suit for mesne profits brought by the present plaintiff in 1887, the claim in respect of this excess land was disallowed.

The present suit was instituted by the plaintiffs for recovery of possession of 613 and odd *bighas* of land including the afore-[948] said plots situated between the red and blue dotted lines in the Amin's map, being reformation on the original site of *mouzah* Argoyla, on the ground of recent dispossession.

The Subordinate Judge found that 496 and odd *bighas* of *mouzah* Argoyla were above water, but gave the plaintiff a decree for the recovery of possession of 391 and odd *bighas* of land only, deducting 104 and odd *bighas*, which he found was the area of the portions situated between the red and blue dotted lines in the Amin's map and marked by the letters A, B and C. As regards this area, the Subordinate Judge held that the plaintiffs' claim thereto was barred by section 13 of the Civil Procedure Code, and that section 244 of the same Code was no bar to the defendant raising such objection in the present suit.

Against this decree, the plaintiffs appealed to the High Court.

Babu Sarada Charan Mitter, Babu Prosanna Chandra Roy, and Babu Mohendra Coomar Mitter, for the Appellants.

Babu Basanta Kumar Bose, and Babu Kritanta Kumar Bose, for the Respondent.

The judgment of the High Court (MACPHERSON and STEVENS, JJ.) was as follows —

The facts of this case are fully and clearly stated in the judgment appealed from and need not be repeated. The question argued before us is purely one of law.

Shortly stated the case stands thus. In 1883 the appellants brought a suit against the respondent to recover certain land, including the plots A, B and

C, which form part of the land now in dispute. They obtained a decree for some of the land exclusive of those plots in May 1884. They executed the decree, and in execution they took possession, with the aid of the Court, and without any objection on the part of the respondent, of the plots A, B and C, which, as already stated, were not part of the land decreed, and omitted to take possession of a part of the land which was decreed. About a year after that the respondent dispossessed them of the whole of the land, of which they had taken possession, and the present suit is brought by the appellants to recover it.

[949] The question is whether the appellants can recover the plots A, B and C, which they unsuccessfully claimed in the previous suit, although with the aid of the Court they took possession of them in execution of the decree in that suit without any objection on the part of the respondent. The appellants' title to the land is found to be proved, but we consider that they cannot now rely on their original title, it being shown that their claim with regard to those plots was rejected in the suit of 1883. If they have any title at all, it is a title which must, in some way, have been since acquired.

The respondent says that section 13 debars the appellants from claiming those plots, which they unsuccessfully claimed in the suit of 1883. The appellants say that the respondent is estopped by section 214 from saying that this land is not part of the land decreed in that suit. Obviously it seems that the respondent's contention must succeed unless that of the appellants prevails.

Conceding that section 244 would debar the respondent from bringing a suit to recover this land, on the ground that, although it was not part of the land decreed in the suit of 1883, the appellants wrongfully took possession of it with the aid of the Court in execution of that decree, is there anything in that section which would debar the respondent who has recovered possession from raising such a question in a suit brought against her by the appellants? The scope and effect of the section was considered in the case of *Bhram Ali Shaik Shikdar v. Gopi Kanth Shikha*, (1897) 1 L. R., 24 Cal., 355. The view taken of it then was that, although it barred a suit brought for the determination of any of the questions referred to in it, it did not bar the trial of any issue involved in those questions, if the issue was raised at the instance of the defendant in a suit brought against him; and it was pointed out that section 244 differed from section 13 in this respect that the latter section barred not only the trial of a suit or issue, where the suit or issue had been previously heard and determined, but also the trial of an issue which should have been raised in a previous suit by either party. It is clear that the question now raised was not raised and determined under section 244; and we think [950] that, although the facts of the case which we have cited were different from the facts of the present case, the view which was taken of section 244 is correct. In our opinion the question not having been raised and determined under section 244, the defendant is not now debarred from contending that the plots claimed were not covered by the decree in the suit of 1883. The case is a hard one, as the action of the plaintiffs throughout has been straightforward and *bona fide*. On the other hand, although the respondent ought to have looked after her own interests in the execution proceedings, and although a servant of hers was present when possession was given to the appellants, the Subordinate Judge finds that there was nothing to indicate to that servant, who represented the respondent, that the appellants were taking possession of land which was not covered by the decree. It seems also that in a subsequent suit the appellants claimed mesne profits on account of these plots, but the

Court refused to allow it on the ground that the land was not part of the land decreed.

The decision of the Subordinate Judge, therefore, seems to us correct, and we accordingly dismiss this appeal with costs.

M. N. R.

Appeal dismissed.

NOTES.

[This was followed in (1903) 7 C.W.N. 607 ; (1904) 19 M.L.J. 1.]

[26 Cal. 950]

The 30th June, 1899.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE STEVENS.

Dukhada Sundari Dasi.....Plaintiff

versus

Srimonto Joardar and others.....Defendants.*

Benami Transaction—Certified purchaser—Civil Procedure Code (Act XIV of 1882), section 317—Sale in execution of a decree—Suit against heirs or mortgagee of the certified purchaser.

Section 317† of the Civil Procedure Code is no bar to a suit against any person claiming through or under the certified purchaser, such as his heir or mortgagee.

Buhuns Koonwur v. Lalla Buhoree Lall, (1872) 14 Moore's I. A., 496; 10 B. L. R., 159; 18 W. R., 157, and *Lokhee Narain Roy Chowdhry v. Kallypuddo Bandopadhyia*, (1875) L. R., 2 I. A., 154; 23 W. R., 358, referred to.

[951] *Raj Chunder Chuckerbutty v. Dina Nath Saha*, (1898) 2 C. W. N., 433, and *Theyyavelan v. Kochan*, (1897) 1 L. R., 21 Mad., 7, followed.

THE plaintiff, Dukhada Sundari Dasi, alleged that her late father, Srimonto Mondul, owned a holding in Mouzah Hukahara, Azimgunj; that in execution of a decree against the said Srimonto, the said holding was sold and purchased by the judgment-debtor in the name of one Sridhur Mondul; that Srimonto continued to enjoy the property; and that he subsequently took a loan from one Srimonto Joardar, the defendant No. 1, on usufructuary mortgage of the holding in dispute, the deed of mortgage being executed by the said Sridhur Mondul. The plaintiff further alleged that the amount due to the defendant No. 1 under the mortgage bond had been paid off out of the profits, and

* Appeal from Appellate Decree No. 625 of 1897, against the decree of Fred. B. Taylor, Esq., District Judge of Moorshedabad, dated the 13th of January 1897, reversing the decree of Babu Jogendra Nath Ghose, Munsif of Berhampore, dated the 10th of September 1896.

Bar to suit against purchaser buying benami. † [Sec. 317:—No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims.

Nothing in this section shall bar a suit to obtain a declaration that the name of the certified purchaser was inserted in the certificate fraudulently or without the consent of the real purchaser.]

accordingly instituted the present suit for a declaration that the late Srimonto Mondal was the owner of the immoveable property in dispute and for the recovery of possession of her share of the same to the extent of one-half of the property, the other half belonging to her sister Khokunmoni Dasi, defendant No. 5. The heirs of the deceased Sridhur Mondul were also made defendants in the suit, being defendants Nos. 2, 3 and 4.

The defence was that Sridhur Mondul was the real purchaser and not a *benamdar* of Srimonto; that the mortgage loan was contracted really by Sridhur; that the mortgage debt had not yet been paid off, and that at any rate the suit was barred by section 317 of the Civil Procedure Code.

The Munsif decreed the suit, but on appeal, the District Judge set aside the decision of the Munsif and dismissed the suit.

The plaintiff appealed to the High Court.

Babu *Srinath Das*, and Babu *Haran Chandra Banerji*, for the Appellant.
Babu *Madhabanand Basak* for the Respondents.

The following judgments were delivered by the High Court (MACPHERSON and STEVENS, JJ.):—

Stevens, J.—In the suit out of which this appeal arises, the plaintiff alleged that the property in question, which had originally [952] belonged to her father and had been sold in execution of a decree against him, had been purchased by him at the auction sale in the name of one Sridhur Mondul and had afterwards been mortgaged by him in the name of Sridhur Mondul to the defendant Srimonto Joardar. As against that defendant, she sought to recover possession of the properties in question on the allegation that the mortgage debt had been more than satisfied out of their profits. She also joined the heirs of Sridhur Mondul as defendants in order to establish as against them the *benami* character of the auction purchase made ostensibly by Sridhur, and consequently her own right as heiress to her father to the extent of one half of his estate.

One of the grounds of defence was that the suit was not maintainable in view of the provisions of section 317 of the Code of Civil Procedure. The Court of First Instance held that the suit was maintainable and decreed the plaintiff's claim, but the Lower Appellate Court, taking the contrary view, dismissed the plaintiff's claim, and hence she has preferred the present second appeal.

The question before us relates to the construction of the first sub-section of section 317 of the Code of Civil Procedure, which is as follows: "No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims."

Does the statutory protection afforded to the certified purchaser extend to a person claiming through or under him, as in the present case, his heirs and his mortgagee?

The Court of First Instance relied on the case of *Buhuns Koonwur v. Lalla Buhoree Lall*, (1872) 14 Moore's I. A., 496; 10 B. L. R., 159; 18 W. R., 157. The judgment of the Lower Appellate Court is not perfectly clear, but it would seem that the learned Judicial Commissioner overlooked the case as against the heirs of Sridhur Mondul and considered it only as against the mortgagee defendant. He says: "The defendant is in the position of Sridhur, and if no suit would lie against Sridhur or his representatives by inheritance, I do not see how a suit can lie against his representative by transfer."

[953] It would thus appear that the Judicial Commissioner, losing sight of the fact that he had to decide the question with regard to Sridhur's heirs, took for granted that it could not have been decided otherwise than adversely to them, and argued from thence that it must be decided adversely to the mortgagee.

I think that the weight of authority is against the assumption and the decision alike of the Lower Appellate Court.

In the case relied upon by the Court of First Instance the precise point now in question was not before their Lordships of the Privy Council for decision. The question in that case was whether the fact of a plaintiff's title being certified as auction-purchaser was conclusive by section 260 of Act VIII of 1859 (which corresponded to section 317 of the present Code of Civil Procedure) to debar the defendant who was in possession from pleading that he was the real purchaser, and that the purchase was made *benami* for him by the certified purchaser. The grounds on which that question was decided in the negative were that *benami* transactions were not *per se* illegal; that the enactment in section 260 of Act VIII was clear and definite; that there was nothing from which it could be inferred that more was meant than was expressed; that it was "confined to a suit brought *against* the certified purchaser;" and that the object which the framers of the Code appeared to have had in view was "to prevent judgment-debtors becoming secret purchasers at the judicial sales of their property and to empower the Court selling under a decree to give effect to its own sale without contention on the ground of *benami* purchase by placing the ostensible purchaser in possession of what it had sold, and of insuring respect to that possession by enacting that any suit brought against him on the ground of *benami* shall be dismissed."

That case seems to be so far in point in the case now before us in that (i) it lays down that section 260 of Act VIII must be construed strictly and literally, and (ii) what their Lordships regarded as the object of the section would not apply to the facts of a case like the present

The case of *Buhuns Koonwar v. Lalla Buhoree Lall* was [954] followed by their Lordships of the Judicial Committee in a somewhat similar case that of *Lokhee Narain Roy Chowdhry v. Kallypuddo Bandopadhyaya*, (1875) I.L.R., 2 I. A., 154; 23 W. R., 358, in which the earlier case was referred to as laying down among other things that section 260 of Act VIII "should be construed strictly and literally."

There is a case decided by the Madras High Court since the present case, was dealt with by the Courts below which is exactly in point. In the case of *Theyyavelan v. Kochan*, (1879) I.L. R., 21 Mad., 7, it was held that the protection given to a certified purchaser could not be transferred by him, and accordingly a person taking an assignment from him could not under section 317 of the Code of Civil Procedure object to the maintainability of a suit to recover the property purchased on the ground that the purchase was made *benami*.

There is also a recent decision of this Court in the case of *Raj Chunder Chuckerbutty v. Dina Nath Saha*, (1898) 2 C. W. N., 433, the principle of which is applicable to the present case, though the provision of law with which it dealt was not section 317 of the Code of Civil Procedure, but an analogous provision in the Revenue Sale Law, namely, section 36 of Act XI of 1859. It was held by a majority of two to one of the Judges who constituted the Bench which tried that case in appeal that the statutory protection afforded by section 36 to the certified purchaser at a revenue sale did not extend to his assignee. The two Privy Council cases noticed above were referred to, not as being

directly in point, but as indicating clearly that a section of the nature of section 36 of Act XI, of 1859 must be construed literally, and as throwing a light upon the principle applicable to the case then under decision. It was held that regard being had to the penal character of section 36, a Court construing it ought not to go beyond the strict letter of the language used, or to put a construction upon that language which would have the effect of materially extending the operation of the section. At page 447 of the report the learned Chief Justice says in his judgment: "In a section of this class it is, in my judgment, safer to [955] adhere to the words actually used than to import into the section words which are not there. The section ought to be construed strictly and literally. Doubtless this construction may lead to anomalies, *e.g.*, that the certified purchaser cannot be sued though his heir may, but the existence or possibility of such anomalies ought not, I conceive, to warrant us in reading the words otherwise than literally." These observations appear to me to apply with equal force to the case now before us.

On the whole, having regard to the authorities which I have noticed, I must hold that the present suit is not barred by the provisions of section 317 of the Code of Civil Procedure.

The decree of the Lower Appellate Court is set aside and the appeal is remanded for disposal on the merits. Costs will abide the result.

Macpherson, J.—I agree. In the case of *Raj Chunder Chuckerbutty v. Dina Nath Saha*, (1898) 2 C. W. N., 433, which has been referred to, I put a different construction upon the analogous provision in the Revenue Sale Law; but that construction was not adopted by the Appellate Bench, the decision of which I am of course bound to accept. There is certainly no ground for putting a wider construction on the terms of section 317 of the Civil Procedure Code.

M. N. R.

Appeal allowed ; case remanded.

NOTES.

[This was followed in (1900) 5 C.W.N., 341 (see also (1903) 8 C.W.N. 476) but dissented from in (1906) 31 Bom., 61.

In the C.P.C., 1908 s.c. 66 sub-clause (1), there is this change, that for the words 'the certified purchaser' in the former Code, the words *any person claiming title under a purchase certified by the Court in such manner as may be prescribed* have been substituted.

The decision in (1913) 19 I.C. 909 was under the C.P.C. 1882 and there, the Calcutta High Court followed this decision of 26 Cal., 950 (which was in accordance with 21 Mad., 7 ; 21 All., 196) in preference to 31 Bom., 61.]

[26 Cal. 955]

The 16th May, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Surja Narain Mukhopadhyas.....Defendant

versus

Pratap Narain Mukhopadhyas.....Plaintiff.*

*Compromise of suit—Effect of Compromise—Interest Act (XXXII of 1839)—
Interest on certain amount payable on the happening of an event and at
certain time—Sum agreed to be paid to defend a suit—Effect of
compromise of suit on liability to pay.*

[955] A brought a suit against B and C. B wrote a letter to C proposing that counsel should be engaged to defend the suit, and that C should contribute Rs. 900 only for it. C agreed to the proposal and consented to pay the amount within ten days. Counsel was engaged and Rs. 4,000 were paid to him. After several hearings the case was compromised. B then demanded from C the amount which he had promised to contribute, and also interest on it. C refused to pay and a suit was brought by B to recover the said amount with interest. C pleaded that he was not liable to pay the amount inasmuch as the case was compromised, and also pleaded that he was not liable to pay interest on it, as the debt was neither certain in amount nor payable at a certain time.

Held, that B was entitled to recover the amount as there was a promise by C to pay it on the happening of a certain event which had happened.

Held, also, that B was entitled to get interest on the amount, inasmuch as the debt was not uncertain, the date of payment was defined, and C knew that the contingency upon which he became liable had occurred.

THIS appeal arose out of an action brought by the plaintiff in the Court of the Subordinate Judge of Hooghly to recover a certain sum of money from the defendant, his younger brother. The allegation of the plaintiff was that in a suit to set aside a partition in which he and his brother, the defendant, were defendants, it was thought necessary to engage counsel. He wrote a letter to the defendant about this, and asked him to contribute Rs. 900 only, to which the defendant gave the following reply : " I think you ought to engage a counsel in suit No. 15 of 1892 in the Court of the third Subordinate Judge, Hooghly. I accept the proposal made by you for the counsel's fee, shall pay you Rs. 900 only, I shall be able to pay you that sum and not more for the counsel, if you so require I shall pay the money within ten days from this date." Counsel was engaged, and Rs. 4,000 were paid to him. The suit to set aside the partition came on for trial, and after several hearings it was compromised. The plaintiff then demanded from the defendant the money which he had promised to pay, and on his refusing to do so, brought the present suit for the recovery of the said amount with interest. The defence was that the plaintiff was not entitled to get the money, inasmuch as the suit was compromised, and that he was not entitled to interest, for the amount was neither certain nor payable at a certain time. The Court of First Instance overruled the objections and decreed [957] the suit. On appeal to the District Judge of Hooghly, Mr. A. E. Staley, the decision of the first Court was affirmed.

* Appeal from Appellate Decree No. 45 of 1898 against the decree of A. E. Staley, Esq., District Judge of Hooghly, dated the 1st of December 1897, affirming the decree of Babu Kali Prasanna Mukerjee, Subordinate Judge of that District, dated the 20th of January 1897.

Against this decision the defendant appealed to the High Court.

Dr. *Rash Behary Ghose*, and *Babu Dwarka Nath Chuckerbutty*, for the Appellant.

Dr. *Ashutosh Mookerjee*, and *Babu Surendra Nath Roy*, for the Respondent.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.) :—

Maclean, C.J.—This case has been so fully argued that I do not think any useful object would be attained by our further considering the matter.

This is a suit by one brother against another for recovery of Rs. 900, with interest thereon at the rate of Rs. 10 per cent., and the litigation arises under the following circumstances. The two brothers, the plaintiff and defendant in this suit, were co-defendants in another suit, in the Court of the 3rd Subordinate Judge of Hooghly, a suit brought by another brother to set aside a certain deed of partition, and in that suit the present plaintiff thought it advisable to engage the services of counsel, and in that view the present defendant concurred, and the following correspondence took place between the two brothers. On the 6th May 1893 the plaintiff wrote this letter to the defendant (omitting the formal parts): "I have thought proper to engage a counsel in our suit No. 15 of 1892 in the Court of the 3rd Subordinate Judge of Hooghly. I shall bear the whole costs of the counsel except that I shall charge from you Rs. 900 only. I won't ask any more money for the counsel's fee. The rest I shall pay from my own pocket. I shall take from Bhuni Rs. 600, please accept the proposal and pay the money;" to which the defendant replied on the same date: "I think you ought to engage a counsel in suit No. 15 of 1892 in the Court of the 3rd Subordinate Judge, Hooghly. I accept the proposal made by you for the counsel's fee, shall pay you Rs. 900 only, I shall be able to pay only that sum and not more for the [958] counsel, if you so require, I shall pay the money within ten days from this date."

Counsel was retained, the suit to set aside the partition came on for trial, and, after continuing for several days, was ultimately settled. The plaintiff did pay counsel's fees, some Rs. 4,000, and asked his brother to contribute the Rs. 900 which he promised to pay. This, apparently, he did not do; and then the present suit was brought.

The two questions we have to decide are: *First*, whether the defendant is liable for the Rs. 900, and, *secondly*, if liable, whether he is liable for interest upon that amount.

Both Courts have decided against the defendant; and hence the present appeal. As regards the principal debt of Rs. 900, it is perfectly clear that the defendant is liable for that sum to the plaintiff, and we did not hear any serious argument upon the question of that liability.

As regards the question of interest it hinges upon the construction of the two letters, and upon the true meaning of the Indian Statute (Act XXXII of 1839). That Statute says this: "It is, therefore, hereby enacted that upon all debts or sums certain, payable at a certain time or otherwise, the Court before which such debts or sums may be recovered, may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time. * * *"

I need not read the rest of the section which has no application to the present case.

It is contended for the appellant that, although there was a written instrument within the meaning of the Statute, the debt was neither certain

in amount nor payable at a certain time, and consequently that the Statute does not apply. It is urged that the liability was a liability contingent only upon the payment of the fee to counsel, and, therefore, being a contingent liability, it was neither a debt nor amount certain, payable at a certain time.

Upon the construction of the defendant's letter, I am inclined to say that it was an absolute, and not a conditional [959] promise or undertaking to pay, but, if so, the appellant contends that it was a promissory note within the meaning of section 4 of Act XXVI of 1881, and that not having been properly stamped the action must necessarily fail. In other words the appellant says that the plaintiff is on the horns of this dilemma: if it were a conditional promise to pay, it was not a contract for the payment of a certain sum at a certain time (within the meaning of the Statute), and if it were an unconditional promise to pay, then it is not properly stamped.

To the latter argument, however, sub-section 3 of section 34 of the Stamp Act of 1879 is a conclusive answer.

But in the lower Court, to get out, doubtless, of the stamp difficulty, the plaintiff's case was urged upon the footing that the promise to pay was conditional only, and I will treat the case on that footing.

It appears to me that the appellant's argument is based upon some confusion between the question of liability for a debt, and the question of whether or not, if the liability be established, it is in respect of a debt or sum certain payable at a certain time. The question of liability is one thing, the question of whether the liability is for a debt or sum certain, payable at a certain time, is another. If the liability be contingent or conditional, and the contingency do not happen, or the condition be not complied with, there is an end of the matter, and the liability is gone; but if a liability in its inception contingent, become, by the happening of the specified event, an absolute liability, then we must refer to the document which creates the liability, and try to discover from that document what the liability actually was, and whether it was in respect of a debt or sum certain payable at a certain time. If, then, we apply that principle to the present case, we find that the contingent liability became an absolute liability, and in respect of a debt or sum certain payable at a certain time, for, upon the construction of the defendant's letter, I entertain no doubt but that the latter requisites are complied with. In my opinion the case is within the Statute.

[960] Dr. Rash Behary Ghose, for the appellant relied upon the case of *The London Chatham and Dover Railway Co. v. The South Eastern Railway Co.*, (1893) L. R. App. Cas., 434, in the House of Lords, where Lord HERSCHELL, J. stated the law in these words: "In order, therefore, to justify the allowance of interest, it must be shown that there is a debt or sum certain payable at a certain time by virtue of some written instrument. Unless that can be established, the case does not come within the words of that part of the section."

I quite agree that before interest can be allowed under the Statute the requisites stated by Lord HERSCHELL must be forthcoming.

The appellant relies mainly upon certain observations of the Judicial Committee of the Privy Council in the case of *Juggomohun Ghose v. Manick Chund*, (1859) 7 Moore's L. A., 263 (278—280), and there are, doubtless, some observations which do give colour to his contention. But the facts of that case are very different from those of the present case, and I think the observations in question must be regarded as made in connection with the particular facts of that case rather than as intended to have so wide and general an application as the appellant contends for. That was a suit based upon a

wager contract upon the average price that opium would fetch at the next sale, and that was held not to be within the scope of Act XXXII of 1839. Their Lordships say at p. 279 of the report: "The Statute by the qualifications which it imposes of certainty in time and amount, by requiring that this certainty and the obligation itself to pay the principal should be created by a written instrument, by making the interest run from the time at which the principal is payable, and, finally, by giving the jury a discretion as to the allowance of interest, even where all these circumstances concur, seems to have been framed, not simply on the principle of compensation to the creditor, but—" and on these words the learned Vakil for the respondent places greater stress—"also on that of penalty to the debtor for not paying punctually at a time when he must have known the debt or sum, specific in amount, was to be paid."

[961] There can be no question that in the present case the debtor did know that he had to pay the debt, which was certain in amount, and he knew the date within which he promised to pay it. If then he did not pay the money punctually why should he not pay the penalty in the shape of interest? Their Lordships then proceed: "Obviously the most honest and punctual debtor may be unprepared to pay an uncertain amount which may not be due for months or years, or only on the happening of a contingency, the falling in of which he may not know of."

These words can scarcely apply to the circumstances of the present case, for the amount was not uncertain, the date of payment was defined, and the defendant knew that the contingency, upon which he became liable, had occurred. Their Lordships proceed: "On this principle, too, the discretion given to the jury to consider all the circumstances of each particular case becomes perfectly reasonable. It is quite consistent with this view that, where the debt is payable 'otherwise' than at a certain time, interest is not to be allowed except from and after the time of a written demand of payment. This reasoning leads their Lordships to conclude that the certainty required must exist at the time when the promise is made."

I read the expression "certainty required" as referring to the certainty required by the Statute, i.e., as to amount and date of payment, both of which exist in the present case, but which were absent from the case before the Privy Council, a case which, in my judgment, does not govern the present. For these reasons the plaintiff, in my opinion, is entitled to interest on the principal debt.

Taking this view, it becomes unnecessary to consider the question which was dealt with in the case of *Kamukummal v. Peeru Meera Levvai Rowthen*, (1897) I. L. R., 20 Mad., 481, the question as to the application of section 73 of the Contract Act to the payment of interest in cases not within the Statute XXXII of 1839.

Lastly, it is said that the Judge in the Court below has not found that the 10 per cent. was the current rate of interest, and that only the current rate of interest can be allowed. There is, however, [962] force in the view urged by the respondent that it has been shown that the plaintiff had to pay 10 per cent. for the money he borrowed to pay the counsel's fees, a rate rather below the not unusual rate of interest of 12 per cent., and that in the absence of any evidence on the other side to show that that was not the current rate, there was sufficient to justify the Court in treating that rate as the current rate. I see no reason to interfere with this conclusion.

On these grounds I think the appeal fails and must be dismissed with costs.

Banerjee, J.—I am of the same opinion. The two questions raised before us in this appeal are, *first*, whether the plaintiff was entitled to recover the amount claimed when the purpose for which it was promised to be paid had not to be carried out to the end by reason of the suit in relation to which the agreement was made having been compromised after it had proceeded up to a certain stage only; and, *second* whether having regard to the nature of the agreement and to the provisions of Act XXXII of 1839, the plaintiff was entitled to any interest on the amount promised to be paid.

The contention upon the first point, which was but faintly pressed, was this, that as the money which the defendant promised to pay was agreed to be paid to enable the plaintiff to meet the expenses of engaging counsel in a suit, in which both the plaintiff and defendant were defendants, and as that suit had not to be defended to the end, but was compromised, the plaintiff was not entitled to recover the amount promised to be paid. But it is admitted that counsel was engaged; it is admitted also that the plaintiff had to pay counsel more than the sum of Rs. 1,500 being the sum total of the Rs. 900, which the defendant promised to pay, and a sum of Rs. 600, which the plaintiff in his letter to the defendant said he would take from another brother who was also a defendant in that suit. That being so, I do not think that the mere fact of the suit having been compromised at a certain stage can affect the liability of the defendant. Having regard to the terms of the contract, the plaintiff took the risk of having to pay more or less according as events took their course.

Upon the second point it was argued that the requirements of Act XXXII of 1839 were not satisfied, because the debt was not [963] certain and the time of payment was, therefore, also not certain: and in support of this contention, the cases of *Juggomohun Ghose v. Manick Chund*, (1859) 7 Moore's I. A., 263, and *London Chatham and Dover Railway Co. v. South Eastern Railway Co.*, (1893) I. R., App. Cas., 429, were relied upon. But though there was uncertainty in the liability to this extent, that the liability was to arise only in the event of counsel being engaged by the plaintiff, it cannot be said that there was any uncertainty either in the amount of the debt or in the time of payment, supposing the contingency arose upon the happening of which the liability was to accrue. The Act of 1839 speaks of a sum certain payable at a certain time. The language of the Act does not show that a contingency in the liability not affecting the amount of the debt or the time of payment can in any way prevent the provisions of the first part of section 1 of the Act from applying to the case. There is, in my opinion, a clear distinction between an uncertainty as to the arising of the liability, and an uncertainty as to the amount of the debt or the time of payment. It is true that there are observations in the cases cited, which apparently favour the contention on behalf of the appellant; but after carefully considering those two cases, the facts of which were very peculiar in their nature, I find that the uncertainty that was held as taking them out of the operation of the Statute was an uncertainty as to the amount of the debt and the time of payment. The passage in the judgment of the Judicial Committee, in the case of *Juggomohun Ghose v. Manick Chund* which was most strongly relied upon, is this: "This reasoning leads their Lordships to conclude that the certainty required must exist at the time when the promise is made, and, therefore, that the Act does not in this part affect debts contingent in amount and time of becoming due; a construction strictly conformable to the natural meaning of the language used." But the passage shows that the uncertainty which their Lordships were considering was an uncertainty as to the amount and also as to the time. But as I have said above there was no such uncertainty in this case. And it is not

denied that the contingency as to the liability was removed by counsel being engaged before the expiry of the ten [964] days within which the defendant promised to pay the money. I am, therefore, of opinion that the case comes within the first part of section 1 of Act XXXII of 1839.

I should add that if the case had not come within the scope of Act XXXII of 1839, still the plaintiff would, under section 73 of the Indian Contract Act, be entitled to recover the amount of interest which has been awarded to him as compensation for damage caused to him by the defendant's breach of contract.

The view I take is, no doubt, opposed to that taken by the Madras High Court in the case of *Kamalammal v. Peeru Meera Levvai Rowthen*, (1897) I. L. R., 20 Mad., 481. But with all respect for the learned Judges who decided that case, I must say that I am unable to assent to the view expressed by them. It was argued that to give this effect to section 73 of the Indian Contract Act would be to make the provisions of a general Act to override those of the special Act of 1839. I do not consider this argument correct. The scope of Act XXXII of 1839 is very different from that of section 73 of the Indian Contract Act. The Act of 1839 provides for the award of interest on debts in certain cases, and provided that the conditions required by the Act are satisfied, interest will be recoverable, quite irrespective of the question whether any actual loss or damage has been caused to the creditor.

On the other hand section 73 of the Contract Act provides for the award of compensation to a person to whom loss or damage has been caused by a breach of contract by another person. Compensation under section 73 of the Contract Act will not therefore be recoverable by a creditor from his debtor on the ground that the payment of money due to him has been withheld by the debtor unless he can shew that actual loss or damage has been caused to him. No doubt the law presumes the withholding of payment of money as carrying with it loss to the person to whom such money is due, the compensation for which loss is interest at the market rate. Such damage I may, without any straining of language, call damage in law, as distinguished from damage in fact, or actual damage, which a person from whom payment of money due is withheld may sustain in certain cases as the plaintiff is found to have sustained in this. Thus where [965] *A* promises to pay money to *B* in order to enable *B* to meet the expenses of a common purpose, and *A* afterwards withholds payment, and *B* has to borrow money on interest to meet those expenses, then, if *B* claims not only the amount agreed to be paid, but also the interest on it which he had to pay, he would, under section 73 of the Contract Act, be entitled to recover such interest, provided other conditions are satisfied, such as that the interest is not exorbitant, but is at such a rate as a reasonable man would agree to pay, having regard to the state of the market. Here *B* recovers what is nominally called interest, but is really compensation for damage sustained by him. But if *B* had not actually to borrow any money, and to pay any interest, he would not in such a case be entitled to recover interest by way of damages under section 73 of the Contract Act, though if the case came within the provisions of Act XXXII of 1839, he would be entitled to such interest. This is, I think, a rational and sound distinction; and having regard to the finding of the Lower Appellate Court, that the "plaintiff has charged the amount of interest only, which plaintiff has had to pay on raising a loan for the purpose of paying the counsel's fee," the decree may be supported under section 73 of the Contract Act, even if the case did not come within the scope of Act XXXII of 1839. This view is not in conflict with the case of *London Chatham and Dover Railway Co. v. South Eastern Railway Co.*, (1893) L. R., App., Cas., 429, in

which interest, so far as it was claimed as compensation, was claimed not as compensation for any loss or damage sustained in fact, but as compensation for loss or damage presumable in law from non-payment of money due.

S. C. G.

Appeal dismissed.

NOTES.

[As regards the Stamp Act, sec. 34, sub-sec. 3, see also (1900) 4 C. W. N. 369.

As regards interest, see also (1905) 3 C. L. J. 541; (1908) 1 S. L. R., 179; *Cunningham and Sheppard's Contract Act* (X Edn. 1908) p. 42.]

[966] *The 4th August, 1899.*

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE STEVENS.

Har Shankar Prasad Singh and another.....Plaintiffs

versus

Shew Gobind Shaw and others.....Defendants.*

Lis Pendens—Involuntary alienation—Execution proceedings—Revenue Sale Law (Act XI of 1859), sections 13, 54—Sale for arrears of Government revenue—Mortgage—Sale in execution of mortgage decree—Right of redemption.

A decree was obtained for the sale of a mortgaged property, being a share of an estate on the 31st August 1899. In execution of that decree, the property was purchased by the plaintiff; on the 11th December 1891, and the sale was confirmed on the 5th March 1892. Meanwhile, pending the execution proceedings, a larger share of the estate, including the share mortgaged, was purchased by the defendants at a revenue sale on the 30th September 1891, which sale was confirmed on 11th March 1892. In a suit instituted by the plaintiffs for the possession of the property purchased by them, the defendants having questioned the validity of the mortgage decree, and contended that they were not bound by it, not being parties thereto, and having in the alternative claimed the right to redeem the mortgaged property, —

Held, that the defendants were bound by the mortgage decree, the principle of *lis pendens* applying to the case.

Held, also, that the defendants, having purchased a share of an estate at a revenue sale, held under the provisions of sections 13 and 54 of the Sale Law, acquired it subject to the mortgage which they were bound in law to discharge before the sale in execution of the mortgage decree had actually taken place, or before, at any rate, that sale had been confirmed on the 5th March 1892; and that having failed to do so, and there being no equities to the contrary, their right of redemption was extinguished.

MEHAL SAHVA, Pergunnah Goa, Zilla Sarun, had separate accounts opened in the Collectorate, of the following shares: 2 annas 8 pie belonging to Har Shankar Prasad Singh, the plaintiff No. 1 in the present suit; 2 annas 8 pie belonging in certain specified shares to Nand Kisore Prasad Singh, Sheo Shankar Prasad Singh, and jointly to two brothers Jagdamba Prasad Singh and Ambika Prasad Singh, the whole constituting an [967] *ijmali kalam*; and the remaining 10 annas 8 pie belonging to certain other persons.

* Appeal from Appellate Decree No. 2136 of 1897, against the decree of Alfred F. Steinberg, Esq., District Judge of Sarun, dated the 19th of July 1897, reversing the decree of Babu Behari Lal Mullick, Subordinate Judge of that District, dated the 8th of May 1896.

Jagdamba executed a mortgage deed in favour of Harbans Sahay, mortgaging his entire interest, *kulhuq hakuq*, in Mehal Sahva. The document did not specify the extent of interest mortgaged. On this mortgage, Harbans sued both the brothers Jagdamba and Ambika, and obtained an *ex parte* decree for the sale of the mortgaged property on the 31st August 1889, the decree directing the sale of the shares belonging to both the judgment-debtors specified therein. Ambika made an application so set aside the *ex parte* decree, but that application was rejected on the 21st January 1890. Then, on the 8th September 1891, Harbans applied for execution of the decree, and obtained the sale proclamation to issue on the 29th September 1891. The sale proclamation was served at various places, on the 19th, 20th and 21st October 1891. On the 11th December 1891, the property was put up for sale and purchased by Har Shankar Prasad Singh, plaintiff No. 1, Din Dayal Patak, plaintiff No. 2, and Moti Sahu. The sale was confirmed on the 5th March 1892. Subsequently, on the 6th March 1893, Moti Sahu conveyed the share purchased by him to the plaintiff No. 1.

Meanwhile, the *ijmali kalam* of Mehal Sahva, belonging to Jagdamba and others, was sold for arrears of revenue and purchased by Sheo Gobind Sahu and others, the defendants in the present suit, on the 30th September 1891, in the name of one Ahmad Karim. Har Shankar Prasad Singh and others appealed to the Commissioner on the 28th November 1891, questioning the validity of the sale, but the appeal was rejected. The sale was confirmed on the 11th March 1892, and possession was given to the defendants on the 20th May 1892.

In these circumstances, after some proceedings in the Criminal Court and some proceedings for registration of names, the plaintiffs brought the present action for possession of the property purchased by them, mesne profits, &c., alleging that the purchase of the defendants at the revenue sale was subject to the mortgage. They contended that although the defendants had the right to redeem, they having failed to exercise it before [968] the date of confirmation of the sale under the mortgage decree, that right was gone. The defendants contended, amongst other things, that they were not bound by the mortgage decree, not being parties to it; that Ambika's share did not pass by the sale in execution of the decree, as it was not mortgaged; that although they purchased the property at a time when the mortgage decree was being executed, the principle of *lis pendens* did not apply to their case, that principle, according to their contention, not applying to (1) involuntary alienations, nor to (2) alienations after decree and pending execution; and further that even if they were bound by the decree, they should still be allowed to redeem the property by payment of the mortgage debt.

The Subordinate Judge decreed the suit, holding that the principle of *lis pendens* applied to the case; that the defendants were bound by the mortgage decree; and that although they had the right to redeem, as they did not choose to exercise that right before the date of confirmation of the sale under the mortgage decree, having a knowledge of that decree, their right of redemption was completely lost after that date.

On appeal, the District Judge, while agreeing with the lower Court as to the effect of the defendants having purchased *pendente lite*, observed as follows:—

"But I cannot hold with him that the equity of redemption expired with the date of confirmation of sale. The rule laid down in *Prem Chand Pal v. Purnima Dasi*, (1888) I. L. R., 15 Cal., 546, does not apply here. The plaintiffs first attempted to ignore the defendants, and then they denied any title in them. Under these circumstances, I know of no law making it incumbent on the defendants to tender the amount of the debt. They could

hardly be expected to pay the money into Court and ask for a declaratory decree. It is only now that the right or liability of redemption, denied before, is judicially declared."

The District Judge accordingly set aside the decree of the lower Court and passed a conditional mortgage decree, subject to the defendants' right of redemption. The plaintiffs appealed to the High Court.

Dr. *Rash Behary Ghose*, and Dr. *Asutosh Mukerjee*, for the Appellants.

[969] Babu *Saroda Charan Mitter*, and Babu *Akkoy Kumar Banerjee*, for the Respondents.

The judgment of the High Court (**Ghose and Stevens, JJ.**) was as follows :—

This appeal arises out of a suit to recover possession of certain shares in a 2-anna 8-pie *patti* in Mehal Shava, which formerly belonged to one Jagdamba Prasad Singh and Ambika Prasad Singh. These persons and some other persons, namely, Nand Kisore Prasad Singh and Sheo Shankar Prasad Singh, owned between themselves the said 2-anna 8-pie share, which is described to be a joint *kalam*, there having been a separate account opened with the Collector as regards the shares of the other shareholders in the said Mehal Shava.

It appears that a mortgage deed was executed by Jagdamba Prasad Singh, who was a member of a joint undivided family, with his brother Ambika Prasad Singh in favour of one Harbans Sahai. This individual obtained a decree against both Jagdamba Prasad Singh and Ambika Prasad Singh, on the 31st August 1889, upon the said mortgage. In execution of this decree the interest of Jagdamba and Ambika in Mehal Shava was sold up and purchased by Har Shankar Prasad Singh, the plaintiff No. 1, and one Moti Sahu, which latter individual transferred the interest which he had purchased to the plaintiff No. 2, Din Dayal Patak. This sale seems to have been confirmed on the 5th March 1892. In the meantime, that is to say, on the 28th March 1891, the *ijmali kalam* of a 2-anna 8-pie share of Mehal Shava fell into arrears, and the owners failed to pay the Government revenue, the result being that on the 30th September, the said *ijmali kalam* was sold up, and purchased by a certain person, who subsequently transferred his interest to the present defendants.

There appears to have been some opposition to this sale. There was an application to the Collector by certain individuals, one of them being stated to be Har Shankar Prasad Singh, offering, under section 24 of the Revenue Sale Law, the amount in arrear, but the Collector refused to receive the money from them, and he rejected the application. Subsequently there was an appeal to the Commissioner, on the 23rd November 1891, by, as it appears from a certified copy of the petition of appeal produced before us, [970] Har Shankar Prasad Singh and some other individuals, questioning the validity of the sale held by the Collector. This appeal, however, was rejected, and the sale was confirmed on the 11th March 1892.

The question that has been raised in this case is as between the plaintiffs, the purchasers at the sale of the 11th December 1891 under the mortgage decree, and the defendants, the purchasers at the sale for arrears of revenue on the 30th September 1891 and which sale was confirmed on the 11th March 1892. The District Judge has held, having regard to most of the facts to which we have just referred (for it appears that all the facts were not before him at the trial) that the principle of *lis pendens* applies to this case, and that the defendants were bound to satisfy the decree in execution of which the plaintiff made his purchase on the 11th December 1891; but he is at the same time of opinion that, having regard to the fact that "the plaintiff opposed the confirmation of the sale before the Commissioner,

who confirmed the sale on the 11th March 1892," in equity he is not entitled to recover possession of the property claimed in the suit, but that he may sell the property, subject to the right of redemption in the defendants, the purchasers at the revenue sale.

We need hardly state that the sale of the defendants was under the provisions of sections 13 and 54 of the Revenue Sale Law, so that he acquired the share 2 annas 8 pie thus sold, subject to the incumbrance which Jagdamba Prasad Singh had created in favour of Harbans Sahai, and subject also to the lien declared under the decree of the 31st August 1889. That being so, it follows that the defendants, after the acquisition of the property by them under the Revenue Sale Law, were bound to discharge the mortgage existing in favour of Harbans Sahai before the sale actually took place, or before, at any rate, that sale was confirmed on the 5th March 1892; but they failed to do so, and we think the learned Judge is perfectly right in holding that the principle of *lis pendens* applies, and that the plaintiff is entitled to relief in this case.

But then the learned District Judge has said, as we have already indicated, that by reason of the opposition that was offered by the plaintiff to the confirmation of the revenue sale, he is debarred [971] from obtaining the precise relief that he has asked for, and all that he is rightfully entitled to is an order for sale subject to the equity of redemption in the defendants. Upon the record as it stood at the time when the case was first heard by us there was nothing to show that the plaintiffs, or either of them, opposed the confirmation of the sale before the Commissioner. We, therefore, thought it right and proper to send for from the Commissioner's Office the original petition or petitions of appeal presented to the Commissioner in that matter. It so happens that the original petition of appeal is not to be found in the Commissioner's Office, and the paper that the Commissioner has sent to us does not afford us any help in finding out who the persons were that appealed to the Commissioner. The learned Vakil for the respondents has, however, placed before us attested copies of the petitions presented both to the Collector on the 31st October 1891, and to the Commissioner on the 28th November 1891, and it would appear from the petitions that one Har Shankar Prasad Singh did oppose the confirmation of the sale held by the Collector on the 30th September 1891. But it will be remembered that the plaintiffs did not acquire the interest of Jagdamba and Ambika in the 2 anna 8 pie *ijmali kalam* until the 11th December, that is to say, some time after the presentation of the petitions to the Collector and to the Commissioner of the Division. At the time of the presentation of these petitions we may take it, as disclosed in the plaint, that the plaintiff No. 1, Har Shankar Prasad Singh, was a shareholder in the estate, Mehal Shava, but his share was confined to a separate 2 anna 8 pie share, and that he had no interest, so far as one can discover, in the 2 anna 8 pie *ijmali kalam*, which was owned by Jagdamba, Ambika and certain other individuals. It is quite possible that as a shareholder in the mehal itself he was advised to come forward to offer to the Collector the amount for which the revenue sale had taken place, as also to join his other co-sharers in the estate in the appeal to the Commissioner, but there is nothing to show that after he acquired the interest, which he purchased, in the 2 anna 8 pie *ijmali kalam*, and which was on the 11th December 1891, he, as such purchaser, offered any opposition to the sale which had taken place on the 30th September 1891, and in res-[972]pect of which an appeal was pending on the 28th November before the Commissioner at the time of his purchase. That being so, we do not see our way to accept the view which

has been put forward by the learned District Judge in this case. We do not think that by reason of any conduct on the part of the plaintiff, Har Shankar Prasad Singh, or on the part of the other plaintiff, Din Dayal Patak (for he does not appear to have taken any part in the petitions that were presented to the Collector and the Commissioner) they are in equity barred from obtaining the relief which, according to the view of the learned Judge himself, they are entitled to have, if it were not for the opposition that they are said to have offered to the confirmation of the sale by the Commissioner.

It has been contended on behalf of the respondents that it was the duty of the plaintiffs to have saved the 2 anna 8 pie *ijmali kalam* from being sold by payment of the arrears. That might no doubt have been a wise course to pursue, but having regard to section 54 of the Revenue Sale Law, it seems to us to be quite clear that the defendants, though they may be taken to have acquired under the sale the 2 anna 8 pie *ijmali kalam*, acquired it subject to the incumbrance that had already been created in favour of Harbans Sahai, and were bound in law to discharge that incumbrance; and the time they had to do so was the period between the 30th September 1891, the date of their purchase, and the 5th March 1892, the date when the sale was confirmed. No doubt the sale to the defendants did not, according to law, become final, until it was confirmed under the orders of the Commissioner on the 11th March 1892, but there was nothing in law to prevent them from paying up the decree in favour of Harbans Sahai, or depositing the money under protest. In that way they might have saved their equity of redemption, but they allowed the sale to take place, the result being that the plaintiffs acquired the property on the 5th March 1892.

In this view of the matter we think that the decree of the learned District Judge cannot be supported. We accordingly set aside the decree of the Lower Appellate Court and restore that of the first Court, with all costs.

M. N. R.

Appeal allowed.

NOTES.

[This was followed in (1905) 2 C.L.J., 288; (1907) 5 C.L.J., n: 11 C.W.N., 495; (1907) 7 C.L.J., 1: 10 C.L.J., 590. See also 9 C.L.J., 346; 9 I.C., 840; 10 I.C., 16; 14 C.W.N., 677; 15 C.L.J., 391; 32 Cal., 891; 9 C.W.N., 728; 1 C.L.J., 371, as regards the applicability of *lis pendens* to mortgage proceedings.]

[973] INSOLVENCY JURISDICTION.

The 2nd August, 1899.

PRESENT:

MR. JUSTICE STANLEY.

In the matter of Sarat Kumar Sen.

Insolvent Act (11 and 12 Vict., c. 21), section 51—Application for personal discharge—Discharge except as to debts due to a particular creditor—Prospective order under section 51.

Application by insolvent for personal discharge. One creditor opposed. It appeared that that creditor lent money to the insolvent on a mortgage on false representations made by the insolvent to him. No decree had been obtained by the creditor on his

mortgage. The opposing creditor applied that the insolvent be dealt with under section 51 of the Insolvent Act. The insolvent contended that an order under section 51 could only be made when the creditor had obtained a decree, and was in a position to apply at once for the arrest of the insolvent, which was not the case here. *Held*, the insolvent was entitled to his personal discharge, as regards all creditors except the opposing creditor; that the Court had no power under section 51 to order immediate commitment of the insolvent, inasmuch as the opposing creditor had not placed himself in a position to issue execution against the insolvent, but that the Court could make a prospective order that with regard to the debt due to the opposing creditor the insolvent should be entitled to his personal discharge as soon as he should have been in custody at the suit of that creditor for the period of six months.

Quere.—If the debt be satisfied out of the proceeds of sale of the mortgaged properties or otherwise, whether the effect of such payment would be to relieve the insolvent from the penalty prescribed by section 51.

THIS was an application by the insolvent for his personal discharge. His discharge was opposed by one creditor who held a mortgage executed in his favour by the insolvent. It appeared on the evidence before the Court that the opposing creditor had lent the insolvent two sums of money on the security of a mortgage on representations by the insolvent that the property mortgaged was unincumbered, whereas as a matter of fact the property had been previously mortgaged. The opposing creditor had not obtained a decree on his mortgage.

Mr. R. Mitter for the Insolvent.

Mr. Dunne and Mr. K. Chowdhry for the opposing creditor, the Second Mortgagee.

[974] Mr. Aveloom for the First Mortgagee.

Mr. Dunne asks the Court to deal with the insolvent under section 51 of the Insolvent Act.

STANLEY, J.—The evidence you have adduced is amply sufficient to enable me to deal with him under section 51. I cannot send him to jail under that section. The case of *In re Mancharji Hirji Readymoney*, (1868) 5 Bom., H. C., O. C., 55, points out the course to be taken under section 51.

Mr. Mitter.—In that case I will offer no evidence and will leave the matter to the Court. I wish to point out that the opposing creditor has not obtained a decree. An order under section 51 can only be made when the opposing creditor has obtained a decree. In this case there is no decree, but the creditor must sue and after obtaining his decree then execute. It is clear that the provisions of the section require that the creditor who opposes should be in a position to apply at once for arrest of the insolvent. Here if the discharge of the insolvent should be postponed till he has been imprisoned for say six months or two years the creditor by delaying in bringing his suit and executing his decree may keep the proceedings open indefinitely. *Samarapuri v. Parry and Co.*, (1889) I. L. R., 13 Mad., 150.

Mr. Dunne.—The debt of the opposing creditor is admitted and I submit that the creditor is in the same position as he would be in if he had obtained a decree.

Stanley, J.—In this matter it has been clearly established that the insolvent procured two loans amounting together to Rs. 9,000 upon the false representation that the property which formed the security for the loans was free from all incumbrances. The property, or a portion of the property, had been mortgaged the year previously to secure a sum of Rs. 4,000. It is apprehended by the puisne mortgagee that the mortgaged property will not realise sufficient to satisfy the three mortgages, and he opposes the discharge of the

insolvent upon the ground of the false and fraudulent representation made to him and on the faith of which he advanced his money. No other creditor is opposing [975] the discharge of the insolvent. I regard the conduct of the insolvent as very reprehensible and I cannot overlook it.

Under the circumstances I grant a personal discharge as regards all the creditors save and except creditor No. 2, and as regards creditor No. 2 I shall apply the provisions of section 51 of the Insolvent Act. It appears to me reasonably clear upon the reading of that section of the Act that I have no power to order the immediate commitment of the insolvent inasmuch as the creditor No. 2 has not placed himself in a position to issue execution against the insolvent. In the case of *In the matter of Mancharji Hirji Readymoney*, (1868) 5 Bom. H. C., O. C., 55, it was held that such an order of adjudication does not in itself operate as an order for the imprisonment of the insolvent, but the detaining creditor if he wishes to arrest the insolvent, for the period prescribed by the Court, must, if he has not already done so, place himself in a position to issue execution against the insolvent. Accordingly, I can only make a prospective order, viz., that as to creditor No. 2 the insolvent shall be entitled to be discharged as soon as he shall have been in custody at the suit of that creditor for the period of six months. The effect of this order may be that if the debt be satisfied out of the proceeds of the sale of the mortgaged properties or otherwise no proceeding may be taken by the creditor No. 2 to enforce this order: but I abstain altogether from saying that the effect of payment will be to relieve the insolvent from the penalty prescribed by this section.

Attorney for the Insolvent: Babu Sashi Sikhan Banerjee.

Attorney for the Opposing Creditor: Babu Ganendra Narayan Dutt.

D. S.

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M. V. KRISHNASWAMY, B.A., B.L.,
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CALCUTTA, Vol. XXVII—1900.

PRIVY COUNCIL.

The 6th May and 8th July, 1899.

PRESENT :

LORD HOBHOUSE, LORD MACNAGHTEN, AND SIR RICHARD COUCH.

Moheschandra Dhal.....Plaintiff

versus

Satrughan Dhal and others.....Defendants.

Ex parte Moheschandra Dhal, Petitioner.

[On petition relating to an appeal from the High Court at
Fort William in Bengal.]

*Privy Council, Practice of—Stay of Proceedings in India pending appeal—
Protection of property pending an appeal by special leave—Order for
stay of proceedings—Civil Procedure Code
(Act XIV of 1882), Chapter XLV.*

Special leave of Her Majesty in Council was obtained for the filing an appeal from a decree of the High Court affirming the dismissal of the petitioner's suit. The High Court rejected his application as plaintiff (appellant) for an order staying execution and continuing the possession of a manager of the estate in litigation pending the result of the appeal. The rejection was grounded on the absence of authority for this purpose, the High Court being authorized, in their judgment, only to make such an order in regard to appeals admitted by themselves. On this petition that the High Court's decision might be reversed, or such order made as would protect the property to abide the ultimate disposal of the suit, their Lordships were of opinion that direct interference to continue the management or to appoint a Receiver was impracticable. But that, on the other hand, interference had, on occasion, been effected where, the appellant being in possession, an order for stay of proceedings had maintained the existing state of things. Therefore, an order staying proceedings should now [3] be recommended by them, the petitioner being answerable in damages, and any aggrieved respondent having leave to move for the discharge of the order,

SPECIAL leave to appeal in the above suit had been obtained on the 18th July 1898 by the petitioner who had sued on the 10th October 1888, alleging himself to be the heir of the late Ramchandra Dhal and claiming ancestral estate. The suit was dismissed on the 28th December 1891 by the Subordinate Judge of Chaibasa, in the Singhbhum District, whose decree was affirmed on the 21st August 1896 by the High Court. The ground of dismissal was that the defendant, now first respondent, was the heir preferentially entitled.

The petitioner now asked for a stay of execution of that decree pending his appeal. The High Court had refused to admit an appeal to Her Majesty in Council under chapter XLV of the Code of Civil Procedure. The petition stated that the estate was, and had been since the last proprietor's death, in the possession of a manager under the Encumbered Estates Act. This manager had been appointed for the liquidation of debts which had been cleared off, leaving a balance now in his hands. It was further stated that the property yielded about Rs. 50,000 per annum, and that the first respondent was without means.

The petitioner, after obtaining the order of the 18th July 1898, had applied to the High Court with reference to clauses (c) and (d) of section 608 of the Civil Procedure Code for a stay of execution, and an order that the manager should remain in possession until the final order of Her Majesty in Council or until the defendant should give security for the compliance with any order that might be made. This was refused by the High Court on the 3rd November 1898, on the ground that the exercise by them of such authority was not provided for in that section, or in any other part of chapter XLV of the Civil Procedure Code. The prayer of the petition included the asking for that order to be reversed, but reliance was placed at the hearing on the general authority to grant relief.

The application was made *ex parte*.

Mr. J. D. Mayne, for the petitioner, argued that as the [3] property in suit now in possession of the manager, as stated, was ready to be delivered to the person who should ultimately be held to be entitled, it was right that it should remain pending this appeal. This would be carried out if a stay of execution should be ordered. If the refusal of such a stay of proceedings by the High Court had been right on the ground that their authority in the matter was limited by what was provided in section 608 of the Civil Procedure Code to appeals which had been certified and admitted in India, then it was a case for the relief which the Queen in Council could order. The exercise of this authority was within the intent and meaning of chapter XLV of the Code, as was shown by section 616. That section declared that nothing in that chapter should bar the full and unqualified exercise of Her Majesty's authority in receiving and regulating appeals, and "otherwise howsoever." The reason for the stay of execution pending an appeal by special leave was quite as complete as in the case of an appeal which, according to the decision of the High Court, fell within their powers under section 608. It might be argued that, with regard to section 616, an appeal for which special leave had been granted thereupon, came within the scope of those powers. But if that were not so, such an order could be granted here. Reference was made to *Perlath Sein v. Bhooloo Singh*, (1864) 10 Moore's I. A., 78; *Inder Kumari v. Jarpul Kumari*, (1886) I. L. R., 14 Cal., 290; L. R., 14 I. A., 1; *Rahimbhoy Habbibbhoy v. Turner*, (1890) I. L. R., 15 Bom., 155; L. R., 18 I. A., 6, and *Administrator-General of Bengal v. Premalul Mullick*, *In re Premalul Mullick's petition*, (1895) I. L. R., 22 Cal., 1011; L. R., 22 I. A., 203.

Afterwards, on the 8th July, their Lordships' judgment was delivered by **Lord Hobhouse**.—The object of this application is the protection of property pending an appeal. The petitioner is suing to establish his title to land as heir of one Ramchandra Dhal. His suit has been dismissed by the Subordinate Judge on the ground that Satrugghan Dhal, a respondent, is the preferential heir, and that decree has been affirmed by the High Court. Special [4] leave to appeal against the decree of the High Court was granted on the 18th July 1898.

The appellant now states that the estate of Ramchandra has been in the possession of a manager under the Encumbered Estates Act, and that the debts have been cleared off, and that a balance of Rs. 30,000 is in the manager's hands. He further states that Satrugghan Dhal is a man of no means. He applied to the High Court to order that the manager should remain in possession, which they refused on the broad ground that the Code gives them no jurisdiction over the subject-matter pending an appeal not certified by themselves.

The petition asks the Queen in Council to reverse the order of the High Court, or to direct the High Court to deal with the case, or to give other relief.

Their Lordships cannot direct the High Court to act where they have no jurisdiction, and they are not prepared to differ from the High Court on the question whether or no they have jurisdiction, without hearing full argument on the point. They are at present disposed to agree that the jurisdiction does not exist; and though it may be very anomalous that property should be left without the possibility of interim protection pending an appeal granted by special leave, the case is one of great rarity, and not unlikely to have escaped the notice of the framers of the Code.

It is clearly quite impracticable, nor does the petition ask, that the Queen in Council should directly interfere to continue the manager, or to appoint a receiver. Interference has been effected here in cases where the Courts below had jurisdiction over the subject-matter, and an intimation to them would be effective; or where, the appellant being in possession, a stay of proceedings would keep the position of things intact. At the bar Mr. *Mayne* asked for a stay of proceedings in this case; and their Lordships are disposed to accede to his suggestion, because it is highly inconvenient that there should not be any interim protection at all pending such an appeal as this, and because, while such a stay of proceedings can hardly be productive of injury to absent parties the petitioner's Counsel is sanguine that it may afford the requisite protection.

[5] Their Lordships will humbly advise Her Majesty to grant an order staying proceedings, but the petitioner must be answerable in damages, and any aggrieved respondent must have leave to move for discharge of the order.

Solicitors for the Petitioner: Messrs. *T. L. Wilson & Co.*

C. B.

NOTES.

[In *Nityamoni Dasi v. Madhu Sudan Sen* (1911) 38 Cal., 335, the Privy Council held that there was power in the High Court, under rule 13 of Order XLV of the Civil Procedure Code (Act V of 1908), to stay execution of a decree, pending an appeal to His Majesty in Council, in a case where the appeal had been admitted by special leave. See also (1909) 13 C.W.N., 690; (1909) 10 C.L.J., 326; (1901) 5 C.W.N., 781; (1900) 28 Cal., 171.]

[27 Cal. 5]
APPELLATE CIVIL.

The 2nd August, 1899.

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE PRATT.

Gerindra Kumar Das Gupta and others.....Petitioners
versus
Rajeswari Roy.....Executor.*

*Appeal—Order refusing to amend a clerical error in the form of Probate—
Probate and Administration Act (V of 1851), section 86—Succession
Act (X of 1865), section 263—Exercise of power of High Court
under section 622 of the Civil Procedure Code, 1882, when
there is no appeal.*

Where there was a clerical error in the form of probate granted, and the Judicial Commissioner refused to amend it on the ground that the probate was granted by his predecessor, it was held that though there was no appeal from such an order either under section 86 of the Probate and Administration Act (V of 1851) or section 263 of the Succession Act (X of 1865), yet the High Court might deal with the case under section 622 of the Civil Procedure Code, and set aside the order.

Khettramoni Dasi v. Shyama Churn Kundu, (1894) I. L. R., 21 Cal., 539, followed.

THERE was an application for probate made to Mr. Cowley, the Judicial Commissioner of Chota Nagpur, and probate was granted on 18th June 1897. But, in issuing the probate, a printed form was made use of, according to which the probate purported to have been granted under section 254 of Act X of 1865, as amended by sections 8 and 9 of Act VI of 1881 and section 4 of Act VI of 1889. The applicant, being a Hindu, did not apply for probate under these Acts or sections, which should have been struck out. Owing to this clerical [6] error, the applicant had some difficulty in administering the estate of the deceased, and he applied to amend the probate. Mr. Taylor, who had succeeded Mr. Cowley, refused to make the correction on the ground that he could not amend a probate issued by his predecessor.

From this order the applicant appealed to the High Court.

Babu Jotindra Nath Banerjee, and Babu Samatul Chunder Dutt, for the Appellant.

No one for the Respondent.

The judgment of the High Court (Rampini and Pratt, JJ.) was as follows :—

This is an appeal against an order of the Judicial Commissioner of Chota Nagpur, dated the 25th March 1898, refusing to amend a probate granted by his predecessor on the 18th June 1897.

It appears that the applicant to this Court applied for probate to the Judicial Commissioner of Chota Nagpur, on the 25th January 1897, and probate was granted accordingly. But, in issuing the probate, a printed form was made use of according to which the probate purports to have been granted under section 254 of Act X of 1865, as amended by sections 8 and 9 of Act

* Appeal from Order No. 207 of 1898, against the order of F. B. Taylor, Esq., Judicial Commissioner of Chota Nagpur, dated the 25th of March 1898.

VI of 1881 and section 4 of Act VI of 1889. These words should apparently have been struck out from the probate, inasmuch as the applicant did not apply for probate under these Acts or sections.

The testator was a Hindu, and his application must be understood to have been made under section 76 of Act V of 1881, as amended by section 12 of Act VI of 1889, and the Judicial Commissioner's order must be understood as having been passed under Act V of 1881. Owing, however, to a clerical error in the form of the probate, the applicant had some difficulty in administering the estate of the deceased; and he applied to the Judicial Commissioner of Chota Nagpur to amend the probate. The Judicial Commissioner, Mr. Cowley, having gone away, the application was made to his successor, Mr. Taylor, who refused to make the correction on the ground that he could not amend a probate issued by his predecessor. It is very doubtful whether there is any appeal in this case. We do not think that any appeal lies either under section 263 [7] of the Succession Act or under section 86 of the Probate and Administration Act. But we think we may deal with the case as an application under section 622 of the Code of Civil Procedure. We find a precedent for this course in the case of *Khettramoni Dasi v. Shyama Churn Kundu*, (1894) I. L. R., 21 Cal., 539.

We, therefore, set aside the order of the Judicial Commissioner, and remand the case to him with a direction that he should amend the probate granted to the applicant by striking out the incorrect sections cited at the top of the probate.

We make no order as to costs.

M. R. M.

[27 Cal. 7]

The 24th July, 1899.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE STEVENS.

Mauladan.....Plaintiff

versus

Rughunandan Pershad Singh.....Defendant.*

*Transfer of Property Act (IV of 1882), section 54—Vendor and purchaser—
Deed of sale—Completion of sale—Registration—Non-payment of
consideration—Delivery of deed of sale.*

Mere registration of a deed of sale, unaccompanied by delivery of the deed to the vendee, does not make the transaction a completed one. Although under the Transfer of Property Act the sale of a tangible immoveable property of the value of one hundred rupees and upwards can be made only by a registered instrument, yet mere registration should not

* Appeal from Appellate Decree No. 82 of 1898, against the decree of Nilmani Dass, Subordinate Judge of Tirhoot, dated the 23rd of August 1897, reversing the decree of Jaya Prosad Pande, Munsif of Somastipur, dated the 30th of November 1896.

be taken as conclusive that the title has passed. If it was intended by the parties that the title should pass only upon the consideration money being paid, such intention should be given effect to.

Sheo Narain Singh v. Darbari Mahlon, (1897) 2 C. W. N., 207, approved.

THIS appeal arose out of a suit instituted by the plaintiff for a declaration that a certain deed of sale executed and registered by her in favour of the defendant was void and ineffectual on the ground that the consideration-money was not paid by the defendant within the time mentioned in a notice served on him. The deed of sale purported to convey to the defendant the shares of the plaintiff in certain mouzahs bearing [8] towzi Nos. 4664 and 4666, in the district of Darbhanga. The plaintiff alleged that after the document was brought back from the Registration Office by her *am-mukhtear* the defendant on being asked for the payment of the consideration-money promised to pay it in a day or two and to take the document; but that eventually he declined to do so.

In defence, it was urged by the defendant that the suit for the cancellation of the deed was not maintainable, as his title to the properties under it was complete and absolute; and that he had paid almost the whole of the consideration-money with the exception of a small amount, about which he took a separate plea. The document remained in the possession of the plaintiff.

The Munsif decreed the suit. On appeal, the Subordinate Judge held that if the defendant did not pay the promised price, the plaintiff ought to have sued for its recovery, and dismissed the suit.

The plaintiff appealed to the High Court.

Babu *Karuna Sindhu Mukerjee*, and Moulvi *Mahomed Mustafa Khan*, for the Appellant.

Babu *Umakali Mukerjee*, for the Respondent.

The judgment of the High Court (*Ghose and Stevens, JJ.*) was as follows :—

This appeal arises out of a suit in which the plaintiff, who is the appellant before us, sought for a declaration that a deed of sale executed and registered by her in favour of the defendant was void and ineffectual. The plaintiff's case seems to have been that the defendant, after the execution of the deed of sale in question, desired that it should be registered, and promised that he would forthwith pay the consideration-money, and accordingly the plaintiff presented the deed for registration and had it registered, and called upon the defendant to pay the consideration-money. The defendant, however, promised to pay it in a short time, but subsequently declined to make the payment. Thereupon the plaintiff was obliged to issue a notice upon him either to pay the consideration-money or to treat the transaction as cancelled, but the defendant refused to receive the notice.

[9] The case of the other side was that the whole of the consideration-money, with the exception of a small amount, was paid to the plaintiff, and that this was a completed transaction.

The Court of First Instance, upon a consideration of the evidence in this case, held that the defendant did not pay any part of the consideration-money, and in the course of the judgment that it delivered brought to light certain facts which indicated that the parties did not consider the transaction as a completed transaction, notwithstanding the registration of the deed. The Munsif accordingly decreed the plaintiff's suit.

We might here mention that notwithstanding the registration of the document in question, it remained in the hands of the plaintiff, and it was not delivered over to the defendants.

The Subordinate Judge, in appeal, has reversed the judgment of the Munsif upon certain grounds which we are not quite able to follow, and he has done so without deciding the question whether any consideration passed from the defendant to the plaintiff. In one portion of his judgment he says : " But there was no evidence in this case beyond the interested statement of the plaintiff's brother, to prove the alleged promise of paying the consideration after registration." That is the only passage in which any reference is made to the question of the payment of the consideration-money. He then says that the plaintiff has misconceived his [her?] remedy, and that he [she?] should have brought a suit not for cancellation of the document but for recovery of the consideration-money ; and he refers to section 54 of the Transfer of Property Act as showing that the transaction was completed so soon as registration was had.

It seems to us that the Subordinate Judge is in error in holding that the mere registration of the document made the transaction a completed transaction. No doubt under section 54 of the Transfer of Property Act the sale of an immoveable property of the value of one hundred rupees and upwards can only be made by a registered instrument, but it does not follow from this that the moment the instrument is registered it should be taken as conclusive that the title has passed. In the case of *Sheo Narain Singh v. Darbari Mahton*, (1897) 2 C. W. N., 207, where the [10] vendor by reason of non-payment by the vendee of the consideration-money, transferred the property to a third party, and that third party brought a suit to recover possession of the property upon the strength of his purchase against the first vendee, a Divisional Bench of this Court, upon a question similar to that raised before us in this case, made the following observations : " It was argued before us that, having regard to the provisions of section 54 of the Transfer of Property Act, the mere registration of the deed of sale conveyed the property. We are not prepared to go to that length. It is true that the Act prevents the property from passing, except the deed be registered, but it does not follow from that, that the mere registration of the deed necessarily passes the property. There might be circumstances that would show that it was not intended that the transfer should have any immediate operation, although the deed had been registered. Registration is required to be made within a certain period after execution, and apart from the section of the Transfer of Property Act, it is not a formality which creates any rights, although it affects the admissibility in evidence of the document. The question as to whether the consideration was paid has a most material bearing on the consideration of the question, whether it was intended that the transfer to the defendant No. 1 should be then and there an operative transfer, or whether it was intended that something further should be done before any effect should be given to it."

We entirely agree in these observations. We think that the registration of a deed does not necessarily make the transaction between the parties concerned complete. We are further of opinion that it was absolutely necessary for the purpose of determining the question of the intention between the parties (for in a case like this the all-important question is one of intention) to decide whether consideration actually passed, and what was the understanding between the parties as to the payment thereof. No doubt, in the passage to which we have already referred, the Subordinate Judge says that he does not accept the evidence on the part of the plaintiff that the defendant promised to pay the consideration after registration ; but we are not prepared to say that that is really conclusive of the question which the Subordinate Judge had to try. He had to consider whether the consideration really passed, as the defendant

[11] alleged, and what was the intention of the parties in the matter of the completion of the sale transaction in question; whether it was intended that the title should pass only upon the consideration being paid by the defendant, or upon the mere registration of the instrument in question.

We think that the judgment of the Subordinate Judge, as it stands, cannot be supported. We, therefore, set it aside, and send the case back to him for retrial with reference to the observations which we have made. Costs to abide the result.

This judgment governs the analogous appeal No. 2181 of 1897.

M. N. R.

Appeal allowed; case remanded.

NOTES.

[The passing of title depends on fulfilment of intended conditions, such as payment of consideration:—(1906) 4 C.L.J., 338; 13 C.W.N., 692; (1904) 28 Mad., 122; (1913) 19 I.C., 563. In (1911) 10 M.L.T., 44 it was held that the mere non-delivery of the deed did not destroy the *trust* that it created.]

[27 Cal. 11]

The 18th July, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Rajib Panda.....Defendant

versus

Lakhan Sindh Mahapatra and others.....Plaintiffs.*

Fraud—Pleading fraud—Evidence Act (I of 1872), sections 40 and 44—

Existence of a previous judgment inter partes—Relevant fact—

*Competency of any party against whom such judgment
obtained, to prove in a suit between the same parties,
that it was obtained by fraud.*

In a suit brought by A against B for *khas* possession of a tank, the plaintiff put in a decree based on a compromise in a previous suit between him and the defendant, to prove his right to *khas* possession. The defence (*inter alia*) was that the decree was a fraudulent one.

Held, that under section 44 of the Evidence Act (I of 1872) the defendant could show that the decree was obtained by fraud (see the case of *Nistarini Dassi v. Nundo Lall Bose*, I. L. R., 26 Cal., 891).

THIS appeal arose out of an action brought by the plaintiffs to recover *khas* possession of a tank as well as damages on the allegation that the defendant had caught fish in the said tank. In support of their claim the plaintiffs amongst other evidence adduced a petition of compromise, and a decree obtained thereupon in a previous suit between the same parties relating to the same tank. [12] The defendant admitted the plaintiffs' proprietary title, but alleged that he held the tank under the plaintiffs as tenant. As to the decree, he stated that it was obtained by fraud, and therefore it was not binding upon him.

* Letters Patent Appeal No. 4 of 1899, in appeal from Appellate Decree No. 1996 of 1897, against the decree of the Hon'ble John Foster Stevens, one of the Judges of the High Court, dated the 6th of December 1898.

The Court of First Instance held that the plea of fraud was not made out and that the plaintiffs' right to *khas* possession was proved, and it accordingly gave the plaintiffs a decree.

On appeal by the defendant the District Judge set aside that decree without coming to any definite finding either on the question of fraud or on the question of tenancy set up by the defendant.

Against this decision the plaintiffs appealed to the High Court, and Mr. Justice STEVENS reversed the decree of the District Judge, and restored that of the Munsif on the ground that the case was concluded by the decree in the previous suit, and so long as it was not set aside either by proceedings duly taken in that suit, or by a separate suit brought for the purpose, it was not open to the defendant to challenge it in any subsequent suit in which it was used as evidence against him.

The judgment of Mr. Justice STEVENS was as follows :—

"In this case the plaintiffs, the landlords, sued for the recovery of *khas* possession of a tank and for Rs. 25 as damages on account of the defendant having caught fish in the tank. The defendant admitted the plaintiffs' proprietary title but alleged that he held the tank under the plaintiffs as tenant.

"Amongst other evidence the plaintiffs adduced a petition of compromise and a decree obtained thereupon in a previous suit between the parties relating to the same tank. In that petition of compromise which was filed by the defendant he admitted that he had no right or possession whatsoever in the tank. He stated that he had relinquished possession of the tank and therefore that the Court should not give possession. He undertook to pay Rs. 35 as damages and costs.

"The defendant sought to get rid of the effect of this decree as evidence against him in the present litigation by stating that it had been fraudulently obtained, that he had not been aware of its contents, and that he had been coerced by the plaintiffs into making the compromise. The Court of First Instance for detailed reasons, which it gave, disbelieved this allegation of the defendant and gave a decree for the plaintiffs. The Lower Appellate Court, without actually deciding upon the evidence [13] that the compromise upon which the decree in the former suit was based had in fact been obtained by fraud, says that it appears to be almost certainly fraudulent, having regard to the terms of it and the relative position of the parties, the defendant, as the District Judge says, being an ignorant and foolish man.

"A good deal of time has been taken up by both sides in argument in this Court, and numerous rulings have been cited which have little or no bearing on the questions relating to the petition of compromise and the decree based upon it.

"The whole question really turns upon the construction of section 44 of the Evidence Act. That section runs as follows: "Any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under sections 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion." The question is whether a party to the suit in which a previous judgment was obtained can be allowed to aver that it was obtained by fraud of his antagonist, though the judgment remains unreversed. This point has not been settled, so far as I have been able to ascertain, either in this country or in England. It was noticed in the case of *Ahmedbhoj Hubibhoy v. Vulleebhoj Cassumbhoj*, (1882) I.L.R., 6 Bom., 703, but it was not necessary to decide it for the purpose of that case. An opinion is, however, expressed at page 715 of the report that such a contention could not be successfully maintained having regard to the recent authorities, especially the case of *Huffer v. Allen*, (1866) L. R., 2 Exch., 15.

I am inclined to take the view that a judgment obtained in a previous litigation cannot be challenged under section 44 of the Evidence Act by a party to the suit in which it was obtained. It seems to me that a judgment must remain of full effect for all purposes, unless

and until it is formally vacated ; when a decree has been obtained by fraud it is competent to the party against whom it has been obtained to have it set aside on that ground. In such a case it is necessary that the party setting up fraud should not merely make a general averment of fraud, but that he should distinctly set forth circumstances which constitute the fraud and that he should strictly prove those circumstances. It seems to me difficult to suppose that the Legislature intended to put a party against whom a decree has been passed in a better position when it is adduced in evidence against him in a subsequent litigation than he would have occupied if he had sued to set it aside. I think, therefore, that the defendant was concluded in the present case by the previous decree based upon the compromise.

"It has been urged for the (defendant) respondent that on the finding of the learned Judge the defendant has established a right by adverse possession-[14]sion. There is no express finding by the Lower Appellate Court to this effect. The learned Judge speaks of the defendant having long possession chiefly on the basis of a finding by the Settlement Officer, but there is no finding that there has been a continuous possession for such a period as would give the defendant a right by adverse possession. Besides as I have said the case is in my opinion concluded by the decree in the previous litigation.

"The appeal is decreed with costs of both the Appellate Courts ; the decree of the first Court is restored."

Against this decision the defendant preferred an appeal under clause 15 of the Letters Patent.

Babu Purno Chunder Shome for the Appellant.

Mr. P. O'Knealy, *Dr. Ashutosh Mookerjee*, and *Babu Upendra Gopal Mitter* for the Respondents.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.) :—

Maclean, C.J.—This is an appeal from a judgment of Mr. Justice STEVENS.

That learned Judge has stated with accuracy the nature of the respective cases of the plaintiff and of the defendant, and the contentions of the parties, and I do not think any useful object will be attained by my recapitulating them.

The real question we have to decide is, whether the defendant is entitled to show in this suit, that the decree obtained in the previous suit between the same parties was obtained by fraud, or whether or not, so long as that decree stands unreversed, it must be taken to be binding upon him.

I concur with the learned Judge in the Court below in thinking that the question turns upon the construction of section 44 of the Evidence Act, though, so far as I can gather from his judgment, he scarcely appears to have discussed the actual language of the section.

There is but little authority upon the point in the reported decisions of the Courts of this country, whilst to my mind, the decisions in the Courts of England are of no assistance to us, for we have to consider, not what the law in England is [and upon this it may be taken that a decree is binding upon the parties [15] so long as it stands unreversed ; see *Huffer v. Allen*, (1866) L. R., 2 Exch., 15], but what the law is in India, having regard to the provisions of the section in question.

And, in dealing with this point, *i.e.*, in dealing with the construction of an Act intended to codify a particular branch of the law, I may, perhaps, usefully refer to the observations of the late Lord HERSCHELL, in the case of *Bank of England v. Vagliano*, (1891) L. R. App. Cas., 107 (145), which have been cited with approval by their Lordships of the Privy Council in the case of *Norendra Nath Sircar v. Kamalbasini Dasi*, (1896) I. L. R., 23 Cal., 563 : L. R., 23 I. A., 18.

The section is as follows: "Any party to a suit or other proceeding may shew that any judgment, order or decree, which is relevant under sections 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

The language of the section is very wide, and reading that language literally, in its ordinary acceptation, and according to its ordinary and natural meaning, it certainly covers the present case. I take it we are bound to construe the section according to the plain meaning of the language used, unless we can find either in the section itself or in any other part of the statute, anything that will either modify or qualify, or alter the statutory language [See *per Lord HALSBURY, L.C.*, in the case of *Vestry of the Parish of St. John's, Hampstead v. Cotton*, (1886) L. R., 12 App. Cas., 1 (6)] even if the result of such construction lead to anomalies, or be productive even of absurdity.

Our attention has not been drawn to any words in the section or to other parts of the Act, which modify or qualify the ordinary meaning of the language used.

In the present case we find a decree relevant under section 40 proved by the plaintiff, the party adverse to the defendant in the suit; how are we to get out of the plain words of the section, and say that the latter may not show that this decree was [16] obtained by fraud? It is, perhaps, strange to those conversant with the English practice to hold that a defendant to a suit can, in that suit, shew that a previous judgment obtained against him by the same plaintiff in a previous suit, was obtained by fraud, without initiating independent proceedings to have that judgment set aside. As against that, however, it must be borne in mind that in this country a looser practice would appear to prevail, for, apparently a defendant may challenge, say, a registered mortgage deed, which is being sued upon, without bringing a suit to set it aside. As was pointed out by Lord MORRIS in the case of *Ali Kadar Bahadur v. Indar Parshad*, (1896) L. R., 23 I. A., 92 (95): I. L. R., 23 Cal., 950 (954), it is not easy to understand how, in such cases, the question comes to be discussed: but if one were at liberty to speculate as to the motives of the Legislature, it is possible that it may have been influenced by some consideration as to this practice, in passing the section now under discussion.

If the section do not cover a case such as the present, to what class of case does it apply, and what is the real object of the section? To this we have received no reply.

The argument against placing a construction on the section consistent with the ordinary meaning of the language is that it would convert it into a procedure section, and that the Act is one codifying the law of evidence and not one of procedure. But there are several other sections of the Act which import questions of procedure, for example, sections 66, 135, 136 and 150. I fail, however, to see why, even though it may import a matter of procedure, we should not construe the section according to the ordinary meaning of its language.

As regards authority upon the point, the case of *Ahmedbhoy Huhibhoy v. Vullbeebhoy Cassumbhoy*, (1882) I. L. R., 6 Bom., 703, was relied upon by the respondents, but upon close examination that case appears to me to be an authority the other way. In that case the first and second defendants set up that the previous decree had been obtained by fraud; the preliminary issue was (I am not quoting the whole of it, which will be found at page 705 of the report) "Whether the [17] said decree is not for the purposes of this suit, a binding and valid decree * * * and whether the said decree is not in this suit binding upon the

defendants and each of them, and whether the defendants, or any or either of them, can *in this suit* in any way object or dispute the said decree." The matter was dealt with as upon demurrer. The question to which the learned Judge applied his mind will be found at page 709 of the report, where he says, "and the question shortly is whether, admitting the allegation of fraud and collusion made by the first and second defendants, they are entitled to set up such fraud and collusion in their defence in this suit, while the decree in suit No. 401 of 1866 stands unreversed."

That issue the learned Judge found in favour of the first and second defendants, and said, after a careful review of the law in England on the subject, that section 44 of the Evidence Act clearly covered the case.

The learned Judge says: "The language is wide enough to allow a party to the suit in which the judgment was obtained to aver that it was obtained by the fraud of his antagonist, though the judgment stands unreversed," and this view is adopted in the case of *Manchharam v. Kalidas*, (1894) I. L. R., 19 Bom., 821 (826).

The case of *Bansi Lal v. Ramji Lal*, (1898) I. L. R., 20 All., 370, cannot be regarded as an authority in the respondents' favour, for section 44 was not even mentioned.

So far, then, as authority goes, it would appear to be in the appellant's favour, but apart from authority, in my opinion the defendant was entitled to shew in this suit that the decree in the former suit was obtained by fraud.

Then it is urged that the Courts below ought not to have gone into the question of fraud, but I think they were bound to do so. When the judgment, which was not pleaded, was put in against the defendant, he was entitled to show it was obtained by fraud. No objection was taken to this before the Munsif, and no application was made by the plaintiff for any adjournment on the ground that he was taken by surprise, and the Munsif decided [18] against the case of fraud, and in the present respondents' favour. There is nothing in this point.

I think, however, the respondent is entitled to a remand to have the question of fraud or no fraud, in relation to the previous decree, more precisely found by the District Judge. His finding is very loose. He says: "The compromise upon which the decree in the former suit was passed seems to me to be almost certainly a fraudulent one." That is far from sufficient. There must be a remand to ascertain whether the previous decree was obtained by fraud, and if obtained by fraud, whether the tenancy set up by the defendant is established. The decree of Mr. Justice STEVENS must be reversed, as also that of the District Judge, and the case remanded, but the respondents must pay the costs both here and before Mr. Justice STEVENS.

Banerjee, J.—I am of the same opinion. This appeal arises out of a suit brought by the plaintiffs for *khas* or direct possession of a tank, and for damages on account of the defendant having caught fish in the tank. The defendant admitted the plaintiffs' proprietary right in the tank, but denied their right to *khas* possession, and alleged that he was entitled to such possession as their tenant, and he denied his liability for the damages claimed.

At the trial, the plaintiffs put in a decree based on a compromise in a previous suit between them and the defendant to prove their right to *khas* possession. The defendant impeached that decree as fraudulent. But the first Court held that the plea of fraud was not made out, and that the plaintiffs' right to *khas* possession was proved, and it accordingly gave the plaintiffs a decree.

On appeal by the defendant the learned District Judge set aside that decree without coming to any definite finding, either on the question of fraud or on question of the tenancy set up by the defendant, and merely observing in his judgment that the compromise seemed "to be almost certainly a fraudulent one," and that the position of the tank "very strongly corroborates the evidence for the defendant as to his ancient possession of the tank."

[19] On second appeal by the plaintiffs, Mr. Justice STEVENS has reversed the decree of the District Judge and restored that of the Munsif on the ground that the case was concluded by the decree in the previous suit, and that so long as it was not set aside either by proceedings duly taken in that suit or by a separate suit brought for the purpose, it was not open to the defendant, who was a party to the decree, to challenge it under section 44 of the Evidence Act in any subsequent suit in which it is used as evidence against him.

Against that decision the defendant has preferred this appeal, and it is contended on his behalf that it was open to him under section 44 of the Evidence Act to shew in this suit that the decree relied upon by the plaintiffs was obtained by fraud, and that the case should be remanded to the District Judge to determine the questions of fraud and tenancy upon which he has not come to any clear finding.

On the other hand, it is urged by the learned Counsel for the plaintiffs that the view taken by Mr. Justice STEVENS is correct; that section 44 of the Evidence Act, as its position in the Act would indicate, is intended only to state the rule of law relating to evidence; that a decree of a competent Court may be impeached on the ground of fraud, but it is not intended to lay down any rule of procedure as to how it should be impeached, that is, as to whether the party seeking to impeach it should proceed by a separate suit or not; and that if section 44 is to have the effect contended for by the defendant, it would lead to certain very anomalous and unreasonable consequences.

After carefully considering the arguments on both sides, I think the contention of the defendant ought to prevail. The question before us is one of the construction of section 44 of the Indian Evidence Act. The proper mode of dealing with such a question is that indicated in the following observations of Lord HERSCHELL in the *Bank of England v. Vagliano*, (1891) L. R., App. Cas., 107, which were adopted by the Privy Council in *Norendra Nath Sircar v. Kamalbasini Das*, (1896) I. L. R., 23 Cal., 563: "I think," said his Lordship, "the proper [20] course is in the first instance to examine the language of the Statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view." Examining then the language of section 44 of the Evidence Act which runs in these words: "Any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under sections 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion," I find that it provides that a party to a *suit or other proceeding* may shew that a judgment, order or decree which is relevant, under section 40, that is, which would as a judgment *inter partes*, operate as *res judicata*, or which is relevant under section 41, that is, which is evidence as a judgment *in rem*, or which is relevant under section 42, that is, which is evidence as a judgment relating to a public matter, and *which is proved* by the *adverse party*, was passed by a Court which had no jurisdiction to pass it or was obtained by fraud or collusion. Or in other words (confining our atten-

tion to so much of the section as bears upon the present case) a party to a suit may shew that a judgment or decree, which is conclusive as a judgment or decree *inter partes* and which has been proved against him by his adversary in that suit, was obtained by fraud. And when may the party shew that the judgment or decree was obtained by fraud? The context evidently shews that the answer must be "In the suit in which the judgment is proved against him by his adversary." The language of the section clearly shows that it is very different from a provision such as the plaintiffs contend it is intended to be, merely declaring that a judgment which is conclusive or admissible in evidence against any party may be impeached by such party on the ground of fraud or collusion. If that had been the object of the section the words "to a suit or other proceeding" and "and which has been proved by the adverse party" would have been wholly unnecessary. To accept the plaintiffs' contention would be to hold that [21] these portions of the section are matters of elaborate surplusage intended to serve no purpose and needlessly introduced into the section, notwithstanding that they are calculated to mislead.

The section makes the same provision for impeaching on the ground of fraud judgments *inter partes*, and judgments *in rem* or judgments relating to public matters. Now it is not disputed, nor can it be disputed (see Taylor on Evidence, 9th edition, section 1713) that a stranger to a judgment *in rem* or a judgment relating to a public matter against whom such judgment is used in evidence under section 41 can impeach it on the ground of fraud in the suit in which it is so used. And it is not reasonable to suppose that the same words are used in a different sense when applied to judgments *inter partes*, that is, judgments relevant under section 40.

Then, again, the section makes the same provision for impeaching a judgment on the ground of fraud that it does for avoiding a judgment on the ground of want of jurisdiction. Now, there can be no question that in the latter case the objection may be substantiated in the case in which the judgment is used as evidence. It would, therefore, not be reasonable to hold that the provision in the former case, which is expressed in the same words, should have a different meaning.

The language of the section, therefore, is clearly in favour of the construction contended for by the defendant, and against that suggested by the other side. Nor can the position of the section in the Act be taken to control the plain meaning of its language. And I may add that there are many sections of the Evidence Act, such as sections 66 to 73, 130, 135, 136, and 150, which relate more or less to matters of procedure, so that there is nothing singular or unreasonable in section 44 laying down, not only a rule of law relating to evidence, but also a rule of procedure.

Let us next examine how far the construction, which the defendant asks us to adopt, does really lead to any anomalous and unreasonable consequences as the plaintiffs contend.

It was contended by the learned Counsel for the plaintiffs that if a party to a suit or proceeding was allowed to shew in such suit or proceeding that a judgment against him was obtained by [22] fraud, it would be open to a judgment-debtor in the course of execution proceedings to impeach the decree sought to be executed—a result which could never have been intended. The answer to this contention is that section 44, if its language is carefully considered, cannot lead to any such result. For the judgment or decree, which the section allows a party to impeach on the ground of fraud must, as the section says, be one "which has been proved by the adverse party"—a qualification which cannot apply to a decree sought to be executed, a decree not requiring

to be proved in the proceedings taken to enforce it. But then it was argued that, if those words are to have full effect given to them, the section will fail to provide for the setting aside by a separate suit of a judgment or decree on the ground of fraud, when such judgment or decree has not yet been used against the party seeking to set it aside. The answer to this argument is that the right of a party to set aside by a suit a judgment or decree on the ground of fraud, exists independently of the provisions of the Evidence Act.

It was next contended by the learned Counsel for the plaintiffs that if the construction proposed by the defendant be adopted, it would be open to a party against whom a suit for money is brought by an executor to the estate of a deceased creditor to show in such suit that probate was obtained by fraud. I do not think any such consequence would follow. For the executor in such a suit has not to prove or even produce the order granting probate, the production of the probate being sufficient for his purpose, and the probate not being a judgment, order or decree, does not come within the scope of the section.

Then it was contended for the plaintiffs that if section 44 was construed literally it might allow a party to impeach a judgment on the ground of his own fraud. That, however, is an objection which will hold good equally against the plaintiffs' construction of the section. For if a party is not to be allowed to impeach a judgment on the ground of his own fraud he ought to be precluded from doing so quite as much when he seeks to establish such fraud in the case in which the judgment is used as evidence, as when he brings a separate suit for the purpose. If a party is precluded from doing so he is precluded, not by any [23] rule of evidence, but by the general principles of justice which prohibit a person to plead his own fraud.

It was further urged that whereas a suit to set aside a decree obtained by fraud must, as provided by article 95 of schedule II of the Limitation Act, be brought within three years after the fraud becomes known to the party wronged, if the defendant's construction of section 44 of the Evidence Act be adopted, such party will have unlimited time to impeach a judgment on the ground of fraud. This no doubt is an anomaly. But there is a material difference between the relief obtainable by a suit for setting aside a decree obtained by fraud and that which a party can have by shewing as defendant in an action in which such a decree is used as evidence against him that it was obtained by fraud.

The supposed anomalous and unreasonable consequences pressed upon our attention in the argument for the plaintiffs (respondents) are not, therefore, of a nature such as would justify our rejecting a construction, which is so clearly in accordance with the plain meaning of the words of the section.

There is no dispute that a stranger to a judgment against whom it is used as evidence, either as a judgment *in rem* or as a judgment relating to a public matter, may impeach it on the ground of fraud in any case in which it is so used. Taylor in his Treatise on the Law of Evidence, after stating that the rule on this point is clear, observes (in paragraph 1713) "whether an *innocent party* would be allowed to prove in one Court that a judgment against him in another Court was obtained by fraud is not equally clear, as it would be in his power to apply directly to the Court which pronounced the judgment to vacate it." And Bigelow in his work on the Law of Estoppel says (see page 208), "whether parties may set up fraud has been a subject of conflicting opinion." Thus in systems of law to which our own is more or less allied, the view contended for by the learned Counsel for the plaintiffs is by no means a clearly settled and accepted one.

No doubt the most natural course for a party to a judgment [24] who seeks to impeach it for fraud, is to apply to the Court which pronounced the judgment to set it aside. But if it is conceded, as it must be, that in addition to that course a party may also institute a suit directly to set aside a judgment obtained against him by fraud, there is not much reason why he should not also be allowed to avoid its effect in any suit in which it is used as evidence, by shewing in that suit that it was obtained by fraud. On the contrary, by allowing a party to do so, we avoid multiplicity of suits.

It remains now to say a few words with reference to the cases cited. Some of these, as for instance the case of *Bansi Lal v. Ramji Lal*, (1898) I.L.R., 20 All., 370, are of very little use for our present purpose, as they were decided without any reference to section 44 of the Evidence Act. Of the remaining cases no one is directly in point upon the question now before us, and if in some of them there occur observations against the defendant's view, there are others, such as the cases of *Nilmony Mookhopadhyaya v. Aimunissa Bibee*, (1885) I.L.R., 12 Cal., 156; *Ahmedbhoy Hubibhoy v. Vulleebhoy Cassimbhoy*, (1892) I.L.R., 6 Bom., 703, and *Manchharam v. Kalidas*, (1894) I.L.R., 19 Bom., 821 (826), which contain *dicta* in favour of that view.

For the foregoing reasons I think the contention of the defendant that it is open to him in this case under section 44 of the Evidence Act to shew that the decree relied upon by the plaintiffs was obtained by fraud, is correct and ought to prevail, and the judgments of Mr. Justice STEVENS and of the District Judge of Cuttack ought to be set aside and the case sent back to the District Judge for disposing of it after determining whether the decree relied upon by the plaintiffs was obtained by fraud, and if it was obtained by fraud, whether the tenancy set up by the defendant is established.

S. C. G.

Appeal allowed ; case remanded.

NOTES.

[When a decree is challenged on the ground of fraud, it may be attacked by setting up a plea of fraud as well as by a regular suit :—(1913) 18 C.W.N., 271; 33 Cal., 967; 32 Mad., 328; (1899) 23 Mad., 216.

See also (1902) 24 All., 242; 26 All., 272; (1902) 30 Cal., 369; (1909) 14 C.W.N., 823; (1912) 16 C.L.J., 552; (1905) 10 C.W.N., 422.]

[25] *The 20th July, 1899.*

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE STEVENS.

Thakur Singh.....Plaintiff

versus

Bhogeraj Singh and others.....Defendants.*

*Limitation—Possession and actual user—Conflicting evidence of possession—
Presumption of possession from title—Title and possession—Onus
probandi—Character of land in dispute—Mode of enjoyment.*

It is only when the evidence of possession is strong on both sides and apparently equally balanced, that the presumption that possession goes with title should prevail. The principle does not apply where the evidence of possession is equally unworthy of reliance on both sides.

* Appeals from Appellate Decrees Nos. 25 and 159 of 1898, against the decree of Babu Bhagwan Chandra Chatterjee, Subordinate Judge of Tirhoot, dated the 18th of September 1897 reversing the decree of Babu Troylukya Nath Shome, Munsif of Sitamari, dated the 22nd of March 1897.

Dharm Singh v. Hurpershad Singh, (1885) I. L. R., 12 Cal., 38 explained.

Possession, however, is not necessarily the same as actual user. When therefore the plaintiff has to prove possession of a land in dispute within the statutory period of limitation, if there is anything special in the character of the land, for example, when it is permanently or temporarily incapable of actual enjoyment in any one of the customary modes, a presumption in favor of continuance of possession, though in no sense a conclusive one, may arise.

Mahomed Ali Khan v. Abdul Gunny, (1883) I. L. R., 9 Cal., 744 : 12 C. L. R., 257, referred to.

IN the two suits out of which these appeals arose the main question was whether the plaintiff was in possession of the disputed lands within twelve years next before the date of the institution of the suits. The plaintiff alleged that the lands in dispute appertained to a *putti* in *mouzah* Pachra, belonging to him and his co-sharers, the defendants second party, and prayed for confirmation of possession after establishment of title.

The defendants first party contended, amongst other things, that the lands did not appertain to the plaintiff's *putti*. Previous to the suits there were some *butwara* proceedings for the partition of the *putti* in question between the plaintiff and his co-sharers ; but the defendants first party having claimed portions of the lands surveyed as appertaining to their *putti*, the Deputy Collector refused to proceed with the partition. Hence the suits.

[26] The Munsif found that the title to the lands in dispute rested with the plaintiff and his co-sharers, excepting a small strip of land. He also found that the plaintiff had failed to prove possession at the date of the suits. Then, as to the question of the plaintiff's possession within twelve years of that date, the Munsif decided that issue in favour of the plaintiff upon grounds set out in the portion of his judgment quoted in the judgment of the High Court. The suits were decreed accordingly.

On appeal the Subordinate Judge held that the suits were barred by limitation and dismissed them.

The plaintiff appealed to the High Court.

Mr. C. Gregory, and Babu *Buldeo Narain Singh*, for the Appellant.

Babu *Sorashi Charan Mitter* for the Respondents.

The judgment of the High Court (GHOSE and STEVENS, JJ.) was delivered by

Stevens, J.—The question in dispute in the two cases out of which these appeals arise is as to whether the plots of land with which they are respectively concerned appertained to the *putti* of the plaintiff, or to that of the defendants. It is not necessary to enter into the history of this litigation, which has been pending since the year 1890. Suffice it to say that when the cases came for the last time before the Subordinate Judge of Tirhut on appeal, that officer held that they were barred by limitation, and accordingly dismissed them.

The view held by the Court of First Instance was that in both cases the land in dispute was of such a character that neither party had been in regular possession of it. The learned Munsif says : "The disputed lands in suit No. 147 are admittedly *putti* (waste) lands over which neither party cared to exercise acts of possession till shortly before the institution of the suits, and the attempt at definite and lasting possession on both sides gave rise to the disputes. It might very well be that the defendants' tenants coming to live near the lands now and then passed over them or kept cowdung on them, and in the same way the plaintiff and his co-sharers also might have tied their cattle on them. These acts having been occasional, neither party cared to oppose the other. When the plaintiff, [27] however, proceeded to lay claim to them definitely by acts of ownership, and especially by the *butwara*

proceedings, the defendants opposed them. As regards the disputed lands in suit No. 40 I am inclined to think that the defendant, Munha Singh, in his evidence before Babu Rajendra Nath, spoke the truth when he said that the lands were formerly swamps. When these swamps became culturable in certain seasons only of the year, it is very probable that now a man on plaintiff's behalf and now a man on defendants' behalf grew crops on such bits as could be sown, the man on behalf of either party sowing such crops as he found convenient, regard being had to the season and the consistency of the soil at the particular period. This accounts for the fact that the witnesses on neither side give any consistent account of the cultivation of the kinds of crops. As in the case of the disputed lands in suit No. 147, so in this case, too, when the swamps gradually became fit for regular cultivation and either partly attempted it, it gave rise to disputes which culminated in the *butwara* proceedings and in these suits. Under such circumstances I think I should hold that possession goes with title. *Dharm Singh v. Hurpershad Singh*, (1885) I. L. R., 12 Cal., 38."

The Munsif had previously remarked that he found it difficult to rely upon the general statements of the plaintiff's witnesses as to possession, and that the evidence of the witnesses for the defendants was also equally unworthy of reliance. Upon the merits of the case the Munsif found that the plaintiff was entitled to recover a portion of the land for which he sued.

The learned Subordinate Judge was, we think, right in holding that the Court of First Instance did not correctly apply the case of *Dharm Singh v. Hurpershad Singh*, (1885) I. L. R., 12 Cal., 38, and that the true application of that case would be where the evidence of possession is strong on both sides and apparently equally balanced, in which case preference should be given to the evidence on the side of the party with whom the title was found. At the same time he does not appear to have considered the case from the point of view from which we think it ought to have been considered in the light of what the Munsif says about the character of the lands in dispute.

[28] As to the question what in fact was the character of the lands he does not say anything, and we do not know whether he differed from the Court of First Instance on that point. The learned Subordinate Judge seems to lay down as a general proposition that if the evidence of the plaintiff, on whom lies the onus to prove possession, be not worthy of reliance, he cannot succeed even if he had a good title. There are, however, certain classes of cases to which a general proposition of this kind would not be applicable, because it may be that the lands in dispute are of such a character that they do not permit of actual enjoyment in any of the ordinary modes. We would refer to the case of *Mahomed Ali Khan v. Abdul Gunny*, (1883) I. L. R., 9 Cal., 744 : 12 C. L. R. 257, decided by a Full Bench of this Court. That was a case of jungle lands, as to which it was stated that the plaintiff and the defendant had good title jointly; that at the date of a *thakbast* in 1859, they were in joint possession; that the whole of the lands were then jungle, yielding, however, some kind of profit which had been variously described; that at some time or times subsequent to that date, but more than ten years before the institution of the suit a portion of the lands was brought under cultivation, and that of the lands so reclaimed the defendants had been in possession from the time of their reclamation. The Court below had held that it was for the plaintiffs to prove that they had been in possession within twelve years prior to the suit and found that they had failed to discharge the onus. It was pointed out by this Court that, although there was no doubt as to the general rule that it lay upon the plaintiff to show possession within twelve years, possession is not necessarily the same thing as actual user. "The nature of the possession to be looked for," it was said, "and the evidence of its continuance

must depend upon the character and condition of the land in dispute. Land is often either permanently or temporarily incapable of actual enjoyment in any of the customary modes as by residence or tillage or receipts of a settled rent. It may be incapable of any beneficial use, as in the case of land covered with sand by an inundation ; it may produce some profit, but trifling in amount, and only of occasional occurrence as is often the case with jungle land. In such cases it would be unreasonable to look for the same evidence of possession as [29] in the case of a house or a cultivated field. All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and in such cases when he has done this, his possession is presumed to continue as long as the state of the land remains unchanged, unless he is shown to have been dispossessed." It was again remarked: "When lands, which have been in such a condition as to be incapable of enjoyment in the ordinary modes are reclaimed and brought under cultivation, the change is in many instances gradual and difficult of observation while in progress. Diluviated land may take years to reform. Jungle land is often brought under cultivation furtively by squatters clearing a patch here and a patch there at irregular intervals of time. So that it may be a matter of extreme difficulty to prove as to any piece of land the exact date at which its condition became altered. And as the plaintiff, who has complied with the conditions we have indicated, is in the absence of dispossession presumed to continue in possession as long as the state of the land remains unchanged, it is essential to enquire on whom the burden of proof of the date of the change lies." After considering this point, the learned Judges observed that the presumption which would arise would be in no sense a conclusive one ; that its bearing upon each particular case must depend upon the circumstances of the case ; and that it was always liable to be rebutted by evidence. They considered that, having regard to the circumstances of that case, the question of limitation ought to be considered together with all the evidence, and they remanded the case to the Court below in order that it might be so considered.

We desire to draw the attention of the learned Subordinate Judge to that case, as it does not appear to us that he has considered these cases from the points of view therein indicated, and in our judgment if the Munsif is correct in his view as to the character of the lands in dispute, it is essentially necessary to the right decision of the question of limitation in the present cases that it should be considered with the whole of the evidence in the case. It is necessary that he should in the first place consider whether there is, as the Munsif found, anything special in the character of the lands, and if he finds that they have such a special character, he should inquire into the [30] nature of the possession which either party enjoyed, and then determine the question of limitation upon the whole of the evidence in the case.

We very much regret the necessity of prolonging this already unduly protracted litigation ; but we feel that it is necessary in the ends of justice to make this remand.

We accordingly remand these cases to the Subordinate Judge for retrial with reference to these observations.

Costs will follow the result.

M. N. R.

Appeals allowed ; cases remanded.

NOTES.

[See also (1904) 8 C.W.N., 876.]

[27 Cal. 30]

The 15th May, 1899.

PRESENT:

SIR FRANCIS W. MACLEAN, K.C.I.F., CHIEF JUSTICE, AND

MR. JUSTICE BANERJEE.

Dino Nath Chuckerbutty.....Defendant

versus

Pratap Chandra Goswami... ..Plaintiff.*

Right of Suit—Suit for declaration and enforcement of a hereditary right to officiate as priest—Code of Civil Procedure (Act XIV of 1882), Section 11—Mesne profits—Suit to have a share in the offerings made to a deity, by one member of a family, against another, based upon an implied arrangement amongst them.

A suit by one member of a family against another for the declaration and enforcement of a hereditary right to officiate as priest at the worship performed by votaries at the foot of a certain tree, and also to have a share in the offerings made to the deity, is maintainable.

Kali Kanta Surma v. Gouri Prosad Surma, (1890) I. L. R., 17 Cal., 906, followed.

Jowahur Misser v. Bhagoo Misser, (1857) 13 S. D. A., Part I, 362, and *Kashi Chandra Chuckerbutty v. Kailash Chundra Bandopadhyaya*, (1899) I. L. R., 26 Cal., 856, distinguished.

THIS appeal arose out of a suit brought by the plaintiff to obtain a declaration of his right to worship a certain tree, to have a share in the offerings made to the deity, and for a decree for possession. The plaintiff's allegation was that one Jagannath [31] Chuckerbutty was the common ancestor of the parties, and upon his death his three sons as *shebait*s performed the worship of the said tree and enjoyed the profits thereof in equal shares; that Goluck Nath Chuckerbutty, his maternal grandfather, was a *shebait* of the presiding deity, and was in rightful enjoyment of a one-twelfth share of the profits, having been an heir of one of the sons of the said Jagannath Chuckerbutty; that after the death of the said Goluck Nath Chuckerbutty, his widow, and then his daughter, the mother of the plaintiff, were in possession of the said share by enjoyment of the profits derived from the worship of the deity; that since the death of Goluck Nath, the profits were at first realized under the management of Sital Nath, brother of Goluck Nath, and afterwards under that of the defendant No. 1; that the profits due on account of Goluck Nath's share were received by his (the plaintiff's) mother through the said Sital Nath, and afterwards through defendant No. 1; that after his mother's death he received the said profits up to the year 1296 B. S. (1889) when the defendant No. 1 refused to pay the share. Hence the suit was brought.

The defence of the defendant No. 1, who alone contested the suit, was mainly that the suit was not maintainable.

* Appeal from Appellate Decree No. 1324 of 1897, against the decree of Babu Mohim Chandra Ghose, Subordinate Judge of Faridpur, dated the 26th of April 1897, affirming the decree of Babu Debendra Nath Banerjee, Munsif of Goalundo, dated the 30th March 1896.

The Court of First Instance overruled the objections and decreed the plaintiff's suit.

On appeal to the Subordinate Judge that decision was confirmed.

Against that decision the defendant appealed to the High Court.

Dr. *Ashutosh Mookerjee*, and Babu *Preo Sankar Majumdar*, for the Appellant.

Babu *Sreenath Dass*, and Babu *Shiba Prosonno Bhattacharyya*, for the Respondent.

The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was delivered by

Banerjee, J.—This appeal arises out of a suit brought by the plaintiff, respondent, to obtain a declaration that his maternal grandfather Goluck Nath Chuckerbutty was a *shebait* of the [32] presiding deity Sri Sri Raj Rajeswar Deb of the tree of Iswar Raj Rajeswar standing on a certain piece of land, within boundaries stated in the plaint, and was in rightful enjoyment of a 1 anna 6 gundas 2 karas 2 krants share, that is a one-twelfth share of the profits pertaining to the said tree, for a further declaration that the plaintiff, as one of his daughter's sons, is entitled to a 13 gundas 1 kara and 1 krant, that is, a one-twenty-fourth share, and for a decree for possession of this last mentioned share, and for mesne profits for the three years immediately preceding the institution of the suit, the mesne profits being estimated at Rs. 50.

The defendant No. 1 alone defended the suit, and his defence, so far as it is necessary to be considered for the purposes of this appeal, was that the suit was not maintainable, and that the claim for mesne profits was excessive. The Courts below have found for the plaintiff and given him a decree.

In second appeal it is contended, on behalf of the defendant No. 1, *first*, that the present suit is not maintainable, and, *secondly*, that there cannot be any decree for mesne profits in such a suit.

In support of the first contention, the case of *Jowahur Misser v. Bhagoo Misser*, (1857) 13 S. D. A., Part. 1, 362, is relied upon. But that case is clearly distinguishable from the present. There, what was claimed was a share in the gratuity or voluntary gift made of certain property to a member of the plaintiff's family as the priest officiating at a *sradh* ceremony, and the Sudder Dewany Adawlat held that such a claim was not maintainable, because the fee paid was in the nature of a voluntary gift to the person to whom it was directly made. That, however, is not the nature of the present claim. What is claimed in the present suit is a right to officiate as *shebait* or priest, at the worship performed by votaries at the foot of a certain tree, and to share the offerings made at such worship, the right to officiate as such *shebait* being claimed by the plaintiff as an hereditary right belonging to the members of a certain family of which he himself is a member.

A suit for the declaration and enforcement of such a right is in our opinion clearly maintainable having regard to section 11 of [33] the Code of Civil Procedure, and to the case of *Kali Kanta Surma v. Gouri Prosad Surma*, (1890) I. L. R., 17 Cal., 906, and the cases therein referred to. The suit, therefore, so far as it asks for a declaration of the plaintiff's right, as set out in the plaint, is clearly maintainable.

It is then contended that there cannot be any decree for possession. This part of the appellant's contention seems to us to be right, and in fact the correctness of this contention is not disputed on the other side.

In support of the second contention of the appellant, it is argued, on the authority of the case of *Kashi Chandra Chuckerbutty v. Kailash Chandra*

Bandopadhyaya, (1899) I.L.R., 26 Cal., 356, that a suit for mesne profits, which consisted in the offerings made to an idol, is not maintainable. But we think the case cited is distinguishable from the present. There the suit was brought against a trespasser, who had kept the rightful owner out of possession for recovery of possession, and for mesne profits, and it was held that no decree for mesne profits could be made owing to the uncertainty of the amount, and owing also to the fact that, in so far as the offerings were intended as voluntary gifts to the person officiating at the time, the plaintiff, even though he was the rightful *shebait*, could not claim any portion of it. Here the claim strictly speaking is not one for mesne profits in the ordinary sense of the term. It is made, not as against a trespasser, but as against a person who was rightfully in receipt of the offerings as a member of the family to which the plaintiff himself belongs, and the claim is based upon what must have been an implied, if not an express, arrangement among the members of the family, that all the members of the family should have a share in the offerings made to the tree, which were collected by the defendant No. 1. The finding of the Court below, though not very clear, must be taken in substance to be that the offerings were so collected. That being so, the plaintiff would be entitled to his share in the profits made until the parties come to a different arrangement, such as a partition, by performing the worship by turns.

[34] Upon the question of the amount of these profits the order of the lower Court is, that it should be determined in execution of the decree. It is very doubtful whether section 212 of the Code of Civil Procedure is applicable to such a case, and whether the amount can be left to be so ascertained. But it is not necessary to consider this question, as the parties have come to an agreement as to the amount, and they consent to a decree being made for Rs. 60 in respect of the mesne profits up to this day.

The result then is that the decrees of the Courts below will be varied by limiting them to a grant of a declaration of the plaintiff's right; and by striking out so much thereof as awards possession, and by substituting for the order for determination of the mesne profits in execution of decree, a decree awarding Rs. 60 as the amount of the mesne profits, leaving the order for costs as it stands in those decrees. In this appeal there will be no order for costs.

S. C. G.

Decree varied.

NOTES.

[This was followed in (1907) 17 C.L.J., 493.]

[27 Cal. 34]

The 12th July, 1899.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE STEVENS.

Madhusudan Das and another.....Judgment-Debtors, Petitioners

versus

Gobinda Pria Chowdhurani.....Decree-holder, Opposite Party.*

Civil Procedure Code (Act XIV of 1882), section 244—Question in execution of decree—Possession in execution of decree after sale—Question arising between the parties or their representatives—Separate suit—Appeal.

Proceedings for the delivery of possession to the auction-purchaser, after sale in execution of a decree, are proceedings in execution of the decree; and when the application for possession is resisted by the legal representative of the judgment-debtor on the allegation that portions of the property belonged to him and not to the judgment-debtor, the question raised comes under section 244 of the Civil Procedure Code and must be decided under that section and not by a separate suit.

GOBINDA PRIA CHOWDHURANI obtained decrees for rent against one Ram Kamal Das, deceased, in respect of two separate [35] holdings, and purchased them herself in execution of the decrees. She applied for *khas* possession of the holdings by ejecting therefrom the sons of the deceased judgment-debtor, Madhusudan Das and Joy Chundra Das. Thereupon they opposed the applications alleging that long before the applicant got the decrees for rent, their father had sold them the whole of the one and one-half of the other holding, and that, therefore, the applicant could not disturb their possession of the same.

The Munsif held that the sales by the father to the sons were not collusive; that the applicant had already recognised one of the objectors in a previous rent suit and by granting receipts, although neither of them was made a party in the rent suit out of which the present cases arose; and that the objectors were in possession of the disputed holdings. He accordingly held that if the objectors had acquired no title by their purchase, that point should be settled by a regular suit, but that the applicant could not get *khas* possession of the land in dispute. He, however, ordered that symbolical possession might be given to her.

On appeal by the applicant, auction-purchaser, the District Judge, without expressing any decided opinion about the *bonâ fides* or otherwise of the sale-deeds of the objectors, held that she was entitled to get *khas* possession of the lands in question. He held, however, that the objectors were at liberty to bring a regular suit to establish their title to the lands in dispute on the strength of their purchase, and decreed the appeals.

The objectors appealed to the High Court.

Babu *Baikanta Nath Das* for the Appellants.

Babu *Basanta Kumar Bose*, and Babu *Jnanendra Mohun Das*, for the Respondent.

The following judgment was delivered by the High Court (**Macpherson and Stevens, JJ.**):—

The respondent purchased two *jotes* at sales in execution of two decrees which she had obtained against Ram Kamal Das for the rent due in respect of them. After obtaining the sale certificates she applied for *khas* possession as against Ram Kamal's sons who, we must take it, were put on the record as representa-

*
Huda.
the order

[36]tives of their deceased father. The sons resisted the application alleging that they had purchased the whole of one and half of the other *jote* from their father prior to the rent suits, that the respondent had recognised them as tenants, and that they were not bound by the decree to which they were not parties. In support of their contentions they put in the *kabals* by which they had purchased the *jotes* and some other documentary evidence. Both Courts considered that the questions raised could only be decided in a regular suit to be brought by one or other of the parties, and that they could not be decided under section 244 of the Civil Procedure Code. The Munsif, holding that it was for the respondent to bring such a suit, declined to give her anything more than symbolical possession. The District Judge on the respondent's appeal held that it was for the appellants, Ram Kamal's sons, to bring such a suit, and that in the meantime *khas* possession must be given to the respondent. These appeals are preferred against this order of the District Judge.

Neither Court has definitely decided the questions raised, but if the case comes under section 244 those questions obviously must be decided under that section and not by separate suit. If the case does not come under section 244, it is equally obvious that there was no appeal to the District Court, and that there is no second appeal to this Court. We must, therefore, determine whether section 244 applies.

It undoubtedly does apply as regards the parties, for there is on the one side the plaintiff, who is the decree-holder and the auction-purchaser, and on the other the representatives of the judgment-debtor. The fact that they claim the *jote* not through the judgment-debtor but adversely to him would not prevent the operation of section 244—see *Punchanun Bundopadhya v. Rabia Bibi*, (1890) I. L. R., 17 Cal., 711. The plaintiff is also none the less a party to the suit because she happens to be the auction-purchaser. Is then the question raised one relating to the execution of the decree? That question is whether the *jotes* sold at the execution sale belonged to the judgment-debtor or to the persons who now repre-[37]sent the judgment-debtor, and from whom it is sought to obtain possession with the aid of the Court. There is also another question involved, and that is whether, having regard to the provisions of the Tenancy Act (if those provisions apply) the *jotes* were not properly sold in execution of the decrees obtained against the appellants' father so as to bind the appellants even if the *jotes* do belong to them.

As the appellants do not claim through or under their father, the sale certificate has not the effect of vesting the *jotes* in the purchaser as against them, but the purchaser is entitled to ask the Court to put her in possession of what she has purchased, and, subject to the provisions of sections 317 and 318, and sections 328 to 335 relating to resistance to execution, the Court is bound to give her possession of some kind. Proceedings for the delivery of possession are, we think, proceedings in execution of the decree. They undoubtedly are so when the decree is for possession, as the proceedings are necessary in order to give effect to the decree, and any question which arose as to the land which the decree-holder was entitled to get under the decree would certainly be a question relating to the execution of the decree. The matter is not so clear when possession has to be given of land which has been sold in execution of a decree. It may be said that the decree is fully executed when the sale is confirmed, and that questions afterwards arising between the auction purchasers and the judgment-debtor or others in connection with the delivery of possession of the property sold are not questions affecting the execution of the decree. They may not affect it in the sense of impeaching the sale, but when the law provides for the delivery of possession to the auction-purchaser by proceedings which form a part of the proceedings in connec-

tion with the execution of the decree, any question arising as to the kind of possession to which he is entitled, is, we consider, a question relating to the execution of the decree within the meaning of section 244. Here the respondent, the decree-holder, says the land is in the possession of the appellants, who are the representatives of the judgment-debtor, and that she is entitled to get as against them *khas* possession. The appellants do not deny that the land is in their actual possession, [38] and that they are the representatives of the judgment-debtor, but they say they are not bound by the decree to which they are not parties, and that the land is their own and not that of the person whom they represent. Both as regards the parties and the subject-matter of the dispute, the case comes, we consider, under section 244, and must be decided under that section and not by a separate suit. If such a suit was brought it would certainly be open to the objection, whatever the Court may now say, that it was not maintainable.

We hold that an appeal does lie and we set aside the decision of both Courts. The case must go back to the first Court to be dealt with and disposed of under section 244. The parties will be at liberty to adduce additional evidence, and the costs of this Court, and of the Lower Appellate Court, will abide the result.

M. N. R.

————— *Appeal decreed ; Case remanded.*

NOTES.

[“It is well settled that when the purchaser is not the decree-holder, a question which may arise in the proceedings for delivery of possession between him and the judgment-debtor, does not fall within the scope of section 47, C.P.C., 1909, 14 Cal., 644; 31 Mad., 177. When, however, the purchaser happens to be the decree-holder the view has sometime been taken that the question of delivery of possession falls within the scope of section 47 :—27 Cal., 34; 27 Cal., 709; 31 Cal., 737; 18 C.W.N., 27; 25 Mad., 529. This view has been carried to its logical conclusion, and it has been maintained in 35 Bom., 452; 26 Mad., 740, that a decree-holder auction-purchaser must obtain delivery of possession by an application to the execution Court and cannot maintain a suit against the judgment-debtor for recovery of possession. The contrary view is supported by the cases of 1 C.W.N., 658; 6 C.L.J., 749; 7 C.L.J., 436; and it is worthy of note that in some of the cases where the view first set out has been maintained, the Court has adopted the conclusion with reluctance and hesitation because it felt bound by previous decisions, 26 Mad., 740; 23 Mad., 87. The cases were elaborately reviewed by a Full Bench of the Allahabad High Court in *Musammat Bhagwati v. Banwari Lal*, 31 All., 82, and the principle was affirmed that a decree-holder, whether holding a decree for sale under a mortgage or a simple money-decree, who purchases at a sale held in execution of such decree, property belonging to his judgment-debtor is in the same position as would be any other purchaser at an auction-sale held in execution of such decree”—*per* MOOKERJEE, J. in (1914) 20 C.L.J., 433.]

[27 Cal. 38]

The 9th June, 1899.

PRESENT:

MR. JUSTICE MACPHERSON AND MR. JUSTICE STEVENS.

Haridas Acharjia Chowdhry and others.....Plaintiffs
versus

Baroda Kishore Acharjia Chowdhry and others.....Defendants.*

Attachment—Subject of attachment—Civil Procedure Code (XIV of 1882), section 266—Meaning of the word “debt”—Attachment in execution of decree—Prohibitory order—Attachment of maintenance allowance.

The word “debt” in section 266 of the Civil Procedure Code means an actually existing debt, that is, a perfected and absolute debt, not merely a sum of money which may or may

* Appeal from Appellate Decree No. 1700 of 1897, against the decree of R. H. Anderson, Esq., District Judge of Mymensingh, dated the 26th of May 1897, affirming the decree of Babu Krishna Chandra Chatterjee, Subordinate Judge of that District, dated the 31st of March 1896.

not become payable at some future time or the payment of which depends upon contingencies which may or may not happen.

When, therefore, *A* is bound under a deed to pay to *B* a monthly maintenance allowance during the life-time of the latter, there cannot be a valid attachment of any portion of the allowance by a prohibitory order issued to *A* of a date anterior to the time when the same falls due to *B*.

BISHAN CHAND DUDHURIA obtained a decree against [39] Shukhomoye Debi Chowdhry, the defendant No. 2, on the 19th November 1883, for the sum of Rs. 6,148 and odd annas, and the said decree was purchased by the late Durgadas Acharjia Chowdhry, father of the plaintiffs, Haridas and Tarukdas.

Baroda Kishore Acharjia Chowdhry, defendant No. 1, executed a deed, dated the 19th Bhadra 1292 (September 1885) in favour of his adoptive mother, the defendant No. 2, binding himself, amongst other things, to pay her, from the month of Assin 1292, during her life, a monthly allowance of Rs. 100, and as security for the payment of the said allowance mortgaged a property mentioned in the said deed.

The plaintiffs' father having applied for the execution of the said decree against the defendant No. 2, the Court issued the following prohibitory order to the defendant No. 1, on the 5th August 1887 :—

"That the decree-holder having put in a petition stating that the said judgment-debtor under letter (sic) dated the 19th Bhadra 1292, acquired the right of getting from you a monthly allowance of Rs. 100 equal to a yearly allowance of Rs. 1,200 and praying that the amount of the said monthly allowance should be attached and deducted on account of the money due under the decree, *purwana*, and as order has been passed for attachment of one-half of the allowance due to the judgment-debtor, you are, therefore, informed under order passed to-day that, if the sum of Rs. 100 be due from you to the debtor, you should not pay a moiety of the said amount to the debtor until further order be passed by this Court, and that you should duly deposit the said moiety into the Court."

Durgadas Acharjia then prayed for execution of the decree by the sale of the attached half of the monthly allowance due from August 1887 to August 1888, and it was sold on the 20th May 1889 and purchased by the decree-holder. The defendant No. 1 not having paid the amount of the said allowance, the plaintiffs instituted a suit in the Court of the Sudder Munsif of the District against him for the recovery of the sum, and obtained a decree which was upheld by the High Court.

Then on the application of the plaintiffs, a notice, dated the 16th January 1891, was served on the defendant No. 1, asking him to deposit in Court the sum of Rs. 1,350, being the amount of the attached allowance *due* at the rate of Rs. 50 per [40] month from September 1888 to November 1890. After some proceedings in execution, the said allowance was sold on the 20th May 1891 and purchased by the plaintiffs for Rs. 165. The present suit was instituted by the plaintiffs to recover from defendant No. 1 the sum of Rs. 1,350 and for other incidental reliefs.

The defendant No. 1 denied his liability, alleging, amongst other things, that there was no portion of the allowance money in suit remaining unpaid by him on the date when the plaintiff made the auction-purchase, *i.e.*, on the 20th May 1891, and that the attachment by the prohibitory order was invalid.

The Munsif dismissed the suit, and the decision was confirmed on appeal by the District Judge.

The plaintiffs appealed to the High Court.

Mr. Hill, Babu Hari Mohan Chakravarti, Dr. Asutosh Mookerjee, and Babu Tarak Chandra Chakravarti, for the Appellants.

Dr. *Rash Behari Ghose*, Babu *Dwarka Nath Chakravarti*, and Babu *Joygopal Ghose*, for the Respondents.

The judgment of the High Court (*Macpherson and Stevens, JJ.*) was as follows :—

This appeal raises, amongst other questions, the question of the meaning of the word "debt" in section 266 of the Civil Procedure Code, which describes the property liable to attachment and sale in execution of a decree.

It appears that one Bishan Chund Dudhuria in 1883 obtained a decree against the second defendant, who is the adoptive mother of the first defendant, and that this decree was purchased by the plaintiffs' father. In 1885 the first defendant executed a deed by which he bound himself to pay to the second defendant a maintenance allowance of 100 rupees per month during the time of her life, and he secured the payment of that sum by the mortgage of certain properties. On 5th August 1887 the plaintiffs, in execution of the decree purchased by their father, obtained a prohibitory order upon the first defendant directing him not to pay half the amount of the maintenance allowance to [41] the second defendant. It will be necessary hereafter to refer more particularly to the exact terms of that order, but under it half the maintenance allowance for the period extending from August 1887 to 1888 was attached, sold, and purchased by the plaintiffs. The plaintiffs then brought a suit against the first defendant to obtain that money, and got a decree. Subsequent to this the plaintiffs, again acting upon the prohibitory order of the 5th August 1887, proceeded to sell through the Court in execution of their decree half the allowance due from [*sic*] the period extending from September 1888 to November 1890, amounting to Rs. 1,350, and on the 20th May 1891 they purchased the allowance so due for Rs. 165. The present suit is brought against the first defendant to enforce the payment of that amount.

Both the lower Courts have held that before the 20th May 1891, the date of the plaintiffs' purchase, and even before the issue of the notice of the 16th January 1891 calling upon the defendant to pay the money into Court, the amount claimed had been paid to the second defendant and that there was nothing due. That being so, it seems clear that the plaintiffs by their purchase bought nothing as the debt purchased by them had been satisfied and was not then in existence.

In this state of things Mr. *Hill* for the appellants has contended that the first defendant is not entitled to plead payment of this debt, as the effect of the prohibitory order of the 5th August 1887 was to attach the money; and that any payment by the first defendant subsequent to such attachment was null and void. That, therefore, raises the question whether the order of the 5th August 1887 effected any valid attachment of the money now claimed. Section 266 of the Civil Procedure Code provides that debts, amongst other things, may be attached and sold, and the question, therefore, is what is the meaning of the word "debt" in that section.

We think it is clear that a debt may include a sum of money due by one person to another, and which is actually payable at the time, as well as a sum of money which is due but not actually payable then. We will assume that the word as used in section 266 has the wider meaning and includes both descriptions, as it is not necessary for the purposes of this case to restrict the [42] meaning. All the authorities seem to show that a debt must be a perfected and absolute debt, not merely a sum of money which may or may not become payable at some future time, or the payment of which depends upon contingencies which may or may not happen. The Common Law

Procedure Act in England provides that "debts due or accruing" may be attached, and the construction which was put upon the word "accruing" was that it must be an actually existing debt and not merely a debt which might or might not become due. The case of *Tuffazal Hossein Khan v. Raghu Nath Prasad*, (1871) 7 B. L. R., 186: 14 Moore's I. A., 40, also clearly indicates that an attachment must operate at the time of attachment upon some existing debt, and that it must not be of an anticipatory character, so as to fasten upon some future state of property. There must be at least an existing debt though it may be payable on a future date. It seems to us impossible to hold that on the 5th August 1887 there was any existing debt in respect of the maintenance allowance which might become payable during the period extending from September 1888 to November 1890. The allowance was only payable to the second defendant during her life-time. If she died before September 1888 there obviously would have been no money due at all. We think, therefore, that the Court could not, on the 5th August 1887, legally attach the money that might become payable as maintenance to the second defendant for the period extending from September 1888 to November 1890, and that there was no legal attachment of that money.

The attachment order of the 5th August 1887 is, moreover, giving it the widest scope, of an extremely ambiguous character, and cannot be said to operate as an attachment of the sum of money now claimed. It recites that the judgment-debtor is entitled to get from the first defendant a monthly allowance of Rs. 100; that the decree-holder prays that the amount of the monthly allowance should be attached and appropriated to the satisfaction of his decree; and that an order for the attachment of half the allowance due to the judgment-debtor has been passed. It then proceeds thus, "you are, therefore, informed under order passed to-day that, if the sum of Rs. 100 be due from you to [43] the debtor, you should not pay a moiety of the said amount to the debtor until further orders are passed by the Court, and that you should deposit the said moiety in Court." There is nothing in that order, whatever its intention may be, to effect an attachment of the money now claimed. It is also, we think, a very doubtful question, whether the attachment made by the order was not spent when the property attached under it was sold. It is not necessary, however, to decide that question as we think there was no valid attachment of the debt sold at the sale of the 20th May 1891; and, as already stated, there was no existing debt at that time. It follows that the plaintiffs acquired nothing by their purchase, and that there was nothing to prevent the first defendant from paying the money to the second defendant.

In the previous proceedings to enforce payment of the maintenance charge for the earlier period extending from August 1887 to August 1888, the plaintiffs obtained a decree which was confirmed up to this Court. It was suggested, but hardly argued, that *that* decree operated as *res judicata* in the present case. It is sufficient to say that the decree has not been put in, and that the contention is on that ground untenable. Besides this, for the reasons given by the District Judge, if for no other reasons, the decree could not operate as *res judicata* in the matter now in dispute. The previous suit was cognizable by the Munsif and was tried and determined by him. The present case was cognizable only by the Subordinate Judge and was tried by him.

We have been referred to the judgment of this Court in that suit by way of a precedent; but it appears to us that it has no bearing on the present case. Then, at the time of the sale, there appears to have been a debt actually due by the first defendant to the second defendant, and the main question was whether the sale was vitiated by the absence of an attachment. The Court considered

that the omission to attach did not vitiate the sale ; but it also considered that there was an attachment of some kind sufficient to give validity to the sale. It did not, however, hold that *that* attachment was effected by the order of the 5th August 1887.

We think that the decision of the District Judge in this case is right. The appeal is accordingly dismissed with costs.

M. N. R.

Appeal dismissed.

NOTES.

[This was followed in (1910) 38 Cal., 13 ; (1901) 28 Cal., 483 ; (1904) 9 C.W.N., 703 ; (1907) 7 C.L.J., 658 ; 12 C.W.N., 145 ; (1908) 30 All., 246. In (1901) 23 All., 164, it was held that an annuity reserved on handing over property to the Court of Wards was attachable.]

[44] ORIGINAL CIVIL.

The 7th September, 1899.

PRESENT:

MR. JUSTICE STANLEY.

Rajnarain Bhadury and others
versus

Ashutosh Chuckerbutty.*

*Hindu law—Will—Construction of will—Dayabhagha family—
Disposition to widow as “ malikatwa.”*

K, a Hindu, died without issue leaving him surviving a widow *B*, having made and published his will wherein he stated, “ I appoint my wife *B* to the ‘ malikatwa ’ after my demise as exercised by myself in respect of the family dwelling house . . . wearing apparel, utensils, &c., whatever there is in respect of all the property aforesaid.” *B* upon the death of *K* took possession of his properties. Upon *B*’s death the plaintiffs, who claimed to be *K*’s nearest of kin, brought this suit contending that the words of the will only conveyed a life estate to his widow *B*, and that after her death they were entitled to *K*’s properties. The defendant, who claimed to be *B*’s nearest of kin, contended that the words of the will gave *B* an absolute estate in *K*’s properties, and that he was entitled to the whole estate.

Held, that the intention of the testator was to give his widow *B* an absolute heritable and alienable estate in his properties.

THE plaintiffs in this case alleged that one Gunga Gobind Bhadury, a Hindu inhabitant of Calcutta, governed by the Bengal School of Hindu law, died intestate, leaving him surviving two sons, Joynarain Bhadury and Roodnarain Bhadury. Joynarain Bhadury died intestate leaving him surviving an only son Nilmoney Bhadury. Nilmoney Bhadury died intestate leaving him surviving an only son Kristo Lall Bhadury. Kristo Lall Bhadury died intestate and without issue, but leaving a widow, Srimati Bhubunessari Dabee ; he also died possessed of considerable property, both moveable and immoveable, including the house and premises No 41, Kally Prosad Dutt’s Street, in Calcutta, and all his property after his death was taken possession of by his widow Bhubunessari Dabee. In the year 1873, No. 11,

* Original Civil Suit No. 207 of 1898.

Kally Prosad Dutt's Street was acquired by Government, and the compensation money in respect thereof, amounting to about Rs. 2,200, was received by Bhubunessari Dabee as the widow and heiress of Kristo Lall Bhadury, and Bhubunessari Dabee, out of the money so received from [45] Government and other monies belonging to the estate of Kristo Lall Bhadury, from time to time purchased and acquired various immoveable properties. Bhubunessari Dabee died on or about the 17th January 1898 intestate, and the defendant, who was a relative of hers, and used to reside with her and manage the estate on her behalf, upon her death wrongfully took possession of the estate of Kristo Lall Bhadury, including the immoveable properties purchased by Bhubunessari Dabee. The plaintiffs also state that Roodnarain Bhadury died intestate leaving an only son Debnarain Bhadury, who also died leaving him surviving the plaintiffs, his legal heirs and representatives; that both Roodnarain Bhadury and Debnarain Bhadury died before Bhubunessari Dabee, and the plaintiffs upon her death were the nearest of kin of Kristo Lall Bhadury deceased, and were as such entitled to the estate left by him including the immoveable properties purchased by Bhubunessari Dabee.

The defendant alleged that Kristo Lall Bhadury, also called Krishna Lall Bhadury, before his death, and on the 20th Joisto 1269, corresponding with the 2nd June 1862, made and published his last will and testament in the Bengali language, whereby he bequeathed all his property, including the house and premises No. 41, Kally Prosad Dutt's Street, to his widow Bhubunessari Dabee. The translation of the will was as follows:—

“To the blessed Srimati Bhubunessari Dabee.

This instrument of willnamah (will) is executed by Sri Krishna Lall Bhadury to the following effect: I having by reason of ill-health come to the house of my father-in-law Srijut Nilmoney Chuckerbati Mahashaye, at Mouzah Novagram, in the District of Hughli, and not having recovered under various modes of medical treatment (and hence) considering my life in peril I appoint” (literally “make”) “my wife Srimati Bhubunessari Dabee to the *malikatawa* (ownership) after my demise as exercised” (literally “done”) “by myself in respect of the family dwelling house (consisting of) two cottahs and six chittaks of land with building purchased in the name of my father Nilmoni Bhadury Mahashaye, deceased, at Sutanutygram, in the town of Calcutta, and wearing apparel, utensils, &c. Whatever there is (*i.e.*) in respect of all the properties aforesaid I, of my own free will, make (this) will. Finis 1269 date 20th Joisto.

Sree Krishna Lall Bhadury of Sutanati.

Sri Raj Krishna Biswas.

Sri Bhutnath Sastrie, &c.

Witness:—”

[46] The defendant further stated that the will was duly registered in the office of the Sub-Divisional Officer of Serampore; that upon the death of Kristo Lall Bhadury, his widow Bhubunessari Dabee took possession of his estate, not as his heiress under the Hindu law, but under the provisions of the will, and that she received the money paid to her by Government for the premises No. 41, Kally Prosad Dutt's Street, as owner thereof; that while proceedings under the Land Acquisition Act were pending in connection with the acquirement of the premises No. 41, Kally Prosad Dutt's Street, and before the payment of the money therefor to Bhubunessari Dabee, the plaintiffs gave notice of objection to the Collector of Calcutta by letter, but subsequently withdrew their objection by another letter; and the defendant further alleged that the properties which Bhubunessari Dabee died possessed of were her own property to which the plaintiffs were in no way entitled; that his father Prosonno Coomar Chuckerbutty, who was the uterine brother of Bhubunessari Dabee,

died in Assar 1303 B.C., leaving him surviving the defendant, his sole heir and legal representative, and that he, the defendant, was the legal heir of Bhubunesari Dabee and entitled to all the property left by her.

Mr. Mitter, and Mr. Chakravarti, for the Plaintiffs.

Mr. Dunne, Mr. A. Chowdhry, and Mr. Dutt, for the Defendant.

Mr. Chakravarti.—The words of the will do not convey to the widow more than an estate for life. The will does not give her a heritable estate or any power of alienation. Were it otherwise she would take as a purchaser and her position would be different from that of a widow. In the case of *Harilal Pranalal v. Bai Rewa*, (1895) I. L. R., 21 Bom., 376, the words used by the testator were "just as I am the owner of the property at present, in the same way after my death my wife again is the owner," and it was held that she took only a life-interest in the property. Among Hindus on marriage the lady passes out of her father's family and becomes a member of her husband's family. She acquires the *gotra* of her husband. There is a deep rooted principle among Hindus that property belonging to the family should never be allowed to go out of the family. See also *Lallu v. Jagmohan*, (1896) I. L. R., 22 Bom., 409. In [47] the case of *Hirabai v. Lakshmibai*, (1887) I. L. R., 11 Bom., 573, a number of Bengal decisions were considered, and it was stated by SARGENT, C. J., in his judgment that the rule must be taken as well established, "that in the absence of express words showing such an intention, a devise to a wife did not confer an estate of inheritance, but carries only a widow's estate as understood by Hindu law." *Koongbehari Dhur v. Premchand Dutt*, (1880) I. L. R., 5 Cal., 684. In *Punchoomoney Dossee v. Troylucko Mohiney Dossee*, (1884) I. L. R., 10 Cal., 342, the testator by his will appointed his wife *malik* of his property and gave his permission to adopt a son, who attaining age would become *malik*, and it was held that the use of the word *malik* did not necessarily mean that she should take an absolute estate. A gift to a daughter as *malik* would be on a different footing, as in the case of *Lala Ramjewan Lal v. Dal Koer*, (1897) I. L. R., 24 Cal., 406. A Hindu husband is never incompetent to create in favour of his wife an absolute interest in immoveable property bequeathed by him to her, though it is necessary, in order to create such interest, to use express language to that effect. *Bhoba Tarini Debya v. Peary Lal Sanyal*, (1897) I. L. R., 24 Cal., 646; *Mathura Das v. Bhikhan Mal*, (1896) I. L. R., 19 All., 16.

Mr. Chowdhry, *contra*.—The words *malik* and *malikatwa* mean "absolute owner" and "absolute ownership," unless there are expressions in the document in which the words are used limiting their meaning. In the cases cited on behalf of the plaintiff there are expressions in the will by which the testator contemplated the creation of subsequent interests, and it was owing to the existence of these subsequent interests that it was held in many of those cases that the meaning of the word *malik* would be so limited by the context as to mean only a life-interest. In the present case there are no expressions in the will limiting the ordinary meaning of the word *malik*, so it must be taken that the testator intended to give his widow an absolute and heritable estate in his property. In a recent case decided by the Judicial Committee it was held that in a Hindu will a heritable and alienable estate is to be understood [48] by the use of the words "shall become *malik*" unless the context indicates a different intention. *Lalit Mohun Singh Roy v. Chukkan Lal Roy*, (1897) I. L. R., 24 Cal., 834; I. L. R., 24 I. A., 76.

Stanley, J.—The main question in this case is, whether under the will of Kristo Lal Bhadury, his widow Bhubnessari Dabee took an absolute interest in his immoveable property or merely the ordinary estate of a Hindu widow.

Kristo Lall Bhadury died many years ago, leaving an only widow, but no issue surviving. He made a will in Bengali, dated the 2nd of June 1862, of which the translation is as follows. (Reads will: see *ante*, page 45.)

After the testator's death his widow took possession of his property and remained in possession of it until her death on the 17th of January 1898. She died intestate leaving the defendant Ashutosh Chuckerbutty her sole heir. The plaintiffs are grandsons of Roodnarain Bhadury, who was brother of Joynarain Bhadury, the grandfather of the testator Kristo Lall Bhadury, and as such are the reversionary heirs of Kristo Lall Bhadury. They contend that under the will of Kristo Lall Bhadury Bhubunessari Dabee only took the ordinary estate of a Hindu widow in his immoveable property, and that upon her death they became entitled to this property as reversionary heirs.

The testator having died prior to the passing of the Hindu Wills Act, which incorporates section 82 of the Indian Succession Act, the construction of his will is not affected by these enactments.

The rule as to the construction of the will of a Hindu is thus stated by their Lordships of the Privy Council in *Soorjeemoney Dossee v. Denobundoo Mullick*, (1857) 6 Moore's L. A., 526 (550): "The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's [49] wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances, no doubt, must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and its disposition is to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption."

Again in the case of *Mahomed Shumsool Hoodeer v. Shewukram*, (1874) 14 B. L. R., 226 (231, 232): L. R., 2 I. A., 7 (14), their Lordships observed: "In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family, and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate."

It is a well settled rule of construction that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. Here there is no expression of intention discoverable in the will to control or qualify the dispositive words; consequently the plaintiffs are compelled to rely upon the view affirmed by their Lordships of the Privy Council that in construing a will one of the circumstances to be regarded is "the law of the country in which the will is made, and its dispositions are to be carried out," and that "in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with regard to devolution of property." The plaintiffs also relied upon the language used by the testator in a *mukhtearnamah* executed by him on the 23rd of June 1862 for the purpose of having his will registered as

showing that the property was given to his widow for the purpose of its preservation only. In this [50] document the following passage occurs : "Owing to ill-health * * * I have made a will in favour of my wife Srimati Bhubunessari Dabee for the *preservation* of my said house, etc., in Calcutta." I shall presently refer to this document.

Counsel for the plaintiffs has strongly relied upon the case of *Harilal Pranalal v. Bai Rewa*, (1895) I. L. R., 21 Bom., 376. In that case one Pranalal by his will directed that after his death his wife Ujam should take possession of and enjoy his property as owner. Then after making certain provisions for his daughters he again directed his wife to take possession after his death and added : "Just as I am the owner of the property at present in the same way after my death my wife Ujam is the owner." It was held by FARRAN, C.J., and STRACHY, J., that the widow took only a life-interest in the property. After referring to the scheme of the will FARRAN, C.J., in delivering judgment, adds : "His (the testator's) main objects appear to be the protection of his property and the maintenance of his wife and children. His wife is to take possession of and enjoy the property, but he adds to this no words of inheritance, nor does he directly give her any power of disposition over it. The Courts have always leaned against such a construction of the will of a Hindu testator as would give to his widow unqualified control over his property. By the use of such expression as 'my wife is the owner after me' or 'my wife is the heir,' it is usually understood that the testator is providing for the succession during the life-time of the widow and not altering the line of inheritance after her death. In the present case the testator is no doubt very emphatic in his declarations that his wife is to be the owner after his death, in one passage stating that just as he is the owner so she is to be the owner. The phrase is however ambiguous. It may mean that he intended emphatically to protect her peaceable possession and management during her life-time against the claims of the husbands of his daughters and their own, or it may be intended to confer as full ownership and power over the property as he had." It is unfortunate that only extracts from the will appear in the report of this case. The intention of a testator is to be gathered from a perusal of the entire instrument and not from passages here and there. From the judgment [51] however it would appear that the main objects of the testator were apparent, and that they were the protection of his property and the maintenance of his wife and children.

In *Punchoomoney Dossee v. Troylucko Mohiney Dossee*, (1884) I. L. R., 10 Cal., 342, one Narain Dutt had two wives, one of whom died in his lifetime, leaving a daughter, the plaintiff, and Kristo Kaminey Dossee, the mother of the defendant, who survived him. Narain Dutt made a will, the material portion of which ran as follows : "Whatever I have of immoveable and moveable property and ready money anywhere my wife Srimati Kristo Kaminey Dossee is the *malik* or proprietress thereof. She will deal with my debts and dues agreeably to the particulars below ; she will pay whatever debts exist and recover and receive whatever dues there are receivable, and I have given commandment (permission) to my wife she will adopt a son ; when the adopted son attains his age he will become the *malik* or proprietor of the whole of my property and will perform the *shrad* and *tarpan* of my father and father's father, and in the event of any good or evil befalling the said adopted son, in that case she will again adopt a son." It was held by Sir RICHARD GARTH, C.J., and CUNNINGHAM, J., overruling the decision of WILKINSON, J., that the use of the word *malik* as applied to the widow did not necessarily mean that she should

take an absolute estate, and that the directions in the will for the adoption of a son indicated an intention that the widow was only to take a limited estate.

In the earlier case of *Koonjbehari Dhur v. Premchand Dut*, (1880) I.L.R., 5 Cal., 684, there was also internal evidence in the will itself that the testator did not intend to give his wife an absolute estate in his immoveable property. No doubt, however, the learned Judges, JACKSON and TOTTENHAM, JJ., did in their judgment lay down the wide proposition that a Hindu wife takes by the will of her husband no more absolute right over the property bequeathed than she would take over such property, if conferred upon her by gift during the life-time of her husband, and whether in respect of a gift or a will it is necessary for the husband to give her in express terms a heritable right or power of alienation. The Court, however, did not rest its judgment upon the rule so stated, but rather upon the finding that there was internal evidence in [52] the will of the testator's intention that the property should not pass to the widow absolutely.

In the case of *Bhobo Tarini Debya v. Pyari Lall Sanyal*, (1897) I. L. R., 24 Cal., 646, a clause in a will of a Hindu testator ran thus: "My first and second wives shall together be entitled to twelve annas of all the properties left by me and Doorga Nath Chuckerbutty and Rajoni Nath Chuckerbutty, sons of my father's sister's son Radha Nath Chuckerbutty, deceased, who have been living in commensality from the time of my predecessor, shall be entitled to a four annas share in equal shares according to the following rules." Then followed the rules, but according to the judgment there was nothing in the will either in what followed or in what preceded expressly stating that the widows were to take an absolute estate. It was held by BANERJEE and RAMPINI, JJ., that the will only gave the widows a restricted interest. In the course of their judgment after reading the terms of the gift the learned Judges say: "If this stood alone and section 82 of the Indian Succession Act was not applicable to the case, then as the bequest (which in this respect follows the same rule as a gift) was one of immoveable property by the husband to his wives, they would take a limited estate under the Dayabhaga. They would take the property without having any power to alienate it; and property over which they have not the power of alienation cannot constitute their *stridhana* or absolute property (see Dayabhaga, chapter IV, sections 1, 18, 19 and 23), and must on their death pass to the heirs of their husband—(see Colebrooke's Digest, Book V., 515, Commentary)." The learned Judges in that case found that it amply appeared from the will that only a restricted interest was intended to be created in favour of the widow.

There is nothing in the will which is now the subject of consideration, either in what precedes or in what follows the gift to his wife, which throws much, if any, light upon the meaning of the language used by the testator. It becomes necessary, therefore, to determine what is the legal effect of the appointment by a Hindu testator of his wife to the *malikatwa* (ownership) of his immoveable property. The words are "I appoint (literally, 'make') my wife Srimati Bhubunessari Dabee to the *malikatwa* (ownership) after my demise as exercised [53] (literally 'done') by myself, in respect of the family-dwelling house, wearing apparel, utensils, etc., whatever there is, that is in respect of all the properties aforesaid, I of my own free will make (this) will." Did this gift confer upon the testator's widow an absolute estate heritable and alienable in his immoveable property, or merely the limited estate of a Hindu widow?

In the case of *Mahomed Shumsool Hooder v. Shewukram*, (1874) 14 B. L. R., 226: L. R., 2 I. A., 7, a Hindu by a petition to the Collector of Patna recited the deaths of his son, of his brother, without leaving issue, of his

brother's wife and his own wife and then proceeded to dispose as if by testament of his property as follows: "Only Mussamut Rani Dhun Kowar, widow of Roy Kalika Pershad, my deceased son, above mentioned, who, too, excepting her two daughters born of her womb Mussamut Bibi Sitatoo and Bibi Dulari, has no other heirs, is my heir. Except Mussamut Rani Dhun Kowar aforesaid none other is nor shall be my heir and *malik*." Later on occur the words: "Furthermore to the said Mussamut Rani too these very two daughters named above together with their children, who after their marriage may be given in blessing to them by God Almighty, are and shall be heir and *malik*." Sir ROBERT COLLIER, in delivering the judgment of their Lordships of the Privy Council, says that the expressions in which the gift is made to Mussamut Rani Dhun Kowar if they stood alone would in their Lordships' opinion show that the testator intended to make an absolute gift to Rani Dhun Kowar; but that the latter expressions qualified the generality of the former, and that the will taken as a whole must be construed as intimating the intention of the testator that Rani Dhun Kowar should not take an absolute estate, but that she should be succeeded in her estate by her two daughters. The gift in this case, it is to be observed, was made not to the testator's widow but the widow of his son.

In *Lalit Mohun Singh Roy v. Chukkun Lal Roy*, (1897) I. L. R., 24 Cal., 834 (849), Lord DAVEY, in delivering the judgment of the Privy Council, states as follows: "The words 'became *malik*' of all my estates and properties would, unless the context indicated a different meaning, be sufficient for that purpose (*i.e.*, to confer an heritable and alienable estate) even without the words "enjoy with son, grandson [54] and so on, in succession," which latter words are frequently used in Hindu wills and have acquired the force of technical words conveying a heritable and alienable estate. The gift in this case was not to the testator's widow but to his sister's son.

In *Lala Ramjewan Lal v. Dal Koer*, (1897) I. L. R., 24 Cal., 406, in which a testator provided (*inter alia*), by his will that his daughters and brother's daughters "shall be *maliks*, and come in possession in equal shares of all the moveable and immoveable properties," TREVELYAN and BEVERLEY, JJ., say "*prima facie* there can be no question, but that a gift where there are no controlling words is an absolute gift and the expression *maliks* used here would ordinarily imply an absolute gift. But it is contended that we must introduce into this will what is said to be the prevalent Hindu idea, that a female ought not to obtain anything beyond an estate for her lifetime, and therefore, although the word *maliks* is used, we must cut down the estate to the extent of an estate given to a Hindu daughter. There is no authority for such a proposition. The words are absolute, and if they stood by themselves without anything to the contrary it would be impossible for us to say that they did not give an absolute estate."

This decision is in consonance with the earlier decision of GLOVER and MITTER, JJ., in the case of *Kollany Koer v. Luchmee Pershad*, (1875) 24 W. R., 395, in which the effect of the language used by a Hindu in a petition whereby he directed that after his death his widow and daughter should be "*maliks*," and his entire estate, real and personal, should devolve upon them was considered. It was held that it was plain that the testator intended to make an absolute gift, and that where it was plain, as far as the words of a will went, that the testator intended to make an absolute gift of his property in favour of his widow and daughter the gift must be construed as absolute, unless it could be shown that by the Hindu law a gift to a female meant a limited gift

Where a Hindu husband gives immoveable property to his wife with express power of alienation, or where the giving of such power is implied by the terms of the gift, she will acquire an absolute estate in the property. Words of limitation, such [55] as are ordinarily used to convey an estate of inheritance, are not necessary. The intention of the husband may be expressed in other ways and is a matter of construction. *Ram Narain Singh v. Peary Bhugut*, (1883) I. L. R., 9 Cal., 830.

Their Lordships of the Privy Council in the case of *Lalit Mohun Singh Roy v. Chukkun Lal Roy*, (1897) I. L. R., 24 Cal., 834, above referred to, at p. 849 of the report, state that the words "become owner (*malik*) of all my estate and properties" would, unless the context indicated a different meaning, be sufficient for the purpose of conferring a heritable and alienable estate.

I find nothing in the will before me to qualify or control the language in which the gift to the testator's wife is expressed. The testator appoints his wife "to the *malikatawa*, as exercised by myself in respect of the family dwelling house." The words "as exercised by myself," so far from limiting the gift, seem to me rather to extend it and to indicate an intention on the part of the testator to confer on his wife the same absolute rights of ownership as he himself enjoyed. The intention of the testator was, I think, to give his wife an absolute heritable and alienable estate. If this were not his intention it is remarkable that no reference whatever is made in his will by the testator to any other object of his bounty or of his regard. He was childless and the plaintiffs were but distantly related to him. There was no great object indeed in his making the will if his widow was only to obtain under it the same limited estate, which she would have enjoyed in the event of his dying intestate. It is observable that the gift of the immoveable property is a combined gift. This tends, I think, to show that the testator intended his widow to have the same absolute interest in the realty as under the gift she would take in the moveable property.

Upon the whole I see no sufficient reason in this case for attaching a restricted meaning to the expressive words used by the testator in the disposal of his property.

I was pressed by Counsel for the plaintiffs with this further consideration. For the purpose of having his will registered the testator executed a power-of-attorney (*muktearnamah*) on the [56] 23rd of June 1862, in which is the following recital: "I have made a will in favour of my wife Srimati Bhunessari Dabee for the preservation of my said house, &c., in Calcutta."

It is contended that the object of the testator being expressed in this instrument to be the preservation of his house an absolute gift was not intended to be made by the will. Even if this document is admissible in evidence to explain or control the language of the will there is nothing in the use of the words "preservation of his house," so far as I can see, which helps the plaintiffs' contention. The question, for whom was the house to be preserved, would still remain. Was it to be preserved for the widow and her heirs, or for the widow and after her the reversionary heirs of the testator? It is too vague and general an expression to be relied on one way or the other.

Having regard to the view which I have formed as to the true construction of the testator's will, it becomes unnecessary for me to determine the remaining issues raised in the case. It may, however, be well for me to state that, in my opinion, the house and premises, known as Shampooker House in Calcutta, were purchased with the proceeds of the sale of the testator's house No. 41, Kally Prosad Dutt's Lane, and so formed part of

his estate. Further that the evidence has not satisfied me that the plaintiffs ever released their claim to the immoveable property of Kristo Lall Bhadury as alleged by the defendant.

I shall declare that upon the true construction of the will of Kristo Lall Bhadury, his widow became absolutely entitled to his immoveable property and dismiss the action with costs.

D. S.

Attorneys for the Plaintiffs: Messrs. *U. C. Dutt & Son.*

Attorney for the Defendant: Babu *P. N. Sen.*

NOTES.

[See *infra* Notes to 27 Cal., 649.]

[57] APPEAL FROM ORIGINAL CIVIL.

The 12th December, 1898.

PRESENT :

SIR FRANCIS W. MACLEAN, KT., CHIEF JUSTICE,
MR. JUSTICE PRINSEP, AND MR. JUSTICE AMEER ALI.

Moti Chand and another.....Plaintiffs

versus

Full Chand and another.....Defendants.*

Practice—Filing paper books for Appeal—Application for enlargement of time to file paper book—Subsequent application at the hearing of the appeal to file paper book then ready—Discretion of Court—Sufficient cause—High Court Rules, Appellate Side, chapter 7, Rule 11.

An extension of time for filing paper books in an appeal will not be granted unless "sufficient grounds" be shown for granting the application.

Where the appellants waited from the 13th August 1898, the date of filing their memorandum of appeal, till the 22nd September 1898, before applying for office copies of the necessary papers to enable them to prepare their paper book, and an application was made by the appellants on the 12th December 1898, for two months' further time to file their paper book, the delay between the 13th August and the 22nd September 1898 being unexplained, *Held*, that no sufficient cause had been shown for extension of time, nor was the case altered by the fact that the paper books were ready when a subsequent application was made on the appeal being called on for hearing, and an application for leave to file them was consequently dismissed.

THE appellants filed their memorandum of appeal in this suit on the 13th August 1898. On the 22nd September 1898 they applied and paid stamps for office copies of the exhibits, depositions, and judgment, in the suit, but owing to the offices of the Court closing soon afterwards the appellants received copies

* Original Civil Appeal No. 25 of 1898 in Suit No. 135 of 1898.

of the judgment and depositions for the purpose of preparing their paper book on the 5th and 6th December 1898, but had not received office copies of the exhibits. On the 12th December the appellants applied to the Appellate Court that two months' further time be allowed them for filing their paper book. There was no explanation afforded by the appellants as to the delay between the 13th August and the 22nd September 1898.

Mr. *Garth* for the Appellants.

Mr. *Pugh* for the Respondents.

[58] The judgment of the Court (MACLEAN, C.J., and HILL and AMEER ALI, JJ.) was as follows :—

Maclean, C. J.—I do not think that we ought to interfere in this case.

The appellants are admittedly out of time, and though no doubt we have a discretionary power—a power to be judicially exercised, upon judicial principles—under rule 11 of chapter 7 of the High Court Rules, Appellate Side, to enlarge the time, upon “sufficient cause” being shown, in the exercise of that discretion I do not see my way to acceding to the present application. The delay which occurred from the 13th August to the 22nd September is absolutely unexplained. So far from any sufficient cause having been shown for enlarging the time, no cause whatever has been shown. Why did the applicants wait from August 13th to September 22nd before applying for the office copies, and then only apply when the offices, if not actually closed, were on the eve of being closed for the vacation? This delay of nearly six weeks—three-fourths of the period allowed for delivering the paper book, is absolutely unexplained. Again, the applicants might have made the present application to the Judge sitting on the Original Side three weeks ago, *i. e.*, immediately the Courts resumed after the vacation. There is no explanation whatsoever of this further delay. Litigants must understand that the rules and orders of this Court are intended to be, and must be, complied with, and I regret as I have had occasion previously to observe the laxity, which has crept into the practice here on this head. Some litigants in these Courts would almost appear to be under the impression, as the result of that laxity, that they are entitled to have the time prescribed by the rules enlarged for the mere asking. I desire to dissipate any such idea. In exercising our discretion under the rule we are bound to regard, not only the view of the applicants but the rights which the respondents may have acquired by reason of the default of the other side. Though no rule fettering the exercise of our discretion should be laid down, the enlargement of time for doing anything after judgment ought to be more cautiously granted than before judgment. But be that as it may, each case must be considered according to its particular circumstances. Litigation in this [59] country is so protracted, and so much time is allowed to litigants to take the various steps, specially as regards appeals, that I am not disposed to extend such time, unless sufficient grounds be shown. The application must be refused with costs.

Office copies of the exhibits mentioned in the above application were received by the attorneys for the appellants on the 19th December 1898, and on the same day the attorneys instructed their printer to print their paper book as quickly as possible, and a copy of the paper book ready for binding was sent to the attorneys' office on the 29th December 1898, whereupon the said attorneys wrote to the attorneys for the respondents stating that they had received from the printer their paper book ready for binding and offered the same for comparison. On the 31st December 1898, the attorneys for the appellants received their paper books and sent three copies of them to the

attorneys for the respondents, who received and retained them. On the 4th January 1899 upon the appeal being called on the appellants applied to the Court upon notice to the respondents for leave to file their paper book.

Mr. Garth for the Appellants.

Mr. Pugh for the Respondents.

The judgment of the Court (MACLEAN, C.J., PRINSEP and AMEER ALI, JJ., *concurring*) was as follows :—

Maclean, C. J.—This application is in effect the same as that which was made to us, and which we refused on the 12th December last ; and we should, I think, be stultifying ourselves if we were now to accede to it. It is an ingenious attempt to obtain indirectly the same benefit as would have accrued to the applicant, if we had granted the previous application, and, as I pointed out during the argument, to obtain an advantage as against the respondents, from the accident of the case before it on the list having occupied many days in argument. But apart from any such consideration, if the present application had been the first and not the second and had been *res integra*, the applicants would still have been face to face with the difficulty that they are unable to show any sufficient grounds which in the exercise of our discretion would warrant us in acceding to the application. No doubt we may, under the concluding paragraph of rule 11 of Chapter [60] 7 of the Appellate Rules exempt the applicants, "upon sufficient grounds verified by affidavit," from the operation of the rules, but no grounds have even been suggested to us. I have heard none ; the only thing suggested is that the paper book is now ready. That is not sufficient, when the paper book ought to have been filed some time ago, and there is no explanation of the delay. If we were to accede to this application we should be depriving the respondents of the vested interest they have acquired in their judgment and depriving them of that interest without any sufficient ground being shown for so doing. In my opinion we ought not to interfere in cases of this class save under special circumstances and none have been shown in the present case. The application must be dismissed with costs.*

[61] Attorneys for the Appellants : Messrs. *Leslie & Sons*.

Attorneys for the Respondents : Messrs. *Farr & Pugh*.

D. S.

* In another case *Gopal Chunder Das v. Radhabullah Das and Bholanath Das*, Original Civil Appeal No. 24 of 1898, in Suit No. 456 of 1896, a similar application was similarly decided on the 17th January 1899.

Mr. Pugh for the Appellants.

Mr. Bonnerjee for the Respondents.

The following judgments were delivered by the Court (Maclean, C.J., and Prinsep and Hill, JJ.) :—

Maclean, C.J. (PRINSEP and HILL, JJ., *concurring*).—This is an application on the part of Lakhimani Dasi, and her infant children, the defendants in the suit, for an extension of time for filing their paper books on the appeal. They ask for two months further time. The dates are as follows : A decree adverse to the present applicant was made on the 6th of May 1898, and on the 6th of August 1898, the appeal was filed by her, jointly with one Gopal Chunder Das, and the time for delivery of paper books, under rule 8 of Chapter VII of the Rules and Orders of the High Court, would be two months from the date of filing the appeal. Nothing, however, was done until the 18th November 1898, when an application was made to Mr. Justice SALE for an extension of time. Mr. Justice SALE refused that particular application, but gave the applicants an opportunity of adducing further evidence which I assume was done. At any rate, on the 28th of November 1899, Mr. Justice SALE made an order extending the time for filing the paper books until the first day

[27 Cal. 61]

APPELLATE CIVIL.

The 18th August, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K. C. I. E., CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Shama Sundram Iyer.....Plaintiff

versus

Abdul Latif and others.....Defendants.*

Arbitration—Code of Civil Procedure (Act XIV of 1882), sections 506 and 578—Reference to arbitration, not by a written petition, but by consent of parties—Whether an award passed on such reference ab initio void—Irregularity not affecting the merits of the case or the jurisdiction of the Court.

The second paragraph of section 506 of the Civil Procedure Code, which says that every application for an order of reference shall be made in writing [62] is directory only ; therefore in a case where both parties consented to a reference to arbitration and where the order of reference was made by the Court in the presence of their counsel or advocates, but not upon a written application, such a reference is not a nullity, as it is merely an irregularity not affecting the merits of the case or the jurisdiction of the Court.

THE facts of the case are shortly these : The plaintiff brought a suit in the Court of the Recorder of Rangoon against the defendant for recovery of possession of a strip of land. The defence was that the land belonged to the defendants and that the plaintiff in fact encroached upon their land. On the 25th August 1897, the Recorder, on the application of both the parties through their counsel or advocates, made the following order : “ By consent let the case be referred to Mr. A. V. DeSouza as arbitrator. Award to be returned in a week.” Before

after the Christmas vacation, which would be the 3rd of January of this year. Upon that day, an application was made on behalf of the present applicant to be allowed to proceed with the appeal *in formâ pauperis*. That application was noted, but not heard, and on the 9th instant, the application to proceed *in formâ pauperis* was withdrawn, and the present application for extension of time was substituted. The question we have to consider is whether any sufficient cause has been shown, within the meaning of the rule, which will warrant us in granting the extension asked. I think no sufficient cause has been shown. The ground suggested is, that the applicants left everything to Gopal Chunder Das, and that Gopal Chunder Das did nothing. That is not sufficient. The delay from the 6th of August 1898 until virtually the 9th January instant, is wholly unexplained.

In saying this I am not unmindful of the suggestion—for it is little more—that they were trying to get money with which to prosecute the appeal. In the exercise of the judicial discretion which is vested in us I see no grounds for granting the application, which must be dismissed with costs. The appeal must under the circumstances be dismissed with costs.

Attorney for the Appellants : Mr. Rose.

Attorneys for some of the Respondents : Messrs. G. C. Chunder & Co.

Attorneys for the remaining Respondents : Messrs. Swinhoe & Co.

D. S.

* Appeal from Original Decree No. 130 of 1898, against the decree of W. F. Agnew, Esq., Recorder of Rangoon, dated the 16th September 1897.

the award was made an application by petition was filed by the plaintiff to the Court for an extension of time for the arbitrator to make his award. This application was granted, and the arbitrator on the 7th September 1897 made his award which was in the favour of the defendants.

On the 15th September 1897, the plaintiff filed a petition impugning the award, and on the next day the Recorder gave judgment confirming it, and a decree was made upon the footing of the award.

Against this decision the plaintiff appealed to the High Court.

Babu Sharat Chandra Roy Chowdhry for the Appellant.

Moulvi Muhomed Habibullah for the Respondents.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.):—

Maclean, C.J.—In this case the plaintiff instituted a suit in the Court of the Recorder of Rangoon against the defendant claiming that he was entitled to a piece of land some 50ft. by 40ft. in respect of which the plaintiff alleged that the defendant was obstructing him in building upon it. The real contest was as to a narrow strip some 2ft. by 40ft. The defendant said that the plaintiff was not entitled to this strip; that it belonged to the defendant; and that the plaintiff was in fact encroaching upon the defendant's land. It will thus be seen that the question was substantially one of boundaries. The matter came before the Recorder, and on the 25th of August 1897, the Recorder, upon the application of [63] the plaintiff and the defendant, made through counsel or advocates, the following order: "By consent let the case be referred to Mr. A. V. DeSouza as arbitrator. Award to be returned in a week." It is not very clear how far the arbitration had proceeded, but apparently nothing much had been done before an application by petition to the Court was made by the plaintiff for an extension of time for the arbitrator to make his award. This application was granted; the matter was gone into before the arbitrator, and the arbitrator duly made his award, dated the 7th September 1897, which was adverse to the plaintiff. The plaintiff then filed a petition before the Recorder on the 15th September 1897, impugning the award, and on the 16th September 1897 the Recorder gave judgment confirming it, and a decree was made upon the footing of the award.

Then comes the present appeal to this Court, and for the first time we are told by the appellant that inasmuch as the original application to refer the case to arbitration was not made in writing, the arbitration proceedings, the award and the decree of the Recorder are each and all invalid. The objection is a technical one, and it is not for us to say whether this is a very straightforward method of conducting litigation; the plaintiff is entitled to raise the point, and we can only decide whether or not it is well founded.

The question depends upon whether or not the second paragraph of section 506 of the Code of Civil Procedure, which says that every application for an order of reference shall be in writing, is directory only, or whether the Court has no jurisdiction to make such an order unless and until the application is so made. It is, perhaps, doubtful whether the point really arises, seeing that the application of the plaintiff for further time was undoubtedly in writing, and whether that application might not, under the circumstances of this case, be treated as tantamount to a compliance with the requirements of the section. The object of having the application made in writing is, one would surmise, to avoid subsequent controversy as to whether or not there was any

such application ; but that there was such an application in this case is not disputed.

We have been referred to two or three cases and especially to the case of *Nusserwanjee Pestonjee v. Mynooddeen Khan*, (1855) 6 Moore's I. A., 134. That [64] case was decided upon the principle that if the Court has not jurisdiction to deal with a matter, the parties by consent cannot give such jurisdiction—a proposition I have no desire to impugn. And there it was held that the Court had no jurisdiction except upon the fulfilment of the requirements of a certain Regulation ; that these requirements were not directory only ; and that as they had not been complied with, the jurisdiction did not arise. The cases of *Gazee v. Hameed Buksh*, (1871) 16 W. R., 160, and *Bhrigoo Roy v. Bhagruth Upadhya* (1864) Gap. No., W. R., 41, when examined have really no bearing upon the case before us.

In my opinion the jurisdiction is created by the first paragraph of section 506, and the second paragraph is directory only, as to the form in which the application should be made. It is clear both parties consented to the reference, and that the order of reference was made by the Court in the presence of their counsel or advocates, and if the section be, as I think, directory only, there has only been an irregularity not affecting the merits or the jurisdiction, and the case falls within section 578 of the Code of Civil Procedure.

There is no evidence that the application was not in writing, but as no such application is recorded, we must take it that no such application was made.

As to the second point, viz., whether we can go into the merits, inasmuch as the award was confirmed by a decree of the Recorder's Court, no appeal lies from that decree under section 522 of the Code.

I would add for the guidance of the lower Courts in dealing with applications under section 506 of the Code that to avoid contests of the present description, the Judges in those Courts should be careful to see that such applications are made in writing.

The appeal must be dismissed with costs.

Banerjee, J.—I am of the same opinion.

The appeal in this case is against the decree made by the Recorder of Rangoon, in accordance with an award made by an arbitrator, to whom the case was referred for determination. That being so, section 522 of the Code of Civil Procedure bars an appeal, unless it can be shown that for some reason or [65] other, the award itself was a nullity—See *Joy Prokash Lall v. Sheo Golam Singh*, (1884) I. L. R., 11 Cal., 37.

The way in which the learned Vakil for the appellant seeks to make out this position is by contending that as section 506 of the Code of Civil Procedure requires that an application for reference to arbitration shall be in writing, and as the application for reference to arbitration in this case was not made in writing, the reference to arbitration was void *ab initio*, and if the reference to arbitration were void, the award made by the arbitrator must be treated as a nullity.

It is quite true that section 506 of the Code enacts that every application for reference to arbitration shall be in writing, but does it follow, where a reference is made by an application not in writing, that the arbitration award that is made upon such reference is a nullity ?

In order that there may be a valid reference to arbitration the essential conditions required by law are, that the parties, or their pleaders duly authorized, shall apply to the Court, at any time before judgment is pronounced, that the matters in difference between them in the suit be referred to arbitration. There is no question here that these conditions were satisfied; no objection is taken to the authority of the pleaders, or advocates, of the parties who made the application; the only objection raised is that the application to the Court for referring the case to arbitration was not made in writing.

Then the law further provides that the application for referring the case to arbitration shall be in writing. But that in my opinion touches only the form of the application, the mode in which it is to be made, and if that provision of the law is not complied with, though the other provisions of the law have been, the defect, in my opinion, would be an irregularity only such as would be cured by section 578 of the Code of Civil Procedure. It was contended by the learned Vakil for the appellant that the omission in this case to make the application in writing was not a mere irregularity, but was a matter that affected the jurisdiction of the Court to refer the case to arbitration; for he contended that the Court acquired jurisdiction to refer a case to arbitration only upon an application being made to it in writing and not otherwise. I do not consider this contention sound. The Court [66] acquired jurisdiction to refer the case to arbitration upon an application being made to it by the parties, or their duly authorized pleaders or advocates. That was done in this case, and the only defect in the application was that the manner of applying was not in strict conformity with the law; that is to say, instead of the application being in writing, it was a verbal application. That, as I have already said above, affects only the form of the application, and nothing more. It was, therefore, a mere irregularity, which could not be said to have affected the jurisdiction of the Court.

I may add that in this case, an application in writing was made by the learned Counsel for the plaintiff on the 31st of August 1897, stating that the arbitrator was ordered to file his award on the 1st of September 1897; that the arbitrator could not do so, as the witnesses for the plaintiff had not yet been examined; and that both parties had agreed to an extension of time being granted; and accordingly, the Court extended the time for filing the award to the 8th September 1897, and the award was filed on the 7th September. So that it may well be said that even if there was a defect in the manner in which the original application for reference to arbitration was made, that defect was cured by this written application, in accordance with which the witnesses for the plaintiff were examined, nothing apparently having been done before the making of this written application on behalf of the plaintiff.

In regard to the cases cited by the learned Vakil for the appellant in support of his argument, which are all distinguishable from the present, I need only make one observation, in addition to what has been said by the learned Chief Justice in his judgment, namely, that in the case of *Nusserwanjee Pestonjee v. Mynooddeen Khan*, (1855) 6 Moore's I. A., 134, the submission to arbitration was a private one and not one made in the course of any suit, and the defects in the submission could not, therefore, be cured by any principle of law similar to that embodied in section 578 of the present Code of Civil Procedure. In my opinion, therefore, the contention of the appellant is not made out, and the appeal must, therefore, be dismissed with costs.

S. C. G.

Appeal dismissed.

NOTES.

[This decision was followed in (1907) 30 All., 32, where the reference was made by the Court in the presence of the parties themselves though not upon a written application. See also 9 I. C., 412.]

[67] FULL BENCH.

The 7th August, 1899.

PRESENT :

MR. JUSTICE PRINSEP, MR. JUSTICE MACPHERSON, MR. JUSTICE GHOSE,
MR. JUSTICE HILL AND MR. JUSTICE STEVENS.

Basanta Kumari Dehya and others.....Defendants

versus

Ashutosh Chuckerbutti and others.....Plaintiffs.*

Landlord and tenant—Suit by a landlord against a tenant for a certain sum payable by him out of the rent to a third person by assignment—

Whether such a suit is one for rent or for damages.

Held (by the FULL BENCH) that a suit by a landlord against a tenant for a certain sum of money payable by him out of the rent to a third person under assignment, is one for rent and not for damages.

Rutnessur Biswas v. Hurish Chunder Bose, (1884) I. L. R., 11 Cal., 221, referred to. *Mohabut Ali v. Mahomed Faizullah*, (1898) 2 C. W. N., 455, approved of.

THIS case was referred to a Full Bench by BANERJEE and RAMPINI, JJ., on the 5th January 1899, with the following opinion :—

This appeal arises out of a suit brought by the plaintiffs, respondents, to recover a sum of Rs. 185-8 annas, on the allegation that the defendants own a *jama* or tenure under the plaintiffs at an annual rent of Rs. 621; that out of this sum, a sum of Rs. 494 is, under an assignment by the plaintiffs, payable by the defendants to the superior landlords; that out of the amount of rent due to the said *maliks*, the defendants have not paid the sum of Rs. 146-8 annas from 1298 to 1301, nor are they required to pay the same to the said *maliks*, and that the plaintiffs are entitled to recover as damages from the defendants the said sum with interest amounting in all to Rs. 185-8 annas.

There were various defences raised to this action which it is not necessary to go into in detail now. In substance the defence was a denial of liability.

The first Court decreed the plaintiffs' claim in part. On appeal by the defendants the decree of the first Court was affirmed.

[68] The defendants have now preferred this second appeal, and at the hearing of the second appeal, a preliminary objection is raised on behalf of the plaintiffs, respondents, that no second appeal lies in this case, the suit being not one for rent, but one of the Small Cause Court class, and for an amount not exceeding Rs. 500.

In support of the preliminary objection the case of *Rutnessur Biswas v. Hurish Chunder Bose*, (1884) I. L. R., 11 Cal., 221, is relied upon. In answer to the preliminary objection, the learned Vakil for the appellants contends that

* Reference to a Full Bench in appeal from Appellate Decree No. 218 of 1897.

the suit is really one for rent, and in support of his argument he relies upon the case of *Mohabut Ali v. Mahomed Faizullah*, (1898) 2 C. W. N., 455.

The terms of the lease which bear upon the question raised in the preliminary objection are as follows :—

"Accordingly agreeably to your application we, with the exception of (the land occupied by) the resident tenants, and the *khamar* lands in Atharokhada, grant you a *kaimi mourasi potta* in respect of the whole of the remaining properties, that is to say, a *kaimi mourasi potta* in respect of 87 bighas 13 cottas of land consisting of the *barati* (lands) of taluk Taraf Goalkhali, as per *hustbud*, and the whole of the *khamar* lands, &c., thereof and the lands of the *bundobusti* (settled) taluk Atharokhada, as well as other *jote jamas* comprised in plots, the boundaries whereof are given below, and also 72 bighas 10½ cottas of *brohmutter* land, both making a total of 360 bighas and 3½ cottas of land, *mal* and *lakhiraj*, at a yearly *jama* of Rs. 621-1 anna 6 gundas 2 coras as mentioned in the *hustbud* papers, on receipt of a bonus of Rs. 800. Out of the said total amount of *jama* or rent, a sum of Rs. 100 should be allowed to you yearly on account of collection charges, after which the sum of Rs. 521-1 anna 6 gundas and 1 cora shall remain as the fixed amount of rent due to us. But we hereby make an assignment to you to pay a sum of Rs. 493-10 annas 1 gunda and 3 coras on account of *sudder* rent payable to us, and of the above amount. According to that assignment you shall pay the amounts of *sudder* rent mentioned in a separate *furd* or sheet to our *maliks* or landlords and into the Collectorate, and take *dakhilas*, challans and receipts, &c., in our names showing payments of *sudder* rent thus assigned over. After paying these amounts of *sudder* (rent) you shall pay to us Rs. 27-7 annas 4 gundas and 3 cowris in cash, according to *kists* or instalments. Upon your making out to us at the end of the year the *dakhilas* showing payments of *sudder* rent to the landlords, for which an assignment is made to you, we shall duly grant you a *dakhila* for the whole of the amount. Bound by these terms you from this day shall take pos-[69]session of the above *mehals* on the strength of this *mourasi potta*, and continue to enjoy the profit, down to your sons, sons' sons, and so on in succession. Should you make default in paying the specified amounts of rent, you shall be dealt with according to law."

The question for determination that arises at the outset is whether the money for which this suit has been brought is rent or not. If it is rent, a second appeal will lie. If it is not rent, a second appeal is barred by section 586 of the Code of Civil Procedure.

Upon this question, we think there is a clear conflict of decisions in this Court, the case of *Rutnessur Biswas v. Hurish Chunder Bose*, (1884) I.L.R., 11 Cal., 221, supporting the respondents' contention while the case of *Mohabut Ali v. Mahomed Faizullah*, (1898) 2 C. W. N., 455, favours the opposite view.

With all respect to the learned Judges who decided this latter case, we feel bound to say that we are unable to distinguish that case from the earlier one. Nor are we able to distinguish the present case from either of those two cases in principle.

As there is a conflict of decisions in this Court upon the question whether when a landlord assigns a part of the rent payable to him towards the satisfaction of the rent due by him to his superior landlord or the satisfaction of a demand for revenue payable by him to the Collector, such sum continues or ceases to be "rent," the question must be referred to a Full Bench; and as the question arises in a second appeal, the whole case must be so referred.

Babu Sarada Churn Mitter for the Appellants.

Babu Surendra Chundra Sen for the Respondents.

The following **opinions** were delivered by the Full Bench (PRINSEP, MACPHERSON, GHOSE, HILL and STEVENS, JJ.):—

Prinsep, J.—In the lease under which the defendants held certain lands from plaintiffs, they agree to pay a certain amount of their rent to third persons. They have failed to do so. Hence the suit now before us on a reference from the Division Court before which the second appeal came on for hearing. Objection was taken before that Division Court that this is a [70] suit for damages for a sum less than 500 rupees, and that consequently a second appeal is barred by section 586 of the Code of Civil Procedure. On the other hand, the defendants claimed the right of second appeal on the ground that this was a suit for arrears of rent. The Divisional Court has referred this case to a Full Bench in consequence of the cases of *Rutnessur Biswas v. Hurish Chunder Bose*, (1888) I.L.R., 11 Cal., 221, and *Mohabut Ali v. Mahomed Farzullah*, (1898) 2 C. W. N., 455, which, in the opinion of the learned Judges, were in conflict on this point, and we are asked to find "whether the money for which this suit has been brought is rent or not."

I was one of the Judges who decided the case of *Rutnessur Biswas v. Hurish Chunder Bose*, (1888) I. L. R., 11 Cal., 221, and I think that that case is distinguishable both from this case and the case of *Mohabut Ali v. Mahomed Farzullah*, (1898) 2 C. W. N., 455, with which it is stated to be in conflict. The report of the case of *Rutnessur Biswas v. Hurish Chunder Bose* shows that the plaintiff and defendant were not landlord and tenant. The defendant was the tenant of the plaintiff's tenant, and, in the agreement with his landlord, he accepted the conditions under which his landlord undertook to make payments of the rent to third parties, and this was accepted by the superior landlord, the assignee. The present case is between landlord and tenant, and the matter in dispute is the non-payment of the rent due by the latter to a third party. This was money due to the plaintiff as rent. In the case of *Rutnessur Biswas v. Hurish Chunder Bose*, (1888) I. L. R., 11 Cal., 221, the money was payable to the defendant's landlord, and was payable under an assignment to a third party, who accepted the assignment and sued on it. Here in my opinion lies the difference in the two cases. The money claimed in the case of *Rutnessur Biswas v. Hurish Chunder Bose*, (1888) I. L. R., 11 Cal., 221, was never payable as rent by the defendants to Rutnessur as his tenant, but it was due under an assignment by the defendant's landlord which was accepted by Ryasona, the predecessor of Rutnessur, the document on which the suit was brought being the *kabuliat* executed by the defendant not in favour of the plaintiff or his predecessor Ryasona, but in favour of Ryasona's tenant. That this was so appears both from the statement of the case in the report which is not [71] carefully expressed and from the judgment itself. The report by the reporter states that the *darijara* lease granted to defendant by Ryasona's tenant was "confirmed" by Ryasona; that was a confirmation of the assignment made in the *kabuliat* granted by Ryasona's tenant to defendant. The suit was brought on this *kabuliat*. My memory of this case, to the judgment in which I was a party, is confirmed by the plaint to which I have referred, which shows that over and above the moneys payable to Ryasona thus assigned there was also money payable by the defendant to his own landlord. The judgment, moreover, shows that the defendant was not regarded as the tenant of the plaintiff. The fact that a portion of this money was under the assignment payable to Ryasona's landlord is immaterial, for none of it was payable to Ryasona except under the assignment and the defendant was never Ryasona's tenant. I observe that in *Mohabut Ali v. Mahomed Farzullah*, (1896) 2 C. W. N., 455, a case admittedly

on all fours with the present case, *GHOSE and STEVENS, JJ.*, distinguished that case from the case of *Rutnessur Biswas v. Hurish Chunder Bose*, (1884) I. L. R., 11 Cal., 221.

The determination of the matter before us depends on the terms of the lease which are set out in the reference. Under that lease the tenant agreed to pay Rs. 521-1 anna 6 cowris 3 krants to the plaintiffs. But it was stipulated and agreed that out of this sum the tenant should pay Rs. 493-10 annas 1 cowrie 1 krant to third parties who were the landlords of his landlord, and it was further provided that "after paying these amounts of *sudder* rent you (the tenant) shall pay us (the landlord) Rs. 27-7 annas 4 cowris 5 krants in cash according to instalments. Upon your making over to us at the end of the year the *dakhilas* showing payments of *sudder* rents to the landlords, for which an assignment is made to you we shall *only* grant to you a *dakhila* for the whole amount." The lease further declared that "should you make default in paying the specified amount of rent you shall be dealt with according to law." According, therefore, to the terms of the lease, the sums payable to third parties were regarded as rent due to the landlord, but under the agreement between the parties, a portion of the entire rent payable was to be paid to third parties. Those [72] third parties did not accept this arrangement and would consequently look to the plaintiffs for payment, and it seems to me that, having regard to this as well as to the terms of the lease, the portion of the rent which the tenant defendants agreed to pay to third parties did not cease to be rent by reason of that agreement. As soon as they failed to make such payments to the third parties, the plaintiffs were entitled to sue for the moneys so due and they could not be restrained until they had been compelled by the third parties to pay themselves. No doubt, it might happen by the default of the tenant defendants that the plaintiffs might be put to the expense of defending a suit. In that case they would be entitled to claim as damages any money for which they might have become liable on this account or for any other cause. But that would not affect the amount of rent for payment of which the lease had been granted or make the money which defendants had failed to pay the third parties other than rent. It is significant that by the terms of the lease a *dakhila* for the rent of each year was not to be granted until the defendants had given proof of the payment to the third parties. I am accordingly of opinion that this suit is a suit for arrears of rent, and that consequently a second appeal lies. It is, I think, unnecessary to express any opinion on the point referred to us except so far as relates to this suit.

Macpherson, J.—I cannot distinguish the case of *Rutnessur Biswas v. Hurish Chunder Bose*, (1884) I. L. R., 11 Cal., 221, from the present case on the ground stated by Mr. Justice PRINSEP, for I see nothing in the report of that case to indicate that the assignment of the rent under the arrangement between the landlord and the tenant had been accepted by the assignee, who was a third party, the zemindar, any more than it was accepted in the present case. In *Rutnessur Biswas v. Hurish Chunder Bose*, Ryasona Dasi gave an *ijara* to Gobind Chunder Sircar, and one of the conditions was that Gobind Chunder should pay a specified portion of the rent to the zemindar who was Ryasona's landlord. Gobind Chunder gave a *darijara* to Hurish Chunder Bose, subject to the conditions under which he himself held, and then resigned the *ijara*. Ryasona confirmed the *darijara* to Hurish Chunder, who thereupon became her tenant, and [73] afterwards transferred her entire right in the land, as well as the right to receive the *dar ijara* rent, to Rutnessur Biswas. Hurish Chunder thus became the tenant of Rutnessur, who sued him for rent which became due after the transfer,

and included in his claim that portion of the rent which Hurish Chunder ought to have paid to the zemindar. It was this portion of the rent which the Court treated as having been assigned to a third party, that is to say the person who was in the first instance the landlord of Ryasona and afterwards of Hurish Chunder, and therefore recoverable not as rent but as damages. The fact that there had been a transfer of the landlord's as well as of the tenant's right made, it seems to me, no difference as regards the question which was decided. In the present case, as in *Rutnessur Biswas v. Hurish Chunder Bose*, the plaintiff seeks to recover from the defendant his tenant a portion of the rent which the tenant undertook to pay, but did not pay, to certain persons who were the landlords of the plaintiff, his lessor, and the question is whether this money is recoverable as rent or as damages. If it is rent a second appeal will lie, if it is not rent there is no right of second appeal.

In my opinion, the money is rent and recoverable as such, and it did not cease to be rent by reason of the so-called assignment—an assignment to which the assignee was not a party and which was not accepted by him. The money was undoubtedly a part of the entire sum which the defendant undertook to pay to the plaintiff, his landlord, as rent for the use of the land. According to the terms of his lease he was to pay this money on the plaintiff's account to certain persons who were the plaintiff's landlords; he was to take from them receipts in the plaintiff's name for the money so paid, and at the end of the year he was to produce those receipts and take from the plaintiff a receipt for the entire amount of the rent inclusive of the balance which he was to pay to the plaintiff direct. This I think clearly shows that in the contemplation of the parties the money did not cease to be a part of the rent or recoverable as such. If the defendant defaulted to pay the money in the way agreed on between himself and his landlord, the assignee had no cause of action against him, and the plaintiff never in any way lost or waived his right to recover the money which was not so paid as a part of the rent. In fact there was to be no discharge for the rent, [74] unless and until the defendant produced the receipts for the payments which he undertook to make.

But assuming that, as a general rule, rent as such cannot be assigned, in the present case, there was, I consider, no such assignment of the money sought to be recovered as to deprive it of its character as *rent*, and the plaintiff did not by the arrangement made with his tenant as to the mode of payment lose his right to recover it from him as a part of the rent. If the money is rent and recoverable as such, the plaintiff cannot, I conceive, by seeking to recover it as damages and calling his suit a suit for damages, alter the real character of the suit and deprive the defendant of the right of appeal to which he would otherwise be entitled. It is possible, of course, that he would be entitled to add to his claim for the rent a claim for damages, if he had suffered any damage by the defendant's failure to adhere to the arrangement, but this does not I think affect the question now raised.

I would, therefore, say that the amount claimed is rent and recoverable as such, and that a second appeal lies.

Ghose, J.—I agree with Mr. Justice MACPHERSON in the view that he has expressed.

With reference to the observation which Mr. Justice PRINSEP has made as to what I and STEVENS, J., held in the case of *Mohabut Ali v. Mahomed Faizullah*, I desire to say that though at the time I thought that the case of *Rutnessur Biswas v. Hurish Chunder Bose* was distinguishable, yet, on further consideration of the facts of that case, as are to be gathered from the report,

and the judgment in the case, I think that, in principle, they are not distinguishable, though no doubt there are some distinguishing features.

I hold that the claim in this case is for rent, and that a second appeal lies to this Court.

Hill, J.—The precise question referred to us does not, I think, arise on this appeal since there is, so far as I can perceive, nothing in the case to indicate that there was an assignment of rent. It is, however, remarked in the order of reference, "The question for determination then that arises at the outset is whether the money for which this suit is brought is rent or not. If it is rent, a second appeal will lie. [76] If it is not rent, a second appeal is barred by section 586 of the Code of Civil Procedure;" and it was to this question that the argument before us was directed. It was, I think, open to the plaintiffs to frame their suit either as a suit for the recovery of rent or as a suit for damages for breach of the agreement to pay a portion of the rent to the plaintiffs' landlord; and in answering the question stated above, I should feel disposed to lay greater stress on those considerations which bear more immediately upon the pleadings in the suit and on the understanding of the parties and of the Courts below with respect to it than upon those which concern the question whether the sums which the defendants failed to pay to the plaintiffs' landlord retained the character of rent. They may have done so, but assuming that they did, that in itself would not, it appears to me, be conclusive of the question before us which, as I understand it, is not whether a suit for damages for breach of the agreement would lie, but whether the suit, as framed, is to be regarded as a suit for rent or a suit for damages as distinguished from rent, and it is upon the answer to the latter question that the right of appeal depends. The plaintiffs have undoubtedly described the suit in the heading of the plaint as a "suit for damages," which damages they lay at Rs. 185-8 annas, and I find nothing in the body of the plaint inconsistent with such a claim. The defendants, in the third paragraph of their written statement, took exception to the form of the suit, and the question thus raised formed the subject-matter of the second issue in the Court of First Instance and was determined by the Munsif on the authority of the case of *Rutnessur Biswas v. Hurish Chunder Bose*, (1884) I. L. R., 11 Cal., 221, in favour of the plaintiffs. What the Munsif says on the subject is this: "I am of opinion that the amount claimed can be recovered not as rent but as damages. The suit in its present form does therefore lie." It is, I think, clear that, in its earlier stages, the parties themselves treated the suit as one for damages, and they moreover went to trial upon the issue whether, being a suit of that nature, it would lie. I should not myself, under these circumstances, feel disposed to allow the defendants at the present stage to change their ground and to treat the suit now as one for rent, so as to secure for themselves a right of appeal which they would otherwise not possess. It is, I think, to be [76] borne in mind that we are not now dealing with a merely abstract question, but the whole case being, under the rules of Court, before us for decision, considerations applicable to it in particular ought to be allowed due weight. On the grounds then that the suit was launched by the plaintiffs as one for damages, and that it was so treated and understood in the Courts below, I should feel inclined to answer the question whether a second appeal lies in the negative. But as the rest of the Court are of the contrary opinion, I ought I think, in the view I take of the scope of the question now before us, to defer to them, and I accordingly concur in the answer which they propose to give to the reference.

Stevens, J.—I concur in the judgment which has been delivered by MACPHERSON, J.

I agree with GHOSE, J., in thinking on further consideration that in principle the case of *Mohabut Ali v. Mahomed Faizulla* is not to be distinguished from that of *Rutnessur Biswas v. Hurish Chunder Bose*.

Prinsep, J.(MACPHERSON, GHOSE, HILL and STEVENS, JJ., *concurring*).—The suit will, therefore, be remanded to the Lower Appellate Court for trial, more especially with reference to the objection taken that a portion, if not the whole of the claim, is barred by reason of section 43 of the Code of Civil Procedure. We have no materials upon which we can decide this issue. The Lower Appellate Court will also consider any points which may have been properly raised before it on this appeal, having regard to the character of the suit as a suit for arrears of rent. The costs will abide the result.

Appeal allowed ; case remanded.

S. C. G.

NOTES.

[See 10 I.C., 382 ; 10 I.C., 406 ; 14 C.L.J., 589 ; and also 32 Cal., 169.]

[77] APPELLATE CIVIL.

The 25th May, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Jogendra Chunder Ghose.....Defendant No. 8
versus
Fulkuunari Dassi and others.....Plaintiffs.*

Hindu Law—Maintenance—Widow's right to a share in lieu of maintenance, on a partition suit having been instituted—Transfer of Property Act (IV of 1882), section 52—Lis Pendens.

After the institution of a partition suit by a member of a joint Hindu family consisting of six brothers and a mother, but before the summonses were served, one of the sons (defendant No. 1) transferred his share of the property, alleging it to be one-sixth, to a third party who was subsequently added as a party defendant to the suit. At the time of the transfer both the transferor and the transferee had notice of the said suit. On a question having been raised as to what share of the property the transferee was entitled to: *Held* that inasmuch as the suit for partition was instituted by one of the sons, the mother had an inchoate or quasi-contingent right, which ripened into an absolute right on a partition having taken place (which happened in this case), and therefore she having been entitled to a share, the transferee could not get more than what the transferor was entitled to at the time of the transfer i.e. an one-seventh share of the property.

* Appeal from Original Decree No. 342 of 1896, against the decree of Babu Rajendra Coomar Bose, Subordinate Judge of 24-Pergunnahs, dated the 21st of September 1896.

Held, also, that inasmuch as both the transferee and the transferor had notice of the partition suit at the time of the transfer, and as there was a dispute about the shares, section 52* of the Transfer of Property Act applied to the case.

THIS appeal arose out of a suit for partition of the estate of one Jagdis Chunder Sarkar who died leaving six minor sons, and a mother and a widow. The suit was instituted by one of the sons, making the other sons, the mother, and the grandmother defendants. After the institution of the suit, but before the service of summonses upon the defendants, defendant No. 1 sold his share in a certain property, alleging it to be an one-sixth, to one Jogendra Chunder Ghose.

The defence of defendant No. 1 was to the effect that the mother was not entitled to any share, as she had property of [78] considerable value given to her by his father; and that in regard to property No. 1 the defendant had sold his one-sixth share to one Jogendra Chunder Ghose. Upon the written statement of defendant No. 1 being filed Jogendra Chunder Ghose was added as a defendant in the case, being defendant No. 8, and his defence was that he was rightfully entitled to the property purchased by him, and that the defendant No. 6, the mother, could not claim any share thereof. The Subordinate Judge found that at the time of the transfer of property No. 1 by defendant No. 1 to defendant No. 8, both of them were aware of the institution of the partition suit, and he overruled the objections of the defendants and made a decree for partition, directing that the grandmother should obtain maintenance, and defendant No. 6, the mother, should get a share in the property, and that the property should be divided into seven equal shares, and that the share of the defendant No. 1 should be assigned to defendant No. 8.

Against this decision the defendant No. 8 preferred an appeal to the High Court.

Dr. *Rash Behary Ghose*, *Babu Umakali Mukerjee*, *Babu Surendro Nath Roy*, and *Babu Sarut Chunder Roy Chowdhry*, for the Appellant.

Babu Nilmadhub Bose, *Babu Dwarka Nath Chuckerbutty*, and *Babu Dasrathi Sannyal*, for the Respondents.

The following **judgments** were delivered by the High Court (MACLEAN, C.J. and BANERJEE, J.):—

Maclean, C.J.—This is a suit for the partition of certain properties which are mentioned in the schedule to the plaint—properties which belonged to one Jagdis Chunder Sarkar, who died in the month of Joist 1293, leaving him surviving his minor sons, the plaintiff and the defendants Nos. 1, 2, 3, 4 and 5, and his widow, the defendant No. 6 and the defendant No. 7, who was his own mother. No question arises in relation to any share of the latter in the property. The suit was instituted on the 27th of August 1895, and summonses were served upon the defendants on the 14th September in the same year. In the interval, on the 12th September, the defendant No. 1 had, for valuable consideration, transferred his share in one of the properties [79] treating (subject to what I will say in a moment) that share as a one-sixth share, to the defendant No. 8, who was subsequently on the 5th December 1895 made a party to the suit.

* [Sec. 52:—During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.]

The real question in dispute is whether the defendant No. 8 is entitled to a one-sixth share, or only to a one-seventh share in the property sold to him, the contention on the part of the mother (defendant No. 6) being that, on partition, she is entitled to a share, equally with her six sons, which would render the estate divisible into seven shares, and not six. The case came on for trial, and the learned Subordinate Judge of the 24-Pergunnahs delivered his judgment on the 21st of September 1896, a judgment which was adverse to the contention of defendant No. 8. The case was then carried on appeal to this Court, and on the hearing of that appeal, this Court held that there must be a remand to have the following further issues tried, namely : (1) whether the defendants Nos. 1 and 8, or either of them, knew the fact of the institution of the suit before the execution of the first conveyance in favour of defendant No. 8 by defendant No. 1 ; and (2) whether, exclusive of the property covered by the earlier of the two conveyances executed by defendant No. 1, in favour of defendant No. 8, there still remained property appertaining to the share of defendant No. 1 sufficient to contribute to the share of No. 6, and whether a partition can be effected, and, if so, in what way, so as to exclude the property covered by the said conveyance by treating it as allotted to the share of No. 1. These issues were referred for trial to the Court below, with directions to take any additional evidence which the parties might desire, and the Court below was to return its finding on these issues.

It is unnecessary to say anything about the finding on the second issue, because it appears that the defendant No. 1 has parted with all his interest in the other properties to other purchasers, who are not parties to the suit, and so no practical effect can be given to the suggestion of contribution implied by that issue.

On the first issue, the Subordinate Judge has found that both defendant No. 1 and defendant No. 8 had notice of the present suit on the 12th of September.

[80] I may point out, incidentally, that both defendant No. 1 and defendant No. 8 would appear to have entertained some doubt as to whether the former's share were really a sixth, for there is a covenant in the *kabala* that, if the vendor's statements be found to be untrue (one of which was that he was entitled to a one-sixth share) that is to say, that if it be afterwards found that his interest was less than the extent of interest which was there declared, he should in that case refund the consideration-money, in proportion to the extent by which the same might fall short.

It is urged for the appellant that, before a partition was actually effected, the defendant No. 1 had an absolute right to deal with his share, and to transfer that share to a purchaser for value free from any claim of his mother to a share on partition ; and that the right of the mother to a share on partition is not an absolute or vested right, but a contingent right only, contingent on the partition being actually made. He further urges that the case is not within section 52 of the Transfer of Property Act.

To this the mother (the respondent) replies, that, inasmuch as under the Hindu law of the Bengal School, which admittedly governs the present case, the mother would, if there were a partition, be clearly entitled to a share equal to that of her sons, the defendant No. 1 could not deal with his share so as to prejudicially affect his mother's right : that he could not transfer to a purchaser a larger interest than he himself had ; and that, inasmuch as the transfer was effected after the institution of the suit, section 52 of the Transfer of Property Act applied.

It is, I think, clear upon the authorities—I need only refer to the case of *Hemangini Dasi v. Kedarnat Kundu Chowdhry*, (1889) I. L. R., 16 Cal., 758; L.R., 16 I. A., 115, and the case of *Sorolah Dossee v. Bhoobun Mohun Neoghy*, (1888) I. L. R., 15 Cal., 292—that in the event of the sons partitioning the property, their mother is entitled to a share equal to their own respective shares, and that she takes this share in lieu of, or by way of provision for, her maintenance, for which the partitioned estate is already bound.

The appellant does not dispute, nor could he successfully [81] dispute, this proposition of law, but he contends that there is no such right in the mother, unless and until a partition has actually taken place, and great reliance is placed upon certain passages in the judgment of Mr. Justice DWARKA NATH MITTER in the case of *Shao Dyal Tewaree v. Judoonath Tewaree*, (1868) 9 W.R. 61, and, without doubt, those passages do give support to the appellant's contention.

That learned Judge says: "The learned Counsel for Doolaro has contended that, in the case before us, partition must be *held to have actually taken place*, and he cited a ruling of Her Majesty in Council to the effect that division by metes and bounds is not at all necessary to constitute partition under the Mitakshara." And later on he says: "It has been said that the question of maintenance is quite distinct from the question before us, but there can be no doubt that the share that is given to a Hindu mother at the time of partition is given to her for no other purpose than as a provision for her maintenance. She has no right to ask for maintenance after she has got such a share, and if a partition *has been effected* in this case, Golaba's suit for maintenance must have been dismissed on that ground alone. It is unnecessary, therefore, to decide whether Golaba had a right to alienate the share assigned to her by the principal Sudder Amin as her *stridhan*, under the Mitakshara law. Our finding is, that she had acquired no right to that share, as she died before partition had been *actually made*." The last sentence indicates that the question there was one of succession, and that as the mother had died before any actual partition had been made, she had acquired no right to any share; and the Judge's remarks must be taken in connection with the case he was then dealing with, which is one substantially differing from the present, where a partition has actually been effected, which would undoubtedly give the mother a right to a share according to Mr. Justice MITTER's view, and when the question here is whether that right can be defeated by a transfer from one of the sons.

It is said for the appellant that Mr. Justice MITTER's view is endorsed by Mr. Justice WILSON in the case of *Sorolah Dossee v. Bhoobun Mohun Neoghy*, (1888) I. L. R., 15 Cal., 292. There Mr. Justice WILSON cites the [82] passage which I have just read, and he says: "The Court seems to me here to lay down, and to lay down not by way of *dictum* or mere expression of opinion, but as the ground of decision, that when a mother takes a share on partition, her title arises from the partition alone, and that she had no pre-existing vested right except a right of maintenance."

In that case again the question was one of succession; the respondent, however, does not put her case so high as that of a pre-existing *vested* right to a share, but she says she has an inchoate or quasi-contingent right which may ripen or crystallise into an absolute right, if and when, the partition takes place, which happened in the present case.

With respect to the case of *Lakshman Ram Chandra Joshi v. Sattya Bhamu Bai*, (1877) I. L. R., 2 Bom., 494, cited for the appellant, the true nature of that suit is stated by Mr. Justice WILSON in the case of *Sorolah Dossee v.*

Bhoobun Mohun Neoghy, (1888) I. L. R. 15 Cal., 292 (313). It is not a case which bears directly upon the present, and though it is relied upon by the appellant, there are passages in the judgment of Mr. Justice WEST which support the respondents' view. For instance, that learned Judge says at p. 508 of the report: "The mother's ownership, which has according to this view been extinguished, revives again on a partition amongst her sons; their ownership in the meantime is complete." But if there existed in the mother any such ownership, must not a purchaser from a son of his share—I am not speaking of a sale for the payment of the father's debts—purchase subject to that right? Mr. Justice WILSON does not share Mr. Justice WEST's view; he thinks that on partition an old right does not revive, but that a new right arises. However, the case of *Lakshman Ram Chandra Joshi v. Sattya Bhamu Bai*, (1877) I. L. R., 2 Bom., 494, is in its circumstances so different from the present that it cannot be regarded as an authority for the proposition for which the present appellant contends. If, as the authorities appear to establish (see *per* WEST, J., at p. 506 of the report of that case), the widow's maintenance, specially as against the sons, is a charge on the estate, a right *in rem* in the [83] fullest sense adhering to the property into whatever hands it may pass, a right convertible, in the event of a partition, into a right to a share equal to that of sons, it is difficult to see upon what principle a son can so deal with his share as to defeat that right of his mother.

In my opinion defendant No. 8 cannot, as between the mother and himself, stand in a better position than his transferor defendant No. 1, and that, as on a partition defendant No. 1 would only be entitled to a seventh share, defendant No. 8 is not entitled to any more; in other words, he must be taken to have purchased, subject to the right of the mother, if there were a partition, to have a share allotted to her in lieu of her maintenance. There appears to me to be some analogy between this case and the principle of the case of *Byjnath Lall v. Ramooldeen Chowdhry*, (1874) L.R., 1 I. A., 206; 21 W. R., 233, in the Privy Council, where it was held that, "where the owner of an undivided share in a joint and undivided estate, mortgages his undivided share, he cannot by so doing affect the interests of the other sharers, and the persons who take the security, that is, the mortgagees, take it subject to the right of those sharers to enforce a partition, and thereby convert what is an undivided share of the whole into a defined portion held in severalty."

But whether the view expressed above be or be not sound, it seems to me that the case is within section 52 of the Transfer of Property Act. The transfer undoubtedly took place after the institution of the suit, and both parties to the transfer had notice of the suit. It is, however, urged for the appellant, that this is not a "contentious suit or proceeding in which any right to immoveable property is directly and specifically in question" within the meaning of the section.

It is said upon the authority of the case of *Radhasyam Mohapattra v. Sabu Panda*, (1888) I. L. R., 15 Cal., 647, that a suit does not become "contentious" until the summons has been served upon the opposite party, but no reason is assigned by the learned Judges for their conclusion. I am inclined to think this view proceeds upon some confusion between [84] what is 'contentious,' and the exact point of time when a *lis pendens* is constituted. I should infer that the conclusion was arrived at by analogy to the English cases, which decide that, as between plaintiff and defendant, the service of the subpoena constitutes the *lis pendens* between them [see *Bellamy v. Sabine*, (1857) 1 De Gex and J., 566 (586)]. We are, however, relieved from going into the question as to the precise point of time when a *lis pendens* is

constituted in this country whether, as between plaintiff and defendants or as between co-defendants, for the section says: "During the active prosecution * * * of a contentious suit, etc., etc.," which indicates with reasonable clearness that, whilst the suit is being actively prosecuted, the property is not to be transferred or dealt with so as to affect the rights of any other party thereto, under any decree or order which may be made therein. It is not suggested that this suit was not being actively prosecuted when the transfer was executed. In this view I fail to see how the case cited is any authority as to what is or what is not a "contentious" suit. A contentious suit is a suit involving contention, and it is perhaps difficult to predicate of any suit, at the moment of its inception, whether or not it is likely to be contentious; but if, in point of fact, it turns out to be a suit which was contested, as is the case here, then, to my mind, the suit is a contentious one and the section applies. It seems to me that in order to appreciate whether the section applies, we must regard the event, and in this case the event showed a contested suit.

We are referred, however, to the case of *Khan Ali v. Pestonji Edulji Guzdar*, (1896) 1 C. W. N., 62, as an authority for the proposition that this section does not apply to a partition suit upon the ground that it is not a suit or proceeding, "in which any right to immoveable property is directly or specifically in question." I scarcely think the Court intended to lay down any such wide proposition. The Chief Justice says: "I do not think that that section applies to a suit for partition in which the shares of the parties and the rights of the parties to the shares are not disputed." Here, however, the [85] shares of the parties are disputed, so the present case is distinguishable.

I have already alluded to the case of *Bellamy v. Sabine* which has been relied upon by both sides, and which has been adopted and followed in this Court in the case of *Raj Kishen Mookerjee v. Radha Mulhub Haldar*, (1874) 21 W. R., 349. It is not pertinent to the case before us save as enunciating, according to the views held by the Courts in England, the foundation of the doctrine as to the effect of *lis pendens*.

For these reasons the appeal fails, and must be dismissed with costs.

Banerjee, J.--I agree with the learned Chief Justice in thinking that the judgment of the Court below is right. The suit out of which this appeal arises was brought by one of six brothers against the other five brothers, their mother and their grandmother, for partition of the property, moveable and immoveable, inherited by the brothers from their father, after determining the question whether the mother and the grandmother are entitled to a share, or to maintenance only; and the prayer of the plaintiff was for division of the property by metes and bounds into eight, seven, or six shares, according as in the judgment of the Court the mother and the grandmother both, or only one of them, or neither of them, had a right to a share.

The defence of the defendant No. 1 was to the effect that the mother was not entitled to any share as she had property of considerable value given to her by his father; that, in regard to property No. 1, the defendant had sold his one-sixth share to Jogendra Chunder Ghose, and that in regard to that property there could not be any partition except under certain rules which had been previously agreed to between the parties. Upon the written statement of the defendant No. 1 being filed Jogendra Chunder Ghose was added as a defendant in the case, being the defendant No. 8, and his defence was that he was rightfully entitled to the property purchased by him, that is the one-sixth share of the defendant No. 1 in property No. 1, and that the [86] defendant No. 6, the mother, could not claim any share thereof. I need

not consider the other objections taken by the defendant No. 8 in his written statement.

The Court below overruled the objections of the defendants Nos. 1 and 8 and made a decree for partition, directing that the grandmother, the defendant No. 7, should obtain maintenance at a certain rate; that the defendant No. 6, the mother, should have a share in the property; that the property should be divided into seven equal shares, and that the share of the defendant in property No. 1 should be assigned to the defendant No. 8.

Against this decree, the defendant No. 8 preferred an appeal. At the first hearing of that appeal, it appearing to this Court essential to the right decision of the case that certain issues, which had not been considered in the Court below, should be framed and tried, namely (1) whether the defendants Nos. 1 and 8, or either of them, know the fact of the institution of the suit before the execution of the first conveyance in favour of defendant No. 8 by defendant No. 1; and (2), whether exclusive of the property, covered by the earlier of the two conveyances executed by the defendant No. 1 in favour of defendant No. 8, there still remained property appertaining to the share of defendant No. 1 sufficient to contribute to the share of defendant No. 6, and whether a partition can be effected, and, if so, in what way, so as to exclude the property covered by the said conveyance by treating it as allotted to the share of defendant No. 1, the case was remanded for a finding on those issues.

The Court below has found that both the defendant, No. 1, and the defendant No. 8, were aware of the fact of the institution of the suit before the execution of the conveyance in question, and that there is not enough property belonging to the share of defendant No. 1, excluding the property covered by the first conveyance in favour of defendant No. 8, to contribute to the share of defendant No. 6. It is now contended on behalf of the appellant that the Court below is wrong in holding that the defendant No. 6 is entitled to any share in the property covered by the conveyance executed in favour of the appellant [87] by the defendant No. 1, that is, in a one-sixth of an 8 annas share which was owned by the father of defendant No. 1, and the grounds upon which this contention is based are two, the first ground being, that as the right of the defendant 6, the mother of the plaintiff, and of the defendants Nos. 1 to 5 to claim a share arises only upon partition being made of their joint paternal property by her sons, and as previous to such partition the defendant No. 1 had transferred his share in property No. 1 to defendant No. 8, he must be taken to have acquired that share free from the claim of the defendant No. 6, and the second being, that the additional reason upon which the Court below has based its decision in favour of defendant No. 6, namely, that the defendant No. 8 is bound by the doctrine of *lis pendens*, is an erroneous reason, the doctrine of *lis pendens* not being applicable to this case.

I shall deal with these two contentions separately.

In support of the first contention, it is argued that as the right of the mother to claim a share in her husband's estate arises only upon partition by her sons, and as no such partition had been made until after the alienation in favour of defendant No. 8, the purchase by the defendant No. 8 of a one-sixth share from defendant No. 1 cannot be held to have been subject to the right of defendant No. 6, which had not come into existence at the date of the alienation. It is further urged that the mother's right to a share in her husband's estate is not in the nature of an absolute right to the estate, but is only in lieu of, or by way of provision for, the maintenance for which the estate is liable, and as a purchaser from one of the sons has been held not to be bound by any claim of the widow for maintenance, no more can he be bound by her claim

for a share on partition which is only in lieu of, and as a provision for, such maintenance. And in support of this argument, the cases of *Sheo Dyal Tewaree v. Judoonath Tewaree*, (1868) 9 W. R., 61; *Hemangini Dasi v. Kedarnath Kundu Chowdhry*, (1889) I. L. R., 16 Cal., 758; I. L. R., 16 I. A., 115; *Sorolah Dossee v. Bhoobun Mohun Neoghy*, (1888) I. L. R., 15 Cal., 292; *Lakshman Ram Chandra Joshi v. Satya Bhama* [88] *Bai*, (1877) I. L. R., 2 Bom., 494; *Adhiranee Narain Coomary v. Shonamal Pat Mahadai*, (1873) I.L.R., 1 Cal., 365, and *Barahi Debi v. Debkamini Debi*, (1892) I. L. R., 20 Cal., 682, have been relied upon.

The right of the mother to a share on partition is founded upon the following passage in the Dayabhaga: "When partition is made by brothers of the whole blood after the demise of the father an equal share must be given to the mother. For the text expresses 'the mother should be made an equal sharer.'" Ch. II, Sec. III, para. 29.

With reference to the above passage in the Dayabhaga it has been held, and it must now be taken as settled law, that the mother's right to claim a share arises only when her sons come to a partition, in other words, that she cannot enforce her claim to a share so long as her sons remain joint and do not ask for partition. But there is nothing said in this passage, or in any other authoritative text of Hindu law, as to the mother's right to a share on partition being so absolutely non-existent before partition, that it may be defeated by any of her sons alienating his share before coming to a partition.

In my opinion, the correct view to take of this right would be to hold that it is an inchoate right as long as no partition is come to amongst the sons, and it becomes actually enforceable only when the sons come to a partition; or in other words, that the right, when it becomes enforceable by reason of a partition being come to among the sons, is enforceable, not only as against the sons, and as regards so much only of the joint property as at the date of partition is in the hands of the sons, but also as against any person deriving title from any of the sons, and as regards the property to which they may have so derived title, subject to certain qualifications and limitations which it is unnecessary to discuss in detail in this case, having regard to the facts found by the Court below, the correctness of which has not been practically impugned. It must be taken to be a correct proposition of law that no owner of property can convey to any [89] person a higher right than what he himself possesses except under certain special circumstances. The purchaser, therefore, of joint family property from a member of a joint Hindu family must take it subject to the rights of his vendor's co-sharers to demand partition and subject also to such rights of other persons who were not strictly speaking co-sharers with the vendor at the date of the alienation, as may arise under the Hindu law upon partition.

The correctness of this general proposition, which is supported by the case of *Bilaso v. Dinanath*, (1880) I. L. R., 3 All., 88, cannot, I think, be disputed. The case of *Sheo Dyal Tewaree v. Judoonath Tewaree*, (1868) 9 W. R., 61, relied upon by the learned Vakil for the appellant, does not really conflict with the view I take. The point actually decided with reference to the mother's share in that case was that such share could not be claimed by a devisee from the mother when she died after the decree of the first Court in a partition suit, but before the hearing of the appeal from that decree, and that was a point very different from the one that arises in this case. Nor is the case of *Barahi Debi v. Debkamini Debi*, (1892) I. L. R., 20 Cal., 682, in point, as it was held with reference to the facts of that case that there was no partition of "the bulk of the family estate," and that what was sought to be divided was

not " anything more than a small outlying piece of property " of which one of the sons had sold his share to the plaintiff.

The second branch of the first contention is that as the mother's right to a share has been held in two of the cases cited, namely, *Sorolah Dossee v. Bhoobun Mohun Neoghy*, (1888) I. L. R., 15 Cal., 292, and *Hemangini Dasi v. Kedarnath Kundu Chowdhry*, (1889) I. L. R., 16 Cal., 758 : L. R., 16 I. A., 115, to be a right that arises in lieu of or by way of a provision for her maintenance, such a right must be subject to the same limitation as the right to maintenance is, and as the right to maintenance is, according to the cases of *Adhiranee Narain Coomary v. Shonamalee Pat Mahadai*, (1873) I. L. R., 1 Cal., 365, and [90] *Lakshman Ram Chandra Joshi v. Satya Bhama Bai*, (1877) I.L.R., 2 Bom., 494, not enforceable against a purchaser from any of the sons, the right to a share on partition must in the same way be held not to be enforceable against such a purchaser. I am of opinion that this argument is not sound. For the reasons for the decision in *Lakshman Ram Chandra Joshi's* case and in that of *Adhiranee Narain Coomary* against the widow's claim in regard to maintenance are inapplicable to her claim to a share on partition. I should, in the first place, observe that though in the two cases of *Sorolah Dossee v. Bhoobun Mohun Neoghy*, (1888) I. L. R., 16 Cal., 292, and *Hemangini Dasi v. Kedarnath Kundu Chowdhry*, (1889) I. L. R., 16 Cal., 758 : L. R., 16 I. A., 115, the mother's claim to a share has been held to be a claim in lieu of or as a provision for her maintenance, in neither of those two cases did the point arise for decision which we have now to consider, and it was only incidentally that the observations, upon which the learned Vakil for the appellant relied, were made.

Now the main reason upon which the decision in the case of *Lakshman Ram Chandra Joshi v. Satya Bhama Bai*, so far as it touches the present question, turned is incorporated in the following passage in the judgment of Mr. Justice WEST: " If then a mother forgoing her claim to a separate provision out of the personal property resides with her sons or step-sons and is maintained by them she must submit, I think, to their dealing with the estate. "

Although that observation may hold good as regards her claim for maintenance in respect of which she may obtain a decree fixing its amount and declaring it to be a charge on any definite property, and although her not doing so may be treated as an omission on her part, the consequence of which is to disentitle her to enforce her claim against a purchaser in good faith from any of her sons, could the same thing be said in regard to her claim to a share upon partition? She cannot enforce such a claim so long as her sons do not come to a partition; she cannot ask for any decree declaring her [91] right to a share in any particular property until a partition is come to by her sons; and therefore, though consequences adverse to her claim for maintenance may arise from her omission to do what she might have done to place her claim on a secure basis, that is a consideration which is wholly inapplicable to her right to a share upon partition.

Another reason given [see *Adhiranee Narain Coomary v. Shonamalee Pat Mahadai*, (1873) I. L. R., 1 Cal., 365] for holding that a widow's claim for maintenance as a charge is not enforceable against a purchaser from any of the sons is, that it would be inconvenient to allow her to enforce such a charge by reason of the uncertainty of the claim and by reason of many other similar claims resting upon a similar ground. These also are reasons which would be inapplicable to the mother's claim to a share upon partition. Such a claim is definite in its nature, her share being defined as being equal to that of one of her sons, and the claim to a share being capable of enforcement only by the mother and not by any other member of the family. The reasons, therefore,

applicable to the case of a claim for maintenance are inapplicable to the mother's claim to a share upon a partition.

The case of *Barahi Debi v. Debkamini Debi*, (1892) I. L. R., 20 Cal., 682, as I have already remarked, does not call for any detailed discussion as the facts of that case were different, and as the learned Judges in their judgment observed: "Of course every case must be determined by its own facts, and there may well be cases in which the main body of the family property is divided, leaving only a small portion joint, and in such a case no doubt the sons would have partitioned the property among themselves, and the right of the widow to have a share set apart for her maintenance would come into existence." On these grounds, I am of opinion that the first contention urged on behalf of the appellant is untenable.

That being so, it is not necessary to discuss the second point at any great length. I would only observe that no valid [92] reason has been shewn for our holding that the case does not come within the scope of section 52 of the Transfer of Property Act. It was urged that there was no contentious suit, at any rate not until the service of summons on the defendant No. 1, and as the transfer in favour of the appellant was made before the service of summons on the defendant No. 1, the alienation in his favour cannot be affected by section 52. But, as has been pointed out in the judgment of the learned Chief Justice, a suit does not become contentious merely by service of summons on the defendant. Whether or not a suit is contentious must depend on whether or not it is really so. The expression "contentious suit" is, I think, used in contradistinction to a friendly suit in which there is no contest, and the parties bring the suit only to obtain the decree of a Court of Justice, declaring their rights as to which they are themselves in perfect agreement. Was that the nature of this suit? Clearly not. The plaint itself raised the question as to whether or not the mother, the defendant No. 6, was entitled to a share; it invited the Court to determine that question; and defendant No. 1 denied the mother's right to a share. Clearly, therefore, there was here a contentious suit in which the right to immoveable property, that is property No. 1 in the schedule to the plaint, was directly and specifically in question.

Great reliance was placed on the case of *Radhasyam Mohapatra v. Sibupanda*, (1888) I. L. R., 15 Cal., 647, as showing that there could not be a contentious suit or proceeding until the service of summons on the defendant. No doubt there is a passage in the judgment of the learned Judges who decided that case which lends some support to this contention; but having regard to the facts of that case, I am of opinion that it is clearly distinguishable from the present. The facts are thus stated in the judgment: "As a matter of fact the defendant No. 2 did not appear to defend the suit. She put in a written statement in which she alleged that she had parted with all her interest in the property to the plaintiff in this suit by virtue of the conveyance to him of the 5th of October 1883, and she asked that he might be made a party to that suit. [93] He was not, as a matter of fact, made a party to that suit, and, as I have said, judgment was given against defendant No. 2, who did not appear to defend the suit. This is the *lis pendens* which the defendant No. 1 seeks to take advantage of." Clearly, therefore, there was no contentious suit there; and I may add that the same remarks apply to the case of *Khan Ali v. Pestonji Edulji Guzdar*, (1896) 1 C. W. N., 62. There also, so far as one can gather from the judgment, it proceeds upon the ground that there was no contentious suit during the pendency of which the alienation in question was made. The second contention of the appellant, therefore, also fails.

S. C. G.

Appeal dismissed.

NOTES.

[See also 31 Cal., 745 and 31 Cal., 658.]

[27 Cal. 93]

PRIVY COUNCIL.

The 29th and 30th June, and 13th July, 1899.

PRESENT :

LORDS WATSON AND HOBHOUSE, SIR RICHARD COUCH, AND
SIR EDWARD FRY.

Domaty Nursiah.....Plaintiff

versus

S. R. M. Ramen Chetty and others.....Defendants.

[On appeal from the Court of the Recorder of Rangoon.]

Partnership—Assignment by plaintiff's partners of their shares—Decree for winding up and for an account.

The plaintiff, as a partner in lending a sum of money upon security given, had a half share in the joint adventure with the first and second defendants. These two, without the plaintiff's exonerating them from liability to him, had assigned their shares to two other persons. The assignees were added as co-defendants after this suit had been filed claiming a decree for a judicial winding up, and for an account. It was not proved that the plaintiff had ever relinquished his claim upon the assignors as a partner, though he might have been aware of the assignment. The two added defendants appeared in the Court below, but not upon this appeal.

Held, that the facts were sufficient to entitle the plaintiff to have the winding up of the partnership, and the account decreed against all the four.

The suit had been dismissed by the Recorder as having been prematurely brought before the complete execution of a decree, already obtained, before this suit was filed, by the plaintiff, appellant, against the borrowers of the [94] money; that decree having followed upon an award of arbitrators which directed that all sums realized in the adventure should be divided in equal moieties between the plaintiff and the original defendants. *Held*, that this suit ought to have been allowed to proceed, and should not have been dismissed. The plaintiff having, on this appeal, agreed to account for all money received by him in the transaction, an account should be directed with a declaration that the added defendants were jointly and severally liable to account, with the first and second defendants, for what had been received by them from the adventure.

APPEAL from a decree (26th November 1896) of the Recorder of Rangoon dismissing the suit with costs.

The suit was brought by the appellant on the 11th June 1896 against S. R. M. Ramen Chetty and S. N. A. Soobramonien Chetty, the first and second defendants, now respondents, the plaintiff having been a partner with them in a joint loan of Rs. 30,000 on the 28th June 1892, on a promissory note with security. In this transaction the plaintiff had a one-half share and the defendants the other half. The borrowers were Cadelly Morady and Domaty Moothaloo. The estate of the first of these was under administration, he

having died in February 1892. The security consisted of cargo boats, licenses for such boats, and title deeds of house property, handed over.

The plaintiff claimed to have the accounts of the joint adventure taken under a decree for winding up the partnership, with an order for realizing the securities for the loan and for the plaintiff to have his share in the assets.

The following are some of the principal facts. All are stated in their Lordships' judgment. In 1893 the two original partners, who traded in Rangoon, using the initials S. R. M., by their agent, Vyraven Chetty, transferred to the said agent, and to Ardappa Chetty, their interest in the loan. In 1895 disputes as to the transaction were referred by the appellants and Vyraven Chetty to the arbitration of a panchayet. The award, to which the first and second defendants were parties, declared that all sums realised from the debtors should be divided between the plaintiff on the one side and his original partners in the adventure on the other. In 1895 the present appellant obtained a decree in the Recorder's Court against the borrowers for the amount stated in the award to be due to him.

[95] It was now questioned whether, until that decree should have been completely executed, a suit such as this would, or would not, be premature; and the main question was whether the plaintiff was entitled or not to obtain a decree for the winding up and an account.

On the 9th July the two original defendants answered that they had assigned their interest to others whom the plaintiff had agreed to accept as responsible in their stead; that the assignees should be made defendants, and that they themselves should be exonerated. The assignees were thereupon made parties, and they pleaded that the suit was premature with reference to the decree of 1895 having been left unexecuted.

The Recorder dismissed the suit on the latter ground. He was of opinion (1) that no suit for an account and payment could be brought until the decree of 1895 had been fully and finally executed; (2) that the plaintiff had not paid over sums which the award had directed that he should pay. His judgment was as follows:—

"The facts of this case are shortly these. In January 1892 a sum of money was advanced by the firm of S. R. M. to a man named Cadelly Morady and to one Domaty Moothaloo. The plaintiff in this case had a half share in this transaction. Subsequently Cadelly Morady died. He had given certain security in the shape of cargo boats and also a house in Rangoon. Letters of administration were taken out to his estate and afterwards a suit was brought against the representative and a decree was obtained for an account. An account was taken and certain sums were found to be due. These are set out in the plaint. Then it appears there were matters in dispute between the plaintiff and one V. A. R. Vyraven Chetty. These matters were referred to a panchayet and an award was made directing certain payments to be made both by the present plaintiff and by the Chetty. As far as the plaintiff is concerned he has not paid his share. He now sues for an account and for payment of a certain sum which is admittedly in the hands of the third and fourth defendants. He originally sued the first and second defendants, but they appear to have assigned their interest over to the third and fourth defendants. This sum of money is the proceeds of sale of cargo boats, and admittedly the plaintiff is entitled to a share in this property, but the whole amount due from the estate of Cadelly Morady has not been recovered. It is stated that there is a considerable amount still to be recovered in execution of the decree against Cadelly Morady's estate, and that nothing has yet been recovered as against the property which is over in his country, nor has there yet been anything realized [96] in respect of the property in Rangoon which is of small value. All these facts are not disputed. In fact the amount to which the plaintiff is entitled, supposing that the whole amount due to the estate of Cadelly Morady is realized, is admitted as set out by himself; and the defendants

do not dispute that for an instant, but they contend that the suit is premature. The argument is that this decree has yet got to be executed. The execution of the decree may be a very lengthy and a very expensive business, and so far as all the money being realized, it is quite possible that nothing may be realized. Apparently Cadelly Morady has assigned over his property in his country, or a portion of it, to a third person. Other litigation may yet crop up, and until the litigations come to an end, I do not see how the defendants can be called upon to pay over anything to the plaintiff. It may be they would have to pay large sums of money, and, so far as the plaintiff actually getting anything more, it may be that he would have to contribute something towards those suits; I cannot say how it will be. At all events the plaintiff is not entitled to a decree directing the third and fourth defendants or any of the defendants to pay over the half share of the proceeds of the sale of the cargo boats to him. If the decree, as against the estate, had been fully satisfied, and the defendants were wrongly retaining in their hands a sum of money which ought to go to the plaintiff, he could, of course, go against them, but I think they are now entitled to say 'we have further expenses to meet, and we do not know what they will come to: we are entitled to keep the assets realized in our hands in order to meet these expenses.' Furthermore, there is another ground on which I think the plaintiff is not entitled to the decree he seeks, that is, that the plaintiff comes into Court to ask for an account, and for a decree against these defendants, and he has not himself obeyed the directions of the panchayet: some of the cargo boats were in his hands and he was directed to pay over certain portions of the earnings and he was also directed to pay over a half share of the costs, but neither of these directions has he obeyed, so that he is asking for a decree from this Court on the ground that the defendants have not paid over money to him which they ought to have done, while he himself is actually in the same position, viz., he has not done what he ought to have done.

"I think the suit is premature and ought to be dismissed with costs."

On this appeal, on which only the original defendants appeared—

Mr. *J. D. Mayne*, for the appellant, contended that there was error in the judgment below. The original defendants had not established any ground for their exemption from liability to account to the plaintiff by the mere fact of the transfer having been made by them of their rights in the partnership adventure. The plaintiff, it was argued, was entitled, notwithstanding the [97] transfer of the interests of the original co-partners, that transfer not forming any real impediment to a decree for the winding up of the transaction and for the direction of an account. It had not been proved that the plaintiff had ever assented to the transfer of the shares in the sense of having agreed that the original defendants should be discharged from all liability to him. There was no sufficient reason for holding the suit to be premature. It could not be alleged that the plaintiff was bound to wait until all the parties entitled to any share under the decree of 1895 had been paid. The plaintiff was entitled to an account of the money already realized and that might be received by the defendants. In the course of the taking such an account any debt due from the plaintiff to the defendants in relation to this adventure could be considered. But that he had not paid money decreed in 1895 formed no ground of defence to this suit.

Mr. *J. Fox*, for the original defendants, the first and second respondents, argued that they having transferred their shares in the adventure to the third and fourth co-defendants, had caused the liability of his clients as the original partners to cease. It was only part of what had taken place that the appellant had been informed of the transfer. He had acted as a person who accepted the responsibility of the added co-defendants. His action had involved the discharge of the original partners. There was no evidence that the present respondents had received any part of the money realized on account of the

loan. Whatever was received of the proceeds of the securities for the loan was not received by the respondents, or either of them, or on their behalf, but was received by the third and fourth respondents for themselves. In the events that had happened, the original defendants, the only respondents who now appeared, were not in any way liable to the appellant in respect of the loan of 1892. In any event the appellant's suit was premature, and in dismissing the suit on that ground the judgment of the Recorder was right.

Mr. J. D. Mayne was not heard in reply.

Afterwards, on the 13th July, their Lordships' judgment was delivered by

[98] Lord Watson.—The appellant Domaty Nursiah and the respondents, S. R. M. Ramen Chetty and S. N. A. Soobramonien Chetty, who carried on the business of bankers and money lenders in Rangoon, under the firm's name or mark S. R. M., their agent in Rangoon being the respondent V. E. A. T. Vyraven Chetty, on the 28th January 1892, jointly advanced the sum of Rs. 30,000 to Cadelly Morady (who has since deceased) and one Domaty Moothaloo. Of that sum Rs. 15,000, or one-half, was contributed by the appellant, and the other half by the firm of the said two respondents, who were his co-adventurers. In order to cover the advance, the borrowers, on the same date, granted to the said respondents, with the consent of the appellant, their promissory note for Rs. 30,000, payable on demand, with interest. In security for the due repayment of principal and interest Cadelly Morady transferred six cargo boats, with their licenses to the respondents' firm, and four cargo boats with their licenses to T. R. M. Seethumbram Chetty, with the knowledge and consent of the appellant. In further security Cadelly Morady deposited with the appellant, on the joint account of himself and his co-creditors, the title deeds of his half share of a house and land in 38th Street Rangoon, known as the southern half of 3rd Calss Lot 16 in Block F1.

Cadelly Morady died intestate in the month of February 1892. Thereafter, in the month of November 1892, Cadelly Ramasawmi applied for and obtained from the Court of the Recorder of Rangoon letters of administration to his estate and effects.

In the end of the year 1892, the respondent V. E. A. T. Vyraven Chetty ceased to act for the firm in Rangoon, of which the appellant's co-creditors, Ramen Chetty and Soobramonien Chetty, were the partners. In 1893, Ramen Chetty and Soobramonien Chetty assigned their interest in the loan made by them and the appellant to Cadelly Morady and Domaty Moothaloo, to the said Vyraven Chetty, and the other respondent in this appeal, K. P. A. T. Adappah Chetty. Upon the 10th August 1893, the said Adappah Chetty, writing to the assignors on behalf of himself and the other assignee, after remarking that they had bought up "your share of yours and Domaty Nursiah's partnership transaction with Cadelly Morady," undertook [99] the following obligation: "In case we did not pay the said Nursiah's half, and he should file a suit against you, we ourselves are bound to pay the costs therein according to original decision."

It appears from a decision, or award, dated 22nd January 1895, by four persons who acted as arbiters, that they had been applied to by Vyraven Chetty on the 13th day of December 1894, who submitted to them certain accounts, documents, and statements connected with the advance made to Cadelly Morady in January 1892. Vyraven Chetty made the application "under power of attorney from S. R. M. and Korangi Domaty Nursiah of Rangoon;" and it is obvious from the tenor of their decision that the arbiters understood that it

was their duty to settle questions arising between Nursiah and the Rangoon firm, of which the respondents Ramen Chetty and Soobramonien Chetty were the members.

The award lays down the principle that Domaty Nursiah and the firm, having each advanced one-half of the loan, must (1) take a half each of the sum and interest which may be realised either through the Court by means of compromise, and (2) each bear one-half of the expenses incurred on account of litigation, and any other manner of expenses that may occur in that behalf. It apportions the income and interest which was derived, "through Nursiah's means," from the Arracan Company, for the use of boats, and also the income and interest arising "through the means of Vyraven Chetty," from the use of other boats, worked by Mohr Bros. The award, which has not yet been implemented, directs that the principal and interest which may yet be realised shall, in like manner, be equally divided.

In 1895, Vyraven Chetty brought an action, in the Court of the Recorder of Rangoon, in the name of the firm, which was creditor in the promissory note, against Cadelly Ramaswami, as the representative of Cadelly Morady, in which accounts were taken, and a decree passed for the sum of Rs. 24,663-4, after giving the defendant credit for the sum of Rs. 13,424-4, being the net proceeds of the sale of the cargo boats held in security.

The decree obtained against Cadelly Ramaswami has not been [100] executed. The house and land in Rangoon, of which the title deeds were delivered in security by Cadelly Morady, have not yet been realised.

The appellant brought the present action in June 1896, in which he called, as defendants, the respondents Ramen Chetty, and Soobramonien Chetty, his original co-creditors. His plaint concluded, *inter alia*, for a declaration that the loan of Rs. 30,000 to Cadelly Morady and Domaty Moothaloo was a joint venture, and that the plaintiff and defendants advanced the money in equal shares; that accounts should be taken, and the venture wound up under the direction of the Court; and that, in the event of the defendants failing to execute the decree which they had obtained against Cadelly Ramaswami, and to realise the mortgaged premises in Rangoon, a receiver should be appointed.

The defendants, Ramen Chetty and Soobramonien Chetty, in their written statement averred that they had assigned their interest in the venture to the respondents Vyraven Chetty and Adappah Chetty, and that the appellant had agreed to accept the said assignees as responsible in their stead. They accordingly pleaded that the action, as against them, ought to be dismissed, and that Vyraven Chetty and Adappah Chetty ought to be made parties to the suit. On the 8th July 1896, they petitioned the Court: "That, in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in this suit, it is necessary that (1) V. E. A. T. Vyraven Chetty, and (2) K. P. A. T. Adappah Chetty should be joined as defendants in the suit." The learned Recorder issued an order to the effect craved.

The respondents, Vyraven Chetty and Adappah Chetty, who have not appeared in this appeal, were accordingly joined as defendants, and they lodged a separate written statement. They admitted that the interest of Raman Chetty and Subramonien Chetty had been duly assigned to them, and they averred that the appellant, being aware of the circumstance, "entered into an agreement with Vyraven Chetty, the third defendant above named, whereby

he agreed to refer the accounts in connection with the said loan, and his deposit account, to the arbitrament [101] of certain persons therein named, and such persons duly made their award." They also averred "that the account sought for in this suit cannot be taken, until the sale of the mortgaged property and the final execution of the said decree, and that there were no matters in dispute in relation to any accounts between the parties at the time of the institution of this suit." They pleaded that the suit as against them should be dismissed with costs.

The joinder of Vyraven Chetty and Adappah Chetty, unfortunately, had not the effect, predicted by the original defendants, of enabling the Court to adjudicate upon and settle all the questions involved in the suit. The main object of the defendant appears to have been, not to aid in the settlement of these questions but to delay a settlement by procuring the dismissal of the appellant's action. The learned Recorder, after hearing evidence, decreed that the suit be dismissed, and that the plaintiff do pay the defendants' costs as taxed.

Their Lordships do not think it necessary to make any observation upon the decree of the learned Recorder, save this—that the facts relied on in his judgment are, in their opinion, sufficient to show that the plaintiff is entitled to have the adventure judicially wound up, and that the action ought therefore to have been allowed to proceed.

Their Lordships desire to express their opinion that the respondents have failed to establish that the appellant, although he may have become aware of the assignment of their interest by Ramen Chetty and Soobramonien Chetty to the other respondents, ever consented to accept Vyraven Chetty and Adappah Chetty as responsible to him in lieu of their assignors. Assuming the statements of either set of defendants, bearing upon the plea of novation, to be relevant, they are not supported by the proof. The appellant Domaty Nursiah swears that, at the date of the award, he was not aware that the original defendants had assigned over their share in the loan of Rs. 30,000 to Vyraven and Adappah, and that he "never dealt with them in the matter." In his cross-examination for the respondents, no reference is made to the time when, or the manner in which, he consented to the novation. The respondent Vyraven Chetty, the only witness [102] examined for the defendants on being shown a letter to the Rangoon firm, setting forth the terms of their arrangement to assign their debt to him and Adappah Chetty, but making no reference to appellant, states, "I told plaintiff all about it. He said 'all right.'" The words said to have been used by the appellant on that occasion imply that he had no intention of disturbing an assignment to which he had no right to object; but they cannot be construed as signifying that he accepted the assignees, and parted from his claims against the assignors.

Their Lordships will humbly advise Her Majesty to reverse the judgment appealed from; and, the appellant having by his Counsel at the Bar agreed to account for all money received by him under the joint adventure of the 28th January 1892, to direct as follows: (1) that an account be taken of all the moneys received by the defendants under the said transaction, and of all dealings and transactions of the plaintiff and the defendants in respect of the said adventure, and that, in taking the said accounts, the decision or award of the 2nd January 1895 is to be treated as binding on the parties; (2) to declare that the third and fourth defendants are liable, jointly and severally with the first and second defendants, to pay to the plaintiff all sums found payable to the plaintiffs, to the extent of the moneys received under the said

adventure by the third and fourth defendants; (3) that there be liberty to the plaintiff and defendants respectively to apply for the payment into Court of any moneys received by the defendants and the plaintiff respectively, and also for directions as to the conduct of the suit brought against the representatives of Cadelly Morady and Domaty Moothaloo, and as to the execution of the decree made in the said suit, and also as to the realisation of the house and land in Rangoon, of which the title deeds were pledged in security by Cadelly Morady; (4) that the costs of process hitherto incurred by the plaintiff in the Court below, as the same shall be taxed, shall be jointly and severally payable to the plaintiff by the defendants, and that future costs shall be reversed for disposal by the Court below.

The respondents S. R. M. Ramen Chetty, and S. N. A. [103] Soobramonien Chetty, must pay to the appellant the costs of this appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. *Bramall, White and Sanders.*

Solicitors for the first two Respondents: Messrs. *Hopgood and Dowzon.*
C. B.

[27 Cal. 103]

PRIVY COUNCIL.

The 15th and 16th June, and 9th July, 1899.

PRESENT:

LORDS WATSON, HOBHOUSE, AND DAVEY, SIR RICHARD COUCH,
AND SIR EDWARD FRY.

Loknath.....Defendant

versus

Bissessarnath.....Plaintiff.

[On appeal from the Court of the Judicial Commissioner
of the Central Provinces.]

Decree—Construction of decree—Assignment of villages part of an impartible estate—Maintenance of a member of a junior branch of a joint Hindu family—Agreement—Arbitration award, decree and settlement thereon—Revenue, by whom payable.

A talukhdar owning an impartible inheritance was the head of a joint Hindu family, of which the defendant, his first cousin, was a member in a junior branch. In 1864 they came to terms as to the latter's claims upon the ancestral estate. A decree in that year founded upon the award of arbitrators between them declared the talukdar's ownership, and the assignment by him of eleven villages to the junior member, free of liability in respect of the revenue. These terms were entered in an administration paper, or *wajib-ul-arz*, of the talukdar before the settlement of 1867, in the record whereof they were also entered. And they were referred to in a sanad granted to the talukhdar. When the settlement of 1889 was in progress the profits of the eleven villages and the Government demand thereon had greatly increased; and for this jama the talukhdar was liable without any proportionate

increase of profit from the eleven villages. In 1881 the talukhdar sued for a declaration that the defendant's right in the villages consisted only in a certain amount of allowance for maintenance derivable from them. He also claimed that the defendant should repay to him a sum which he had paid for local cesses. The defence was that the defendant's right in the eleven villages had been conclusively settled in the above proceedings.

Held, that by the true construction of the decree of 1864, which was the foundation of the title of either party, the profits of the eleven villages belonged to the defendant, and that the revenue was to be paid, as between [104] the two, by the plaintiff with the enhancements, without benefit to him from the increase in the yield of the land. The principle of the judgments below was that the question to be decided was of the kind where the head of a family and a junior member dispute the amount of maintenance that should be paid. But the property assigned in this case was not of the variable character which belonged to an ordinary allowance for maintenance, and there was nothing to show that the Courts had authority to disturb settled arrangements on the ground of their being originally based on claims to maintenance.

The talukha was vested in the plaintiff subject to the right of the defendant to hold the eleven villages, and as between them, the former was liable for the jama and the latter for the local rates and cesses.

APPEAL from a decree (20th February 1896) of the Judicial Commissioner varying a decree on (21st November 1893) of the Judicial Assistant to the Commissioner, which had reversed a decree (7th November 1892) of the District Judge of Bilaspur.

The defendant, appellant, Loknath, belonged to a junior branch of a joint Hindu family of which a former head was Badrinath, the father of the plaintiff, respondent, Bissessarnath, the talukhdar of Tarenga, an impartible talukha in the Bilaspur district. Badrinath died in the year 1887, and his son Bissessarnath, who then succeeded him, brought this suit to have it declared that an arrangement, based on an award of arbitrators in 1864, the subject of a decree in that year, and carried into the twenty years settlement of 1867, should be altered. Eleven villages forming part of the talukh had been assigned by Badrinath to his cousin Loknath, in lieu of maintenance, the talukhdar agreeing to pay the Government revenue upon these villages, and Loknath to pay the local cesses thereon.

The improved productiveness of the eleven villages assigned to Loknath led to the main question in this suit and on this appeal. The increased profits from the land caused the enhancement of the revenue thereon at the settlement, in a corresponding degree. Under these circumstances the talukhdar complained that the arrangement of 1864 was inequitable and should be altered. Loknath's defence was that it was permanent and that it had been and should be acted upon. The hardship, from the talukhdar's point of view, was that Loknath possessing the villages with [105] all their profits and paying no revenue thereon, he, the talukhdar, had to pay the revenue at greatly enhanced rates, deriving no benefit from the increased profits. The question mainly was whether the talukhdar was legally entitled to relief from the obligations entered into by his father in 1864 and followed by the subsequent proceedings.

The agreement, of which the true construction was determined, appears in their Lordships' judgment.

In the settlement of 1867, under the instructions of the Settlement Commissioner, the proprietary right in Tarenga talukha was recorded as Badrinath's, as head of the family in possession. The junior members were to receive adequate allowance. Loknath was to hold the eleven villages free of revenue. The arrangement was recognized in the revenue documents. It was recorded in the wajib-ul-arz of Tarenga by a statement from Badrinath, to whom,

afterwards, sanads were issued as talukhdar with a reservation of these villages. Badrinath died in November 1887 and Bissessarnath was recognized as his successor. In 1898 a new settlement was made in the district, and dissatisfied with the orders made Bissessarnath filed this suit on the 17th June 1892.

In this he claimed two principal reliefs—

First, a declaration that the defendant's right in respect of the eleven villages was no more than to receive an annual allowance for maintenance, charged on them, of Rs. 1,500; *secondly*, that Rs. 16,798 should be repaid to him by the defendant in respect of local cesses which he, the plaintiff, had paid on account of the eleven villages and on account of sums received by the defendant beyond what was within his right.

The written statement of the defendant and the issues raised questions of the plaintiff's right on these points; and whether the arrangement of 1864, and the decree of that year, followed by the subsequent proceedings at the settlement of 1867, amounted to a grant of the villages in lieu of maintenance; and whether more recent changes had rendered it inequitable that the arrangements should continue.

[106] The District Judge was of opinion that the arrangement could not be held to be other than a temporary one, but that, until the rate of the defendant's maintenance allowance should be altered, he was entitled to retain the entire profits of the eleven villages in his possession. The first part of the claim was disallowed; but in regard to the cesses, and the amount sued for, he considered that the defendant was liable in that respect. He decided that the defendant was to pay the future dues for cesses, and to pay to the talukhdar the sums paid by the latter on this account. The amount to be paid he estimated at the money claimed.

This judgment was not maintained by the Judicial Assistant to the Commissioner on appeal, who dismissed the suit entirely, after remanding it; *first* for trial on the issue whether the arrangement of 1864 and 1867 was a grant of eleven villages in lieu of maintenance, and whether the subsequent change of circumstances had rendered it inequitable that that arrangement should be literally adhered to; and again, on an issue,—“what amount per annum is suitable and proper for the maintenance of the defendant, and on what conditions is he entitled to retain the eleven villages now in his possession.” In the end, the Judicial Assistant to the Commissioner dismissed the suit with costs.

On second appeal, the Judicial Commissioner dismissed the defendant's appeal with costs. He disapproved of the opinion of the first Appellate Court that the maintenance of a junior member of the family ought to grow in the exact ratio of value of the increase in the value of the family property. But he considered that there was injustice in the arrangement of 1864, whereby, as he said, “the defendant obtains, not the ordinary profit represented by the increase of income minus the increased Government revenue, but the gross profit, and at the same time the plaintiff pays the increased revenue, not out of the increased income, but out of his own pocket.” His conclusion was as follows: “I think that all that the defendant can fairly expect is the net increase in the profit of the eleven villages, and that he ought to bear whatever increased burdens have been laid upon the estate in respect of those villages by the recent settlement. The decree of the Lower Appellate Court is modified to that extent only, and a formal decree will be drawn up accordingly, in which it shall be [107] stated that this arrangement shall have effect from the date of the institution of this suit. The claim for money will stand dismissed.”

On this appeal,—

Mr. *C. W. Arathoon*, for the Appellant, submitted that the respondent had failed as plaintiff to establish the case in his plaint that he was entitled as proprietor while the defendant was only holding the villages in respect of an allowance for maintenance to be paid out of their net profits. By the terms stated in the award of 1864 carried into the settlement of 1867, the eleven villages were settled with the appellant on the express condition that the respondent was to pay the revenue thereupon, while the talukh was granted to the latter with a reservation of the defendant's right. This also appeared from the sanads granted to the respondent. The terms of the award, as carried into the *wajib-ul-arz* of the talukh, as well as recorded at settlement, had been recognized and acted upon for many years, and were intended to be permanent. The reasons for setting the arrangement of 1867 aside, or modifying it, were insufficient.

Mr. *A. Cohen Q.C.*, and Mr. *J. D. Mayne*, for the Respondent, argued that the right of the appellant in the eleven villages transferred to his possession was not absolute, but that he had a qualified interest only therein, holding them as representing the maintenance to which he was entitled, or in lieu thereof, by arrangement. That view had prevailed in the judgment of the Courts below, where the arrangements arrived at in 1864 and 1867 had reference to the changes that might be effected at settlements, and were not intended to be permanently fixed between the parties in all respects. These arrangements were open to be revised when circumstances had resulted, such as were the great rise in the rental of the lands of the villages, and a corresponding increase in the amount of jama assessed upon them. The intention of the parties could not be said to be carried out if the present state of things were to be maintained. This relief was claimable as the original object could no longer be attained without the alteration which would place the parties on more even terms. In deciding that the defendant should continue [108] to hold his villages on the same terms as those on which he had held them during the twenty years settlement, the Court of first appeal below had failed to notice that a maintenance would be received by him about twice as large as that which had been considered sufficient for him in 1867, but that the cost of securing this maintenance to him had risen from less than Rs. 1,000 a year in 1867 to nearly double that amount in revenue in 1889. There were decisions in which agreements for maintenance had been held to be of a temporary nature and to be changeable. Reference was made to *Greesch Chunder Roy v. Sumbhoo Chunder Roy*, (1835) 5 W. R., (P. C.) 98; *Ram Kullee Koer v. Court of Wards*, (1872) 18 W. R., 474; *Nobo Gopal Roy v. Anrit Moyee Dossee*, (1875) 24 W. R., 428, and *Ruka Bai v. Ganda Bai*, (1878) 1. L. R., 1 All., 594.

Counsel for the appellant was not called upon to reply.

Afterwards, on the 8th July, their Lordships' judgment was delivered by

Lord Hobhouse.—The parties to this appeal are members of a joint Hindu family, and the dispute relates to the enjoyment of the family property. The plaintiff below, now respondent, is the head of the family and the proprietor of the talukh Tarenga. The defendant, now appellant, belongs to a junior line. He claims enjoyment of 11 villages forming part of the talukh. His right to the net profits of the villages has been maintained by the decree appealed from, but subject to payments of Government jama, which he contends that the talukhdar ought to bear.

It is not shown at what date this portion of the Central Provinces became British territory, nor when regular Courts were established with jurisdiction

for revenue or for civil purposes. Counsel have informed their Lordships that the earliest laws they have found in these matters are those passed for civil suits in 1865, and for revenue in 1881; whereas some of the judicial proceedings under consideration are prior to 1865. But it is clear that the officers placed in charge of the country taken over from the Mahrattas exercised authority to settle disputes [109] in some legal modes, which throughout this litigation have, doubtless rightly, been taken as valid and as governing the rights of the disputants. The controversy has been and is as to the construction and effect of the official proceedings.

In the year 1862 Badrinath, the father of the plaintiff, was owner of the talukh, and the defendant Loknath, his first cousin, claimed a moiety of it. Judgment was given by Major Denuys, the Deputy Commissioner of Raipur, on the 16th September 1862. He treated the estate as subject to the Hindu common law, each branch being equally interested in its profits, and liable for its debts. He decreed that Badrinath should pay to Loknath half profits from the usufruct; adding "at the time of the regular settlement it will be competent for the plaintiff to sue for a division of the estate." It appears that this decree was upheld on appeal by the Commissioner, whose decree, dated 16th October 1862, is not in the record.

Loknath sought execution of his decree in the Court of an Assistant Commissioner, Bakhtawar Singh, and in the course of those proceedings the parties effected a compromise through the medium of arbitrators. That compromise was reduced to writing, signed by the parties and by the arbitrators on the 29th October 1864, and on the same day embodied in a decree of the Court. There are three versions of it in the record. One is called a copy; of what is not explained. One is an official translation. One is contained in recitals to the decree. Their Lordships agree with the first Court (the Civil Judge of Bilaspur) in holding that the real foundation of the defendant's rights is this decree. It adds nothing to its recital of the award beyond stating the approval of the Judge and ordering "That the award filed by the arbitrators and consented to by the parties be filed with the record. The parties should act up to it."

It does not appear that any of the three versions differ from the others in any matter now under dispute. But the verbal differences are numerous, and as the decree, owing to mutilations and some imperfection in transcription, requires supplement from the award, their Lordships take the document which appears to be a translation of the award actually filed with the record. It is as follows:—

[110] "Compromise arrived at between Badrinath and Loknath on arbitration in the year 1864.

"We are Badrinath tabuddar defendant, and Loknath, plaintiff, residents of Tarenga District, Bilaspur.

"Whereas there existed a dispute between us on account of partition of villages in the tahuddrai of Tarenga talukha and a decree being passed execution proceedings were instituted. Venkat Rao, Jawahir Singh, Babu Chasisao and Viswanath Sakham were appointed by us as arbitrators to settle the private dispute. The arbitrators gave us advice, made accounts of debts and villages to our satisfaction, and effected partition, having settled the matter thus: The villages Amukoni and Tikari, rental Rs. 174, Godhi, Datrengi, Madhuban, Lamti and Datrenga, rental Rs. 275, Achanakpur rental Rs. 7, Kesla with hamlet of Kuar Dewan rental Rs. 8, Buchipar rental Rs. 30, and Turma rental Rs. 12, in all eleven villages rental Rs. 506-8 out of the whole tabud ilaka are awarded to the plaintiff Loknath. The plaintiff is to possess and enjoy them. The defendant has no power over these. The plaintiff is at liberty to possess, occupy and manage them just as he pleases. But the defendant

is to pay out of his own pocket the Government revenue in respect of these villages. The plaintiff has no concern with the payment of the revenue and will not have to pay it. The defendant shall have power over the rest of the villages in the tahud. The plaintiff shall have no power over them. Each is to hold possession of his share. The defendant shall be responsible for the old and the present debts. He may pay it or not. As regards house furniture each is to have what he has at present. But the defendant is to divide equally (with the plaintiff) the buffaloes in his possession. The defendant is to pay the plaintiff Rs. 494 on account of profits for the years 1272 and 1273 (Fusli). Thereafter from the year 1274 (Fusli) the defendant and his heirs shall have no claim except to his villages and *vice versa*. The plaintiff and the defendant are to enjoy waters, forests, lands, pounds, etc., living in their respective shares. The defendant shall be responsible to pay (revenue) to Government. Plaintiff shall have no concern. On settlement being finally effected the defendant shall be responsible for payment of the revenue assessed. We, the parties, accept this decision of the arbitrators. We shall act up to the conditions above laid down."

Shortly afterwards Loknath became dissatisfied and appealed to Mr. Chisholm, the Deputy Commissioner, who gave judgment on 15th December 1864. He describes Loknath's proceedings as an appeal to set aside the agreement, and to have a fresh inquiry into the share of profits to which he is equitably entitled. His decision is—

"I see no reason for cancelling the agreement mutually entered into by the parties because at present no indisputable data exist on which a more [111] satisfactory finding could be based. It may be true that special facts have been concealed by defendant, and that the real rental of villages has not in all cases been stated, but if a fresh inquiry was ordered similar pleas might be brought forward. The best arrangement seems to me to uphold the agreement and to allow the parties the option at the regular settlement to claim a fresh adjudication based on the full information obtained from the detailed settlement proceedings."

Accordingly he dismissed the appeal.

The terms of the settlement came to be decided by the same Mr. Chisholm, who was then Settlement Officer. Loknath renewed his claim to a half share of the talukh. Badrinath offered to allow to Loknath for the period of the new settlement the sum of Rs. 1,196 for maintenance in lieu of the 11 villages. Mr. Chisholm's decision was given on 31st October 1867. There are two versions of it in the record; their Lordships follow the official translation in p. 110. After giving an opinion that a talukhdari estate is not divisible according to the ordinary rule of heirship, he refers to the litigation of 1862 and 1864 up to the date of the compromise. He says the villages then came to Loknath as "mukasa," a word, which, according to Wilson's glossary, imports a holding either rent free, or by the State of its own State property. He continues:—

"After the filing of this agreement the execution proceedings closed on the 29th October 1864. But after the decision Loknath objected, and being dissatisfied with the agreement, appealed to the Commissioner. The appeal was dismissed by that Court on 15th December 1864, and the parties held possession up to date under the terms of the agreement."

He goes on to show how Loknath has profited by the increased value of the land, while Badrinath has borne the increased jama. He concludes thus:—

"In reality by virtue of and after the agreement he has not been a loser but a gainer to a great extent. Yet he claims a half share. Until the previous agreement is cancelled this claim of Loknath is in my opinion altogether groundless, because what he gets according to his agreement is quite enough for his maintenance. Besides that I am not in favour of shares being apportioned in a talukhdari. As regards the previous orders of the Settlement Department about this dispute I made reference to the Settlement Commissioner in order to have the matter of proprietorship cleared up, and in reply thereto a fresh decision was permitted. It is therefore desirable to decide the matter in accordance with previous

possession and custom. That is to say all the talukhdari rights should remain with the talukhdar and arrangements for maintenance of his brothers, &c., may be made separately.

"It is therefore ordered that the entire talukhdari right of talukh Taronga be awarded to the present holder Badrinath tahuddar and clear provision for the maintenance of brothers, &c., be laid down in the administration paper of Taronga. Loknath will continue to hold the villages that are in his possession without payment of revenue."

This is the decision on the controversy which, in 1864, Mr. Chisholm postponed in order to obtain the fuller light of the settlement inquiry. In 1864 he intimates that Loknath, who was the party seeking to disturb the compromise, might succeed if he showed unfair dealing by the talukhdar. In 1867 he holds that no such case has been shown. "What he gets according to his agreement is quite enough for his maintenance." He does not so much as discuss Badrinath's proposal to substitute an allowance for the term of settlement in lieu of the villages. He decides, he says, in accordance with possession and custom; giving the talukhdari as a whole to the talukdar, but maintaining Loknath in his possession of the villages. That is to uphold the compromise as against both parties, though its effect in three years had been to increase Loknath's income and the talukhdar's payment of jama.

Loknath was dissatisfied with the decision and appealed to the Commissioner, Mr. Balmain, who affirmed it on the 28th February 1868.

During this settlement inquiry an administration paper or *wajib-ul-arz* was compiled for the talukh. It is set out at length in the record. It bears date 24th May 1867 and (apparently in anticipation of the settlement actually concluded) opens thus:—

"Special Administration Paper of the village of Taronga tehsil and district Bilaspur."

"I am Badrinath son of Manohar Rao Bania tahuddar malguzar resident of Taronga tehsil and district Bilaspur.

"Whereas the new settlement of this village under Act IX of 1833 for twenty years commencing with the 1st July 1867 and ending with June 1887 corresponding with Sambat 1924 to Sambat 1943 on a uniform revenue of Rs. 200 per annum has been effected with me before the Settlement Officer of the Bilaspur District, I hereby agree to act up to the following conditions until expiry of the period of settlement and further revision."

[113] Then comes Chapter I headed "Acquisition of the Zemindari." It contains a blank form for the description of a village, and then continues:—

"This village has long since been in our family. Now, at the present settlement, inquiry in respect of rights to this village having been made, the proprietorship of the village of Taronga, along with the rest of the talukha, was conferred upon me by order, dated 31st October 1867, and the villages of Amakoni, Tilkari, Turma, Buchipar, Achanakpur, Kosla, Datronga, Datrengi, Madhuban, Lamti and Godhi were given in lieu of malikana to the claimant, Loknath, free of revenue, which was made payable by me. He shall hold possession thereof so long as the village remains in my family. My real brothers Baijnath and Kedarnath shall get Rs. 250 each in cash. With these exceptions nobody else shall have any concern with the talukha. I am myself the owner of the whole talukha."

It has been contended at the bar that the passage just quoted is all subject to the opening statement by Badrinath, and is open to alteration at future settlements. The construction is inapplicable to a statement of the acquisition of the zemindari and of the title of the talukhdar, which nobody, least of all Badrinath, would contend to be alterable on future settlements; and it is equally inapplicable to fixed interests of sub-proprietors. Nor can the expression "as long as the village remains in my family" be cut down to mean "during the term of settlement." Nor has the term "malikana" anything to do with maintenance. It indicates ownership of some kind; and

if the villages were assigned, as Loknath contends, by way of compromise of his larger claim of joint ownership, which at the date of the wajib-ul-arz had been affirmed by one set of officers and had not been rejected by Mr. Chisholm, except as being barred by the compromise itself, the expression used "in lieu of malikana" is well enough adapted to express that arrangement. The reference to future settlements is accounted for by the fact that the principal part of the document refers to details of value and management whose nature is alterable with time.

In December 1867 and in succeeding months formal sanads were issued by the Chief Commissioner Sir Richard Temple, and countersigned by Mr. Chisholm as Settlement [114] Officer, for the purpose of vesting in Badrinath the formal and legal title to the villages belonging to the talukh. The following is the sanad relating to the village of Datrenga, one of the eleven : —

"113 District.

"Under the authority of Government, and by virtue of this sanad, proprietary rights and ownership in mouzah Datrenga talukh Tarenga of the Bilaspur District are vested in Badrinath, son of Manohar Sao Bance, and his heirs and assigns, according to the boundaries defined at the regular settlement, subject to the payment of such land revenue and other cesses, as may from time to time be assessed according to the terms of settlement and to the conditions specified in the administration paper and other settlement records.

"(Signed) R. TEMPLE."

In this way the statement of Loknath's rights in the wajib-ul-arz became part of the title by which the plaintiff in the suit holds his talukh.

So matters continued during the settlement of 1869—1889. The only material dispute related to local cesses, as to which it was held in Badrinath's favour that they should be defrayed by Loknath.

On the occasion of the new settlement of 1889 it was found that the value of the land, and consequently the demand of the Government for jama, had risen very largely. Using round numbers, the annual net profits of the talukh had increased from R. 5,700 to 22,000, the profits of Loknath's villages from R. 1,900 to R. 5,700, and the jama from R. 930 to R. 3,800. The talukhdar contended in effect that he ought not to pay more jama than the amount charged in 1869, and that Loknath was entitled to nothing from the 11 villages beyond a maintenance calculated at the rate of 1869, and stated by the talukhdar to be R. 1,581. After some differences of opinion among the Revenue officers the case was referred to the Governor-General in Council, who pointed out that the question was one of strict law, depending on the agreement of 1864. Thereupon the talukhdar instituted this suit praying relief according to his view as just stated.

Though the Civil Judge held, as above stated, that the decree of October 1864 embodying the compromise is the basis of [115] Loknath's rights, he went on to hold nevertheless that it was swept away by Mr. Chisholm's decision of October 1867, and that thenceforward Loknath had no right whatever except the ordinary right of a junior member of a joint family to maintenance, which might be enhanced or diminished from time to time. That he thought was a point for the Government to decide. He gave the plaintiff a decree for a declaration that the defendant's possession is in lieu of maintenance, and for the sum of R. 1,707-1-6, the amount of cesses for three years before suit. The rest of the claim he dismissed.

From this decree both parties appealed to the Judicial Assistant to the Commissioner, who considered that the sole question was the proper amount of maintenance. He first allowed the plaintiff to amend his plaint by asking

a declaration " what amount of maintenance the defendant is entitled to, and on what conditions he should continue to hold his 11 villages." Then he remanded the suit to the Civil Judge for the trial of those questions.

At the hearing after remand he expressed his opinion that " Loknath should continue to hold his villages on the same terms as those on which he held them during the 20 years' settlement." His principal reason was that Loknath was not receiving so large a proportion of the profits as he had when the settlement of 1869 came into operation. He dismissed the suit with costs.

The talukhdar then appealed to the Judicial Commissioner, who considered that Loknath was getting an undue share and declared him to be entitled to the net increase of the profits of the 11 villages, but subject to pay the increased jama. His decree is dated 20th February 1896. A cross-appeal by Loknath was dismissed.

All these judgments, widely differing in result, proceed on the principle that the dispute between the parties is of the ordinary kind which occurs when the head of a family and a junior member cannot agree on the proper amount of maintenance. Their Lordships asked the respondent's Counsel whether there is any authority to show that Courts have jurisdiction to disturb [116] compromises or settled arrangements of a permanent character on the ground that they were originally based on claims for maintenance. No such authority was produced, and the principle adopted by the learned Judges below has no warrant in law unless it can be shown that Loknath's interest in the villages was of the variable character which belongs to an ordinary allowance for maintenance. To attribute that character to it is, their Lordships think, to misread the history of the case.

It would indeed be difficult so to view it if we had nothing before us but the decisions of Mr. Chisholm. In December 1864 he decided what has been called an appeal, which however was not an appeal but an attempt by Loknath to set aside a compromise. Mr. Chisholm saw no reason for setting it aside, because there was no evidence, such as he hinted might be forthcoming at the settlement inquiry, showing concealment of facts by the talukhdar. In effect he postponed the dispute to the more convenient season of the settlement. In his order of October 1867, during the settlement proceedings, he lays down that Loknath can have no claim until the agreement is cancelled, and for that there is no case because he has got enough. Besides that, he dissents from the opinion of his predecessors that the talukhdari is partible. It is, indeed, very probable that Loknath got a good bargain by effecting a compromise during the prevalence of an official opinion that the estate was partible, though he himself was dissatisfied with getting only 11 villages, while the talukhdar got the bulk of the estate, which was potentially, and soon became actually, of much greater value. But anyhow the bargain was maintained against the dissatisfaction of both parties.

But whatever doubts might occur on Mr. Chisholm's judgments, they are only part of the history, and must be read with what preceded and what followed. They were preceded by a decree for half profits; an attempt to execute it; fresh disputes; a compromise which says that Loknath shall have 11 villages to possess, occupy and manage them just as he pleases, and that each is to hold possession of his own share, and which makes arrangements for the public burdens, for the debts of the estate, [117] furniture, buffaloes, apparently all matters that could be thought of. It is very difficult to suppose that such an arrangement was ever thought to be of a temporary character; and it is left in force by Mr. Chisholm. The transactions which accompany and follow the judgment of 1867 are even more emphatic and precise. For

the *wajib-ul-arz* was settled at that time, and was followed by the *sanads* of 1867 and 1868, which incorporate it and make it impossible for the *talukhdar* to show title to the villages of the *talukh* without also showing *Loknath's* interest in 11 of them.

Their Lordships are of opinion that the plaintiff is not entitled to any relief except as regards the cesses for the repayment of which he sued. The proper course will be to discharge all the decrees below except that of the Civil Judge of Bilaspur so far as it gives to the plaintiff the amount of cesses sued for. Instead thereof it should be declared that the *talukh* is vested in the plaintiff, subject to the right of the defendant to hold possession of the 11 villages on the terms specified in chapter I of the *wajib-ul-arz* of the 24th May 1867; and that, as between the plaintiff and the defendant, the plaintiff is liable for the Government *jama*, and the defendant for the local rates and cesses levied on such villages or on the *talukh* in respect of them. As the defendant has disputed payment of the cesses at least up to the Court of the Judicial Assistant, he should pay the due proportion of costs in the two first Courts. His appeal to the Judicial Commissioner must have been misconceived, seeing that the suit against him had been dismissed, and his appeal was rightly dismissed with costs. With these exceptions the respondent should pay the costs of all the proceedings in all the Courts. Their Lordships will humbly advise Her Majesty to pass a decree in accordance with the foregoing opinion. On this appeal the respondent wholly fails and he must pay the costs of it.

Appeal allowed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent: Messrs. *Watkins and Lempriere*.
C. B.

NOTES.

[See also 31 Cal., 111.]

[118] *The 21st and 22nd June, and 8th July, 1899.*

PRESENT:

LORDS WATSON, HOBHOUSE, AND DAVEY, SIR RICHARD COUCH,
AND SIR EDWARD FRY.

The Deputy Commissioner of Bara Banki.....Defendant

versus

Ram Parshad.....Plaintiff.

[On Appeal from the Court of the Judicial Commissioner of Oudh.]

Evidence Act (I of 1872), section 34—Admissibility of books of account containing entries after transactions—Corroborative evidence.

By section 34 of the Indian Evidence Act, 1872, the admissibility of books of account regularly kept in the course of business is not restricted to books in which entries have been

made from day to day, or from hour to hour, as transactions have taken place. The time of making the entries may affect the value of them but should not, if they have been made regularly in the course of business afterwards, make them irrelevant.

The course of business in keeping the accounts in the office of a talukhdari estate was that monthly accounts were submitted by karindas at the head office where they were abstracted and entered in an account book, under the date of entry, that being in some cases many days after the transaction of payment or receipt; but the entries were made in their proper order, on the authority of the officer whose duty it was to receive or pay the money. *Held*, that the entry in the account book was admissible as corroborative evidence of oral testimony to the fact of a payment, for what it was worth, objection being only to be made to its weight, not to its relevance under section 34.

The opinion expressed in the judgment in *Munchershaw Bezoni v. The New Dhurumsey Spinning and Weaving Co.* (1880) I. L. R., 4 Bom., 576, against the reception of an account book containing an entry not made at the time of the transaction, was not approved.

APPEAL from a decree (31st July 1895) of the Judicial Commissioner's Court in favour of the plaintiff, reversing a decree (6th September 1892) of the Deputy Commissioner of Lucknow, who dismissed the suit with costs.

This appeal related to the second of two suits heard together, which were brought to charge with liability the estate of the late Raja Mahpal Singh upon two mortgage bonds, one dated the 4th September 1880, securing Rs. 7,000 at 12 per cent. for one year, and the other, dated the 20th January 1881, for the like period, securing a further sum of the same amount at 15 per [119] cent. The suit on the later bond was brought on the 13th April 1887, and the other suit on the earlier one, the subject of this appeal, on the 26th August 1887.

The Raja died on the 8th October 1882, leaving a widow Rani Chubraj Kunwar, and his infant son, Raja Pirthi Pal Singh. The family estate, Surajpore, was represented by the defendant, appellant, as manager for the Court of Wards on behalf of the infant. Both suits were brought by the manager of the Kayestha Patshala, a school at Allahabad, founded by the late Munshi Kali Parshad, who died in 1886, four years after the death of the Raja, whose wakil this Munshi had been for many years.

The facts of the case are stated in the judgment of their Lordships, and the circumstances under which the two suits came to be heard together, when it was not disputed that the only question between the parties was whether the money had been paid by the Raja to Kali Parshad. On this question of payment the point arose, which was brought forward on this appeal, whether the Court, under section 34 of the Indian Evidence Act, 1872, could receive in evidence, as being relevant, books of account kept in the estate office of the Surajpur talukhdari according to the usual course of business, and containing entries made on the authority of officers whose duty it was to receive and pay money, although the entries were not made at the date of the transactions.

Section 34 enacts: "Entries made in books of account regularly kept in the course of business are relevant whenever they refer to a matter into which the Court has to inquire, but such evidence shall not alone be sufficient to charge any person with liability."

The District Judge, having admitted an account book which he considered to be relevant evidence within that section, found the payment proved, and dismissed the suit with costs. The account book in question was termed the "roshanbahi" on this record.

On the plaintiff's appeal, the Additional Judicial Commissioner gave the following opinion in which the Judicial Commissioner concurred :—

[120] "It was contended for the plaintiff that the roshanbahi was not proved to be a genuine account-book of the Surajpur estate; that the entries in it were not admissible in evidence, as it was not regularly kept in the course of business, that it was not an original account-book, and for that reason also was inadmissible in evidence.

"I think that the evidence of Nand Kumar, Sarju Parshad, a late dewan of the Surajpur estate, and Lal Bahadur, a late mohurrir of the estate, is quite sufficient to prove that the roshanbahi is a genuine account-book of the estate, more particularly as the plaintiff did not call Babu Tara Parshad, to whom it is said in the letter of Mukarram Husain to Munshi Hanuman Parshad, dated the 7th April 1887, the accounts had been shown. The objection that the roshanbahi is not regularly kept in the course of business and therefore the entries in it are not relevant, is based upon section 34, Indian Evidence Act, and the case of *Munchershaw Bezoni v. The New Dhurumsey Spinning and Weaving Co.*, (1880) I. L. R., 4 Bom., 476, it being urged that the roshanbahi was just such a book of account as was held by Mr. Justice WEST in that case to be one not regularly kept in the course of business. On the other hand it was argued, that so long as a book of account was kept regularly, the system on which it was kept was of no importance, and it could not be said that because it was the practice to enter certain transactions when they came to the knowledge of the Head Office under the date of entry, the roshanbahi was not regularly kept in the course of business, it not being possible to make the entries in any other way. Reference was made to *Reg. v. Hannanta*, (1877) I. L. R., 1 Bom., 610.

"It appears to me that the contention for the appellant must be accepted. In the case decided by Mr. Justice WEST, that learned Judge defines a book of account, regularly kept in the course of business, within the meaning of section 34, Indian Evidence Act, to be only a book of account which is entered up from day to day or hour to hour as the transactions take place. Now, it seems clear that the roshanbahi is not such a book. Entries may have been made daily in the book, but in many instances they were not made as the transactions entered took place. On the contrary, many transactions are entered which took place many days before they were entered. The relevancy of a book of account under section 34 does not depend merely on the fact that entries are made in it from day to day. The book must be regularly kept in the course of business. The case cited for the respondents is not in point. It was decided in that case that entries in a book of account, if regularly kept in the course of business, are admissible whether or not they have been made by, or at the dictation of, a person who had a personal knowledge of the truth of the facts stated. The objection taken is not that entries in the roshanbahi were not made by, or at the dictation of, a person [121] having a personal knowledge of the truth of the facts stated, but that the book was not regularly kept in the course of business, i.e., that entries were not made as the transactions took place, but subsequently. It is immaterial that certain transactions could not be entered as they took place. Some system should have been adopted under which every transaction that took place could have been entered in a book of account as it took place.

"In my opinion the entries in the roshanbahi are not relevant under section 34, Indian Evidence Act, that book of account not being regularly kept in the course of business within the meaning of that section. It was not contended that the entries relied on were admissible under any other part of the Indian Evidence Act.

"In considering therefore whether the debt claimed under the bond, dated the 20th January 1881, has been paid, the entries relied on cannot be referred to."

The Appellate Court then found the payment not to have been proved, and in the suit of the 26th August 1897 decreed the claim.

Mr. A. Cohen, Q.C., and Mr. J. H. A. Branson, for the Appellant, in that part of their argument which referred to section 34, argued that the main reliance in this case was to be placed upon the oral evidence of payment given

by Nund Kumar, an old servant of the estate, which was corroborated by a roshanbahi, or account book, proved to have been a genuine account book of the estate, containing an entry of Rs. 9,000. This sum was attributed by that witness to the bond in suit. The Appellate Court below had wrongly refused to admit this book on the ground that it was not relevant within the meaning of section 34, the entries made therein not having been made from day to day or from hour to hour, as the transactions took place, but having been made when some period had elapsed. That some delay should occur was quite consistent with the book having been kept in a due course of business, the karindas of the estate being in the habit of submitting monthly accounts which were abstracted and entered in the roshanbahi under the date of entry. Disbursements might be made at a distance from the office of the estate, at Hathaunda, where the book was kept. The judgment of the Bombay High Court, referred to by the Additional Judicial Commissioner in *Munchershaw Bezoni v. The New Dhurumsey Spinning and Weaving Co.*, (1880) I. L. R., 4 Bom., 476, was upon [122] this point erroneous. The requirement of section 34 was only to the effect that a book, to be relevant evidence, must have been kept in a due course of business, and did not insist that the entries therein should be made from day to day. The time of the making of the entry might be important in a high degree, in regard to its value as evidence, but, according to the section, did not affect its admissibility.

Mr. *H. Cowell*, and Mr. *W. Colvin*, for the Respondent, argued that the judgment of the Appellate Court below was right in excluding the roshanbahi. The entries therein had not been made at the dates of the transactions of which they purported to be memoranda, but had been made afterwards at the dictation of karindas. The reason against the admission of this book, as relevant evidence within section 34, was that it was not kept "regularly in the course of business," where regularity was essential. The roshanbahi was a mere day book, and its value consisted in its daily record of transactions, or its entries at no distant date. Again, in this instance, the amount entered was in excess of the amount due at its date, and no entry had been referred to as showing what was done with the balance. Thus the entry on which the appellant relied was not sufficiently identified with the mortgage debt of which it was sought to prove payment.

Mr. *J. H. A. Branson* replied.

Afterwards, on the 8th July, their Lordships' judgment was delivered by

Sir R. Couch.—The suit, which is the subject of this appeal, was brought on the 26th August 1887 by Munshi Hanuman Parshad, manager and superintendent of the "Kayestha Patshala," Allahabad, against Rani Chabraj Kunwar, widow of the late Raja Mahpal Singh and Raja Pirthi Pal Singh, his son, a minor, under the guardianship of his mother the Rani, on a mortgage-bond, dated 4th September 1880, for Rs. 7,000, said therein to have been borrowed from Hanuman Parshad, manager of the Patshala, out of the Patshala's funds, and to be repaid with interest to the manager for the time being of the Patshala. The sum claimed to be due for principal and interest was [123] Rs. 15,141-2-10. After the filing of the plaint the estate of the minor came under the management of the Court of Wards and the appellant was made a defendant in the suit. Previously to this suit being brought another suit between the same parties had, on the 13th April 1887, been brought on a similar bond, dated the 20th January 1881, for Rs. 7,000, in which the sum claimed for principal and interest was Rs. 13,547-14-8. On the 5th January

1889 the respondent on the death of Hanuman Parshad before the trial was made plaintiff in the suits in his place. The suits were tried together, it being agreed that evidence taken in the suit first instituted, which might be material to the other suit, should be evidence in that suit. Both were dismissed by the District Judge, his full judgment being given in the first suit.

The defence in each of the suits was that the lender of the money was not the Patshala but Munshi Kali Parshad, a deceased vakil who used to practise at Lucknow, and who managed the transactions of the Patshala at Lucknow till his death, having endowed it with considerable property, and that the money had been repaid to him by the Raja. After the examination of the plaintiff had been finished his pleader stated in answer to a question by the District Judge that if the defendants proved that the monies due on the bonds were paid by the Raja to Kali Parshad his client was willing to treat such payment as made to himself. This was the only question that had to be decided. The Raja died on the 8th October 1898 (*sic*) and Kali Parshad died on the 10th November 1886. On the 3rd April 1887 Hanuman Parshad, as manager or president of the Patshala, sent a letter to the Rani demanding that the bonds should be paid, or that some arrangement should be made for their payment, and saying that he had sent Tara Parshad, the accountant of the Patshala, in order that he might bring a reply without delay. To this letter Muharram Husain, the karpardaz of the Surajpur (the Raja's) estate replied on behalf of the Rani on the 7th April by a letter in which he said that the money due on the bonds had been paid to Kali Parshad, that the accounts in the office of the estate had been shown to Tara Parshad and that Kali Parshad was the old vakil of the estate and consequently had not been asked to return the bonds or give receipts. On the 13th April [124] 1887 the suit on the bond of 20th January 1881 was brought. It did not appear why the suit on the bond of the previous 20th September was not brought until August 1887.

The case of the defendants, as regards the payment of the bond of the 20th January 1881, is that the Raja received on the 26th April 1882 from the Bank of Bengal at Lucknow Rs. 27,010-5-3, part of a lakh of rupees borrowed from Mr. Jackson, and that out of this sum he paid Kali Parshad Rs. 16,406, which included the principal and interest due on the bond. It was not disputed that the Raja borrowed a lakh of rupees from Mr. Jackson and that he received Rs. 27,000 and odd from the Bank of Bengal at Lucknow on the 26th April 1882 as part of this loan, and that Kali Parshad deposited Rs. 17,000 in the London and Delhi Bank on the 1st May 1882. The principal witness for the defendants was Nand Kumar, a servant of the Surajpur estate, who had been in its service for 15 or 16 years. If his evidence is true this bond was paid. The defendants relied upon entries in a roshanbahi or day-book of the Surajpur estate and upon a list of the debts of the Raja made soon after his death. This list, which was produced, contained an entry of Rs. 20,000 due to "Hanuman Parshad, the manager of Kayestha Patshala," but there was no entry in it of either of the bond debts. Nand Kumar deposed that he made it out of the papers of the estate, and that Kali Parshad dictated the item of Rs. 20,000; he gave the list to Kali Parshad, and he filed it in the Tahsildar's Court; that Kali Parshad read the list in Nand Kumar's presence, and made no objection as to any debt due to the Patshala having been omitted; the Rani repaid the Rs. 20,000.

As to the entries in the roshanbahi their Lordships accept the statement as to it in the judgment of the Judicial Commissioner's Court. "This book was kept

at the office of the estate at Hathaunda, and in it the money received and disbursed on behalf of the estate was entered. Receipts or disbursements of money at any other place but Hathaunda were entered when the receipt or disbursement was brought to the knowledge of the office under the date of entry. For example, the kariundas of the estate used to submit monthly [125] accounts, which were abstracted and entered in the roshanbahi under the date of entry. Again, if the Raja visited Lucknow or any place, all money received or disbursed on his behalf by his servants was entered on his return to Hathaunda under the date of entry. That is to say, a servant of the estate might during a certain period receive or pay money for his master, and the receipts or payments for that period would be entered when the servant rendered an account perhaps many days after the date of the receipts or payments, and when entered would all appear under the date of entry." It should be added that these entries were made in their proper order on the authority of the officer whose duty it was to receive or pay the money. The District Judge says in his judgment that this book was kept in the way in which talukhdars' accounts are kept, and the Judicial Commissioner's Court says that the evidence of Nand Kumar, Sarja Parshad, a late dewan of the Surajpur estate, and Lal Bahadur, a late mohurrir of it, was quite sufficient to prove that the roshanbahi is a genuine account-book of the estate; but on the authority of a decision of the Bombay High Court in *Munchershaw Bezongji v. The New Dhurumsey Spinning and Weaving Co.*, (1880) I. L. R., 4 Bom., 576, it held that the entries were not relevant under section 34 of the "Indian Evidence Act," the book not being regularly kept in the course of business within the meaning of that section. In the case referred to the learned Judge held that the words in section 34 "books of account regularly kept in the course of business" mean books entered up from day to day or from hour to hour as transactions take place. Their Lordships are unable to approve of this decision. It gives a much too limited meaning to section 34. If it were correct, merchants' and bankers' books regularly kept would in many cases be excluded from being used as corroborative evidence. The time of making the entries may affect the value of them, but should not, if not made from day to day or from hour to hour, make them entirely irrelevant. Notwithstanding the rejection of the entries the Appeal Court held on the other evidence in the case that the defendants had established that the Raja paid Kali Parshad the [126] amount due on the bond of the 20th January 1881, agreeing with the finding of the District Judge as to this bond, and they dismissed the appeal in the suit on it. But as to the bond of the 14th September 1880 they held that the entries not being relevant the proof of payment rested entirely on the evidence of Nand Kumar and the inference to be drawn from the bond debt not being entered in the list, and this being the only admissible evidence on the point, the defendants had failed to prove that the Raja paid that bond to Kali Parshad. Their Lordships being of opinion that the entries were admissible to corroborate Nand Kumar, they think the payment of this bond to Kali Parshad was also proved, and they will humbly advise Her Majesty to affirm the decision of the District Judge, to reverse the decree of the Court of the Judicial Commissioner and to order the appeal to it in the suit on the bond of the 14th September 1880 to be dismissed with costs. The respondent will pay the costs of this appeal.

. For the Appellants : The *Solicitor, India Office.*

Solicitors for the Respondent : Messrs. *Ranken, Ford, Ford and Chester.*
C. B.

NOTES.

[See also 32 Cal., 582; 9 C. W. N., 421; 29 Cal., 334; 29 I. A., 43 P.C.; 25 Bom., 616; 3 Bom., L. R. 213.]

[27 Cal. 126]
CRIMINAL REVISION.

The 30th May, 1899.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Charoobala Dabee.....Petitioner

versus

Barendra Nath Mozumdar.....Opposite party.*

*Revision—High Court's power of Revision—Presidency Magistrate,
Proceedings of—Order for further inquiry—Criminal Procedure
Code (V of 1896), sections 423, 435, 439—Charter Act
(24 and 25 Vict., C. 104), section 15—Letters
Patent, High Court, 1865, clause 15.*

The High Court has powers of revision in respect of an order of discharge passed by a Presidency Magistrate by reason, not of section 28 of the Letters Patent, 1865 but of section 15 of the Charter Act (24 and 25 Vict., C. 104). That section has always been interpreted in a very extended [127] meaning, so as to give ample powers of superintendence, that is to say, powers of revision over proceedings of subordinate Courts. But the High Court has no power under the Code of Criminal Procedure to interfere in revision with an order of dismissal or discharge passed by a Presidency Magistrate.

Colville v. Kristo Kishore Bose, (1899) I. L. R., 26 Cal., 746, dissented from. *Opoorba Kumar Sett v. Probod Kumary Dassi*, (1893) 1 C. W. N., 49, referred to.

A Presidency Magistrate acting under section 203 of the Criminal Procedure Code dismissed a complaint on the report of the police without examining the complainant, and without finding on such examination that there was no sufficient ground for proceeding. The High Court, acting under section 15 of the Charter Act, ordered a further inquiry to be made into the matter of the complaint.

ON the 28th February 1899 a complaint was filed on behalf of the petitioner before the Presidency Magistrate, Northern Division, Calcutta, charging one Barendra Nath Mozumdar with the offences of criminal misappropriation and criminal breach of trust in respect of certain money, jewellery and documents. The Magistrate directed a police inquiry, but did not examine the complainant or her witnesses. Upon receipt of the police-report the Magistrate dismissed the case on the 7th March 1899 under section 203 of the Criminal Procedure Code. The petitioner thereupon applied on the 10th March to the same Magistrate to revive the complaint on the ground that the order of dismissal was made in her absence and without the examination of herself and her witnesses; but the Magistrate held that, having once dismissed the complaint, he had no power in law to revive it without an order of further inquiry by the High Court. The petitioner moved the High Court on the 22nd March for a further inquiry; but her application was rejected. She then made another application to the same Magistrate for a revival of the case. The Magistrate

* Criminal Revision No. 273 of 1899, made against the order passed by Syed Ameer Hossein, Presidency Magistrate, Northern Division, dated 25th March 1899.

made the following order on the 25th March: "Having once dismissed it, I can't revive this case under the ruling of the High Court, dated 16th September 1898, in the case of *Ram Kumar v. Ramji Dass* (Unreported)." A rule was then obtained against this order from the High Court on the 13th April, calling upon the Presidency Magistrate "to show cause why an order directing further inquiry should not be passed in this case;" and the following memorandum was also [128] made: "At the hearing of this rule, the case of *Ram Kumar v. Ramji Dass* (Unreported), dated 16th September 1898, referred to by the Presidency Magistrate as well as the case of *Opoorba Kumar Sett v. Probod Kumary Dassi*, (1893) 1 C. W. N., 49, will be considered. The papers, relating to the previous application made by this petitioner on the 22nd March last, will also be put up."

Babu Boidya Nath Dutt appeared on behalf of the Petitioner.

The judgment of the High Court (*Prinsep and Hill, JJ.*) was as follows:—

In this case the Presidency Magistrate discharged the accused, and a rule was granted to show cause why an order directing further inquiry should not be passed. When that rule was made, there was some uncertainty in regard to the powers of the High Court in this respect, because section 437 of the Code of Criminal Procedure, which empowers this Court to make an order for further inquiry, is not made applicable to proceedings before a Presidency Magistrate. There was also another rule to the same purport, which had been granted by the same Bench, of which I was a member, and, under the terms of that rule, it was expressly stated that it would be considered whether this Court has not under section 15 of the Charter Act powers to pass such an order. The rule in that case has been heard and dealt with by another Bench of this Court, who have held that such power is given to the High Court as a Court of Revision under section 439 read with sections 425 and 423. In cases which have come before me as a member of another Bench, I have expressed my opinion that such a power is not given to this Court as a Court of Revision in respect of an order of discharge passed by a Presidency Magistrate, and, as I do not approve of the judgment in that case, and my brother HILL shares that opinion, it is necessary that I should state the ground upon which we do not agree with it.

Section 437 expressly gives to the High Court, the Sessions Judge and the District Magistrate power to order a Magistrate to make a further inquiry, but it does not refer to the proceedings before a Presidency Magistrate. The Code of Criminal Procedure [129] throughout draws a distinction between Presidency Magistrates and other Magistrates, and expressly refers to Presidency Magistrates wherever it relates to proceedings before them. The fact that this power is expressly given in respect of proceedings before other Magistrates, while there is no provision made in respect of proceedings before Presidency Magistrates, seems to show that the Legislature did not intend to deal with orders of discharge passed by Presidency Magistrates. But it has been held that the powers expressly conferred on the High Court and other Courts by section 437 in respect of orders of discharge passed by Magistrates, not by Presidency Magistrates, can be exercised by the High Court in exercise of its powers of revision under the Code of Criminal Procedure, and sections 439, 435 and 423 of the Code have been referred to as authority for this. We do not agree in this view. Section 435 enables certain judicial officers to send for records of subordinate Courts for the purpose of satisfying themselves as to the "correctness, legality or propriety" of such proceedings. But it confers no powers in regard to the correction of errors so found. And although it may be conceded that the proceedings of a Presidency Magistrate, in which

an order of dismissal or discharge may have been passed, may be thus sent for, unless some power to act in revision be conferred, although errors may be pointed out for future guidance, nothing further could be done. Powers of revision are, however, expressly given by other sections. Section 439 confers on the High Court as a Court of Revision all the powers of an Appellate Court under section 423. But section 423 does not enable a Court of Appeal to direct that further inquiry be made into a case in which an order of discharge or dismissal may have been passed. Section 423 confers a power to direct further inquiry only in respect of a case of an appeal from an order of acquittal, and that this power is so limited is shown by an express enactment in section 437 to provide for such orders being passed.

Under such circumstances we are not disposed to agree with the view expressed by another Bench of this Court in the case of *Colville v. Kristo Kishore Bose*, (1899) I. L. R., 26 Cal., 746, in respect to the application [130] of the Code of Criminal Procedure. That was a case of a rule granted by a Bench of which I was a member, and it was expressly stated that it would be considered whether this Court could exercise the power in question under section 15 of the Charter Act. The learned Judges before whom that rule was argued have apparently misread that order, and have considered that reference was made to section 15 of the Charter, that is of the Letters Patent, whereas it expressly referred to section 15 of the Charter Act, and therefore acting under this misapprehension the Judges considered that there was some mistake in the order, and that the reference should have been properly made to section 28 of the Letters Patent. In the view which we take regarding the application of section 28 of the Letters Patent, we are not inclined to agree with the learned Judges that that section in any way applies to a case such as the present, and we are not aware that there is any authority for this. But, dealing with this rule as it has been argued before us, and as it was intended that it should be argued by the note made when the rule was granted, we think that this Court has powers of revision in respect of an order of discharge passed by a Presidency Magistrate by reason of section 15 of the Charter Act. That section has always been interpreted in a very extended meaning so as to give ample powers of superintendence, that is to say, powers of revision over proceedings of subordinate Courts, and we may refer as a case in which a similar opinion was expressed to the case of *Opoorba Kumar Sett v. Probod Kumary Dass*, (1893) 1 C. W. N., 49. We, therefore, hold that in such a case as that now before us the Court can act as a Court of Revision under section 15 of the Charter Act, and therefore, although not on the grounds stated in the rule to which reference has been made, we come to the same conclusion as was then arrived at. It is consequently unnecessary to refer this difference of opinion to a Full Bench. On the merits of this case, the rule should, in our opinion, be made absolute. The Presidency Magistrate, acting under section 203, has dismissed this complaint on the report of the police, but he has done so without examining the complainant and without finding on the examination of the [131] complainant that there is no sufficient ground for proceeding. There will, therefore, be a further inquiry made into the matter of the complaint.

S. C. B.

NOTES.

[This ruling was discussed and dissented from in (1909) 36 Cal., 994: 11 C.L.J., 50, as being opposed to the Full Bench Ruling in (1888) 15 Cal., 608, followed in (1901) 28 Cal., 211.

The Bombay High Court in (1902) 27 Bom., 84, refusing to follow this case accepted and followed the view in the other two Calcutta cases.]

[27 Cal. 131]

The 23rd August, 1899.

PRESENT:

MR. JUSTICE RAMPINI AND MR. JUSTICE PRATT.

Averam Das Mochi.....Petitioner

versus

Abdul Rahim.....Opposite Party.*

*Workman's Breach of Contract Act (XIII of 1859)—Breach of
contract by workmen—Trial—Procedure—Criminal
Procedure Code (V of 1898), section 370.*

In the trial of a case under the Workman's Breach of Contract Act (XIII of 1859) the Magistrate is not bound to frame his record in accordance with the provisions of section 370 of the Criminal Procedure Code.

It is doubtful whether a proceeding under the first clause of section 2 and under section 3 of Act XIII of 1859 is a criminal proceeding. There is no *offence* committed and there is no *accused*. The provisions of section 370 of the Criminal Procedure Code are, therefore, inapplicable to a case of this nature.

THE petitioner entered into an agreement with the opposite party for working under him as a *durzi*, but he broke the terms of the agreement and went to work under another employer. The opposite party thereupon complained against the petitioner under section 1 of the Workman's Breach of Contract Act (XIII of 1859), and the Magistrate under section 2 of the Act ordered the petitioner to return to his work, and under section 3 of the Act directed him to enter into a recognizance in the sum of Rs. 50 for the due performance of the order. The petitioner moved the High Court, and obtained a rule to show cause why the above order should not be set aside and the case retried.

Babu *Dasarathi Sanyal* for the Petitioner.

The **judgment** of the High Court (**Rampini and Pratt, JJ.**) was as follows:—

This is a rule to show cause why an order of a Presidency Magistrate passed under Act XIII of 1859 should not be set [132] aside and the case retried. The order is under section 3, directing the defendant to give a recognizance in the sum of Rs. 50 to return to his work. The petitioner is a *durzi*, who, it is said, entered into a stamped agreement to work for the opposite party. He left him to work for another employer, who gave him higher pay. The opposite party accordingly complained against him under section 1 of the Act. The Magistrate under the first clause of section 2 ordered him to return to his work, and under section 3 directed him to execute the recognizance mentioned above.

The learned pleader, who appears for the petitioner, urges (1) that the evidence has not been properly recorded; and (2) that the Magistrate has written no judgment. He, however, has not been able to show us any section of Act XIII of 1859, or of the Criminal Procedure Code, prescribing how evidence in a case of this nature should be recorded or requiring a judgment to be written. He cited two cases—*Pollard v. Mothial*, (1881) I.L.R., 4 Mad., 234, and *Queen-Empress v. Indaryit*, (1889) I. L. R., 11 All., 262,—in the former of which it is ruled that inquiries under section 2 of Act XIII of 1859 cannot be made summarily, while in the latter it is held that offences under section 2 of

* Criminal Revision No. 564 of 1899 against the order passed by Syed Ameer Hossein, Presidency Magistrate of Calcutta, Northern Division, dated the 28th June 1899.

Act XIII of 1859 *can* be tried summarily. These cases are, therefore, in direct conflict. The former of them, while laying down that such cases cannot be tried summarily, does not explain how they are to be tried, except that, it is said, they should be conducted "with care and patience." The latter is no guide to us in this rule, as it applies to Mofussil Magistrates and not to a Presidency Magistrate. We are accordingly unable to accede to the learned pleader's contention that the Magistrate was bound to frame his record in this case in accordance with the provisions of section 370 of the Criminal Procedure Code.

Sub-section (3) of section 2 of the Code of Criminal Procedure prescribes that "the provisions of this Code shall apply to all proceedings instituted after the commencement of this Code." This must mean *criminal* proceedings, otherwise the Code would be applicable to all civil proceedings, which cannot [133] be. Now, is a proceeding under the first clause of section 2 and under section 3, Act XIII of 1859, a criminal proceeding? It may be that an order passed under the second clause of section 2 of the Act by which a workman may be imprisoned for three months is a criminal proceeding, but it seems doubtful if the order in this case, which is one not under the second clause of section 2, can properly be so called.

Further, the provisions of section 370 appear inapplicable to a case of this nature, (1) because no *offence* has been committed; and (2) because there is no *accused*.

Finally, there would appear to us to be no merits in the applicant's case. The order of the Magistrate shows that the complainant and one witness were examined. They proved the execution of the agreement by the petitioner. It is not denied that he has broken this contract or that he is a workman to whom the Act is applicable. It would accordingly seem that he is liable to be called upon under section 3 to execute a recognizance, and we understand he has executed the recognizance required of him.

In these circumstances it seems to us that this is not a case in which it is necessary for us to exercise our discretionary power of revision. We discharge this rule.

S. C. B.

NOTES.

[See this case referred to in 35 Cal., 1035.]

[27 Cal. 133]
CRIMINAL REFERENCE.*The 26th July, 1899.*

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Queen-Empress

versus

Makimuddin.*

Reformatory Schools Act (VIII of 1897), sections 8, 11, 16 and 31—Rule framed by the Local Government—Youthful offender—Evidence of age—Order not properly passed—Penal Code (Act XLV of 1860), section 83.

If an order for detention in a Reformatory School in substitution for transportation or imprisonment be not properly passed, a Court is not debarred by section 16 of the Reformatory Schools Act (VIII of 1897) from altering or reversing such order.

[134] A boy of about 9 years of age was found in the grounds of the residence of the Commissioner of Patna at 3 A. M. in the morning with a brass *lota* in his hand. He was tried summarily and without any preliminary inquiry as to the age of the boy being made, was sentenced to three months' rigorous imprisonment, or in lieu thereof to be detained in a Reformatory School for seven years. *Held*, the accused did not come within the definition of "youthful offenders" as given in the Rules (*Calcutta Gazette*, Part I, p. 226, 1st March 1899), framed by the Local Government under section 8 of the Reformatory Schools Act; and the offence of the accused being his first offence the case should have been dealt with under section 31 of the Act.

It is not that a Magistrate is under no circumstances competent to find from the appearance of a person convicted by him that he is a youthful offender, but it is generally desirable that there should be some reliable evidence on the point, and especially when it is necessary to determine the period of detention.

The age of the accused being under twelve years the Magistrate should, considering the provisions of section 83 of the Penal Code, have found that the accused had attained sufficient maturity of understanding to judge of the nature and consequences of his act.

REFERENCE under section 438 of the Criminal Procedure Code by the Sessions Judge of Patna. The following were the material portions of the letters of reference:—

"In this case it appears that a boy of about 9 years of age was found in the compound of the Commissioner of Patna's residence at 3 A.M. one morning with a brass *lota*. It is said that he was offering the same for sale. He was suspected and was taken to the *thannah* where it was found that the *lota* in question belonged to one of the constables there. Then a first information was drawn up and the boy was sent up charged with theft. The case was made over to the Deputy Magistrate, Babu Ram Anugrah Narayan Sing, for trial on 3rd June. The case was tried summarily, and the accused was sentenced to three months' rigorous imprisonment or in lieu thereof to be detained in a Reformatory for 7 years. It appears to me that the Deputy Magistrate did not make any preliminary inquiry as to the age of the youthful offender as required by section 11 of the Reformatory Schools Act (VIII of 1897). It also appears to me that in other respects the order is improper, as the facts scarcely indicate that the boy is a proper subject for a Reformatory School. If the boy had real criminal tendencies he would not have acted as he had done *viz.*, take a *lota* from under the bed of a constable and then try to sell it at 3 A. M. in the Commissioner's compound. I

* Criminal Reference No. 145 of 1899, made by G. W. Place, Esq., Sessions Judge of Patna, dated the 8th of July 1899.

think that the Deputy Magistrate should have made a preliminary inquiry as to the boy's age, and that then he should have acted as directed by section 31 of the Act, *viz.*, either discharged the boy after due admonition or delivered him to his parent or his guardian on such guardian or relative [135] executing a bond to be responsible for the good behaviour of the youthful offender. I, therefore, recommend that the conviction be quashed and the sentence reversed, and that, the case be sent back to the Deputy Magistrate to be dealt with under section 31 of Act VIII of 1897."

The explanation offered by the Deputy Magistrate who tried the case was as follows:—

"I have the honour to state that on a look of the boy I was satisfied that his age was about 10 years, so I did not make any further inquiry as regards the same by calling the boy's father or any medical officer. I noted his age in the record of the summary proceedings. If the learned Sessions Judge desires I may hold a further inquiry under section 428, Criminal Procedure Code, by calling the boy's father and any medical officer. As the offence was committed at night I was of opinion that the offence was serious."

No one appeared at the hearing of the Reference.

The judgment of the High Court (Prinsep and Hill, JJ.) was as follows:—

The Magistrate in a summary trial has convicted the petitioner of theft and has sentenced him to "three months' rigorous imprisonment, in lieu to undergo seven years detention in a Reformatory."

The Sessions Judge has referred this case to this Court for revision because there has been no inquiry or evidence taken to ascertain the petitioner's age, and, therefore, no proper finding that he is a youthful offender; and he has also observed that the case should have been considered under section 31 of the Reformatory Schools Act (VIII of 1897) rather than as a fit case for an order for detention in a Reformatory School.

In explanation the Magistrate has stated "on a look of the boy I was satisfied that his age was about 10 years so I did not make any further inquiry."

Section 16 of the Act declares that no Court shall alter or reverse in appeal or revision any order passed with respect to the age of the youthful offender or the substitution of an order for detention in a Reformatory School for transportation or imprisonment.

In this case there has been no order in respect of the age of the youthful offender. He has been summarily declared to be a youthful offender.

[136] We do not desire to be understood as holding that a Magistrate is under no circumstances competent to find from the appearance of a person convicted by him that he is a youthful offender within the definition given in the Act, but we think that it is generally desirable that, when it is procurable, there should be some reliable evidence on the point, and especially when it may be necessary to determine the period of the detention which is limited to his attaining eighteen years of age.

But that is not the matter really raised in this case. The real question seems to be whether this boy should be detained at all in a Reformatory School. Now, although we are debarred by section 16 of the Act from altering or revising an order for detention in a Reformatory School in substitution for transportation or imprisonment it must be an order properly so passed. Section 8 of the Act declares that the Local Government may make rules for defining what youthful offenders should be sent to Reformatory Schools having regard to the nature of their offences or other considerations, and among the Rules so made (see *Calcutta Gazette*, March 1, 1899, Part I, p. 226) it is declared that such youthful offenders shall be those "convicted of offences against property or any other offence shewing dishonesty or depravity (1) in all cases, when

they have been previously convicted of any such offence ; and (2) on first conviction, when a brief term of imprisonment is considered an undesirable and inadequate punishment, or they are without proper parental or other control, or there is reasonable cause for supposing that they are being trained to, or are likely to relapse into, crime."

We cannot regard the offence of which the petitioner has been convicted, stealing a *lota* from the side of a sleeping man, as within these terms, or as the Magistrate describes it in the explanation a "serious" offence. It is admittedly also a first offence, and therefore it seems to come within section 31, which apparently has been overlooked by the Magistrate. We accordingly set aside the order as not an order properly made and direct the Magistrate to proceed in accordance with the rules made by the local Government.

[137] We also draw the attention of the Magistrate to section 8 of the Indian Penal Code. He should, having regard to the age of the boy being under twelve years of age, find that the accused has attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on the occasion of his taking the *lota*. The fact that he offered it for sale very soon after taking it and in the same locality is remarkable, and would seem to throw some doubt whether he understood the nature and consequences of his act.

S. C. B.

[27 Cal. 137]

The 6th September, 1899.

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE PRATT.

Queen-Empress
versus

Natu and another.*

Pardon—Criminal Procedure Code (V of 1896), section 337 and section 339—

Tender of pardon—Trial of person who, having accepted a pardon, has not fulfilled the Conditions on which it was offered—Prosecution for giving false evidence—Sanction of High Court.

When a pardon under section 337 of the Criminal Procedure Code has been tendered to and accepted by any person in connection with an offence he should not be tried for any alleged breach of the conditions of his pardon or for any offence connected with that for which he has received pardon until the trial of the principal offence has been completed.

No prosecution for the offence of giving false evidence in respect of a statement made by a person who has accepted a tender of pardon should be entertained without the sanction of the High Court, as provided by section 339, clause (3) of the Code.

REFERENCE under section 438 of the Criminal Procedure Code by the Sessions Judge of Rungpur.

The facts of the case appear from the following material portions of the letter of reference :—

"The three accused Natu, Kekar, and Sarafdi have been committed for trial by the Sub-Divisional Magistrate of Kungram. It appears that on the 6th May Sarafdi lodged an

* Criminal Reference No. 178 of 1899 made by A. F. Harward, Esq., Sessions Judge of Rungpur, dated the 25th of August 1899.

information before the Police to the effect that one Besad had been murdered by Baden Sardar and others, and that the body had been buried by them in a certain dry tank. The Police proceeded to the spot and found the body in the place indicated. The body was so far decomposed that the cause of death could not be ascertained at the *post-mortem*.

[138] "On the 19th June, while the Police inquiry was still going on, Kekar and Natu made statements before the Sub-Divisional Magistrate of which the general effect was that the deceased was killed by Sarafdi and one Tariulla, and that the body had been buried by them in the dry tank with the intention of throwing suspicion on the other party.

"On the 29th June Sarafdi, Natu, and Kekar were sent up for trial by the Police on a charge of murder. On that date, apparently before taking any other evidence, the Sub-Divisional Magistrate made a tender of pardon to Natu and Kekar. They accepted the pardon and were examined as witnesses, but made statements quite inconsistent with the statements previously made by them before the Magistrate. At the foot of each of their depositions the Magistrate recorded an order revoking the pardon. After revoking the pardon the Magistrate proceeded with the inquiry against all three accused jointly and has committed them all three for trial with a charge of murder against Sarafdi only and a charge under section 194 of the Penal Code against all three accused and charges under sections 201 and 202 of the Penal Code against Natu and Kekar.

"The orders which I recommend for revision are the orders revoking the pardons granted to Natu and Kekar and the subsequent order committing them for trial to this Court. It appears to me that these proceedings were illegal because the Magistrate had not at that stage of the case any jurisdiction to revoke the pardons. Section 337 (2) of the Criminal Procedure Code runs: 'every person accepting a tender under this section shall be examined as a witness in the case.' I think these words clearly mean at the trial of the case and not merely at an inquiry prior to commitment. I think therefore that the law requires that Natu and Kekar should be examined as witnesses at the trial of Sarafdi before the Court of Sessions.

"I would therefore recommend that the orders of the Magistrate revoking the pardons tendered to and accepted by Natu and Kekar be set aside, and that the commitment of Natu and Kekar be quashed, and that it be ordered under the provisions of section 337 (3) of the Criminal Procedure Code that Natu and Kekar be detained in custody until the termination of the trial of Sarafdi by the Court of Sessions."

No one appeared at the hearing of the Reference.

The judgment of the High Court (Rampini and Pratt, JJ.) was as follows:—

In this case the Magistrate has revoked the pardons tendered to Natu and Kekar and has committed them for trial to the Sessions along with Sarafdi, though not for murder with which Sarafdi is charged. We agree with the Sessions Judge that the Magistrate's procedure is wrong, and that it was premature to remove Natu and Kekar from the category of witnesses. It seems clear [139] from clauses (2) and (3) of section 337 of the Criminal Procedure Code that they are to be made available as witnesses at the trial of the case in the Sessions Court. Moreover, it is the intention of the law that a person to whom a tender of pardon has been made should not be tried for an alleged breach of the conditions upon which the pardon was tendered until the original case has been fully heard and determined. See *Queen-Empress v. Sudra*, (1891) I. L. R., 11 All., 336. We must also point out that in committing the accused for trial for an offence under section 194 of the Indian Penal Code the Magistrate appears to have contravened the injunction contained in clause (3), section 339 of the Criminal Procedure Code, viz., "no prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court." Under the circumstances we quash the commitment of Natu and Kekar, and direct that they be detained in custody until the termination of the trial of Sarafdi by the Court of Session. This order will

not preclude the Magistrate from hereafter proceeding against Natu and Kekar in accordance with law.

S. C. B.

NOTES.

[In (1908) 32 Mad., 173, WALLIS and PINHEY, JJ., observe as follows as regards the procedure to be adopted when an approver is put on trial after his evidence, as such, is taken :—"Under the amended section, (viz., s. 339 as amended in 1898) however, it does not appear that there is any necessity for withdrawal or that withdrawal has any effect. After the approver has given evidence the prosecution can proceed with the case against him if they choose and he can plead pardon in bar of the trial, and the only question appears to be, is making a full and true disclosure a condition precedent which the approver has to prove to establish his right to pardon, according to the view taken in *Queen-Empress v. Ganga Charan*, (1899) 11 All., 79, under the Code of 1882, or his failure to make such full and true disclosure a condition subsequent determining or forfeiting the pardon which was apparently the view taken in *Queen-Empress v. Sudra*, (1892) 14 All., 336, which was followed in *Queen-Empress v. Natu*, (1900) 27 Cal., 137, decided subsequently to 1898. * * * An approver cannot in our opinion be said to forfeit a pardon unless he has already been pardoned. If so, it is for the prosecution to prove that the pardon has been forfeited. This is the view taken in *King-Emperor v. Bala*, (1901) 25 Bom., 675, and *Emperor v. Kothia*, (1906) 30 Bom., 611, with which we agree on this point. * * * As regards the procedure to be followed we think that where a pardon has been tendered and the approver is afterwards put on trial he should be asked if he relies on it and if he says 'yes' which is a plea of pardon, the issue as to the pardon should be tried first."]

[27 Cal. 139]

APPELLATE CRIMINAL.

The 7th August, 1899.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Mankura Pasi and others

versus

Queen-Empress.*

Evidence—Evidence in Criminal case—Evidence of bad character—Belonging to a gang of persons associated for the purpose of habitually committing theft—Penal Code (Act XLV of 1860), section 401—Evidence Act (I of 1872), section 14 and section 54 as amended by Act III of 1891.

The character of the accused not being a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft punishable under section 401 of the Indian Penal Code, evidence of bad character or reputation of the accused is inadmissible for the purpose of proving the commission of that offence.

Where it was proved that certain persons were found together at some distance from their houses, that they were all intimately connected with one [140] another and were in the habit of visiting *melas* together, that one of them was arrested in the act of picking a pocket, and that when they were arrested many of them gave false names and false addresses, *Held*, they could not be convicted under section 401 of the Indian Penal Code, there being no proof that they belonged to a gang of persons associated for the purpose of habitually committing theft.

AT a *mela* in Gaya Lachman Pasi was caught by the Police in the act of picking a pocket, his companion Thakur Basi was pursued towards a house. On the house being surrounded and searched by the Police, the appellants, including Thakur Basi, were found in it. Some money and various articles were found with the appellants, but none of these things were shown to have been

* Criminal Appeals Nos. 226 and 308 of 1899, made against the order of H. Holmwood Esq., Sessions Judge of Gaya, dated the 20th of February 1899.

stolen property. It was proved that the appellants came from the same neighbourhood in Oudh and were possessed of little means of subsistence; that some of them had been convicted of theft, and that there were orders requiring some of them to furnish security for good behaviour. The appellants were all convicted by the Sessions Judge of Gaya, under section 401 of the Indian Penal Code, of belonging to a gang of persons associated for the purpose of habitually committing theft.

Four of the appellants were sentenced to seven years' rigorous imprisonment, seven others to five years' rigorous imprisonment, and the remaining six to three years' rigorous imprisonment.

Mr. *P. L. Roy* (with him *Babu Jogesh Chandra De*) for the Appellants.—To establish the offence under section 401 of the Indian Penal Code it is necessary to prove (a) the existence of a gang, (b) association, and (c) association for the purpose of habitually committing theft. The mere fact that certain persons are seen together does not establish the existence of a gang; it may be evidence of association, but mere association is not enough. For a conviction under this section it is necessary to go further and show that the association was for the purpose of habitually committing theft. Habit implies the commission of more than one offence of theft; there is no evidence of habit in this case. Then the judgment of the lower Court is vitiated by the wholesale improper admission of evidence as to character and reputation. Character cannot be said to be a fact in issue in this [141] case; see section 14 of the Evidence Act. Even if it is admitted for the sake of argument that a previous conviction is admissible it cannot be contended that evidence may be given of general reputation. *Shriram Venkatasami v. Queen*, (1871) 6 Mad. H. C., 120; *Queen v. Kamal Fukeer*, (1872) 17 W. R. Cr., 50; *Queen v. Mooktaram Sirdar*, (1875) 26 W. R. Cr., 18; *Empress v. Naba Kumar Patnaik*, (1897) 1 C. W. N., 146.

The *Officiating Deputy Legal Remembrancer* (Mr. *Abdur Rahim*) for the Crown.—There is ample evidence which, if believed, would show that the accused persons along with others formed a gang, and there is also proof of association. The only question is whether it has been proved that the prisoners associated together for the particular purpose of habitually committing theft. It is not required to show that they did actually habitually commit theft, but only that they associated with that object. The object is a matter of inference to be drawn from the circumstances of each case. The question whether evidence of character is admissible in a case under section 401 of the Penal Code is not free from difficulties. If a number of persons be found to be a gang associated together, then the character which these persons bear may be relevant to show what is the object of their association.

The judgment of the High Court (Prinsep and Hill, JJ.) was as follows:—

The appellants on these two sets of appeals have all been convicted at the same trial under section 401 of the Penal Code of belonging to a gang of persons associated for the purpose of habitually committing thefts. The evidence shows that they all came from the same neighbourhood in Oudh, and that they are in many respects associated together. The question, however, raised is whether the evidence proves the particular offence that their association was for the purpose of habitually committing thefts. The circumstances which have led to this case are remarkable.

[142] There was a big religious gathering or *mela* at Gaya early in September last, and the Police were on the look-out to protect the public against

thefts committed when crowds were assembled. Lachman Pasi was caught in the act of picking a pocket, and his companion was pursued towards a certain house. That house was surrounded by the police and searched, and in it the appellants were found, including Thakur Basi, who has been identified as the man who was pursued. While the house was surrounded a man was seen trying to escape by walking on the cornice towards the roof of the adjoining house. The cornice gave way, he fell and was killed instantaneously by the fall. He was the man who had taken in the appellants as lodgers. Some money and various articles were found with the appellants, but none of these articles have been shown to be stolen property. The conviction of the appellants really depends upon the suspicious circumstances under which they were arrested.

There is some evidence of bad character ; there are the convictions of some of them for theft, and orders requiring some of them to furnish security for good behaviour, and there is the fact that they are possessed of little means of subsistence. The reported cases of convictions of this offence are few. In *Shriram Venkatasami v. Queen*, (1871) 6 Mad. H. C., 120, it was laid down that in order to prove an offence under section 401 of the Penal Code there must be (1) proof of association, (2) proof that such association was for the purpose of habitual theft, and it was added that habit is to be proved by an aggregate of acts. In that case the report seems to show there was some evidence, which was accepted by the jury, that a number of thefts occurred at the same time, and in the same neighbourhood, where the accused were found, from which it was found that the association of the accused was for the purpose described by section 401 of the Penal Code; and it was apparently on this ground that, although the learned Judges held that the charge to the jury was defective, they refused to interfere, because it was not shown that the accused had been prejudiced by this defect. In the present case there is no such evidence. We have only the evidence of this one instance of picking a pocket for which Lachman Pasi was arrested.

[143] There are two cases, *Queen v. Kamal Fukeer*, (1872) 17 W. R. Cr., 50, and *Queen v. Mooktaram Sirdar*, (1875) 23 W. R. Cr., 18, on section 400 of the Penal Code, a cognate offence, which do not throw much light on the matter now under consideration, except that it was held that there must be evidence that the accused were members of a gang associated for the purpose of habitually committing dacoity.

We have also been referred to the case of *Empress v. Naba Kumar Patnaik*, (1897) 1 C W. N., 146, in which it was considered whether evidence of the previous convictions of some of the accused of dacoity was admissible for the purpose of proving association for that purpose and bad character. It is unnecessary to repeat the grounds upon which the learned Judges held, on consideration of section 54 of the Evidence Act, as amended by Act III of 1891, section 6, and section 14 of the Evidence Act, as well as upon the terms of section 310 of the Code of Criminal Procedure, that such evidence was inadmissible as evidence of bad character, because we concur with the judgment delivered. It is sufficient to add, in reference to the case now before us, that the character of the accused was not in issue, and that in consequence evidence of such character or reputation is not admissible. Such evidence, we observe, has, in the case before us, formed the main if not the only ground on which the appellants have been convicted, and when that evidence is examined, it will be found to consist of convictions of theft against only a few of the appellants. It would be very unsafe to rely upon the convictions, so as to connect all the appellants with the unlawful association within section 401, even if such evidence were admissible. And in addition to such evidence we find on the record some orders in which some of the appellants have been required to give

security for good behaviour. But even here it is not shown by those orders that the grounds on which they were passed were that these persons were habitually addicted to theft, so as to form a link in the evidence in this case, supposing for the sake of argument, and on such grounds only, that such orders were admissible as evidence.

The case against the appellants, therefore, rests on their being [144] found together at some distance from their houses, that they are all intimately connected with one another, that they are in the habit of visiting *melas* together, that one of them was arrested in the act of picking a pocket, and that, when they were arrested, many of these gave false names and false addresses. However suspicious the circumstances in this case may be, we think the evidence falls short of what is necessary for conviction under section 401 of the Penal Code, for, in our opinion, there is no proof that the appellant belonged to a gang of persons associated for the purpose of habitually committing theft.

The conviction and sentences are, therefore, set aside, and the appellant must be released.

D. S.

NOTES.

[In (1911) 38 Cal., 408 : 15 C. W. N., 461, it was held that evidence of previous convictions of offences against property and of bad livelihood is admissible to prove habit in gang cases under s. 401, I.P.C.]

The authority of this case was doubted as being opposed to (1897) 1 C. W. N., 146, and other unreported cases of the Calcutta High Court and was explained away by their Lordships in (1911) 38 Cal., 408, as follows :

"Clearly then the decision in *Mankura Pasi v. Queen-Empress*, (1899) 27 Cal., 139, cannot have been intended by the learned Judges to exclude such evidence in gang cases, but only in the case then before them, where they appear to have been under the impression that there was no other evidence.]

[27 Cal. 144]

CRIMINAL REFERENCE.

The 5th September, 1899.

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE PRATT.

Queen-Empress

versus

Deodhar Singh and another.*

Penal Code (Act XLV of 1860), section 218—"Charged," Meaning of, in that section—Criminal Procedure Code (Act V of 1898), section 4, cls. (f) (n)—Cognizable offence—Offence under Gambling Act—Accomplice—Witness present on the occasion of the giving of a bribe.

The District Superintendent of Police gave a warrant under the Gambling Act (Bengal Act II of 1867) to D, a Sub-Inspector, to arrest persons found gambling in a certain house. In order to save two persons from legal punishment for having committed an offence under the Gambling Act in that house D framed a first information and a special diary incorrectly. *Held*, he was properly charged with, and found guilty of having committed, an offence under section 218 of the Penal Code. The word "charged" in that section is not restricted to the narrow meaning of "enjoined by a special provision of law." An offence under the Gambling Act, being an offence for which the District Superintendent of Police may arrest or by

* Criminal Reference No 19 of 1899, made by G. W. Place, Esq., Sessions Judge of Patna, dated the 16th of June 1899.

warrant direct an arrest, is a cognizable offence within the meaning of section 4, cl. (f) of the Criminal Procedure Code. The words "a Police Officer" in that clause do not mean "any and every police officer;" it is sufficient if the Legislature by any law limits the power of arrest to any particular class of Police Officers.

[145] D and F, a Head Constable, were also charged under section 161, and section 161 read with section 114, of the Penal Code, respectively, and it was contended that these charges were not sustainable, because they rested entirely on the testimony of persons alleged to have been accomplices, who had not been corroborated in material particulars. Held, the mere presence of a person on the occasion of the giving of a bribe, and his omission to promptly inform the authorities, do not constitute him an accomplice, unless it can be shown that he somehow co-operated in the payment of the bribe, or was instrumental in the negotiations for the payment.

Queen v. Chundo Chundalinee, (1875) 24 W. R., Cr.. 55; *Queen-Empress v. Maganlal*, (1889) I. L. R., 14 Bom., 115; *Queen-Empress v. Chagan Dayaram*, (1890) I. L. R., 14 Bom., 331; *Queen-Empress v. O'Hara*, (1890) I. L. R., 17 Cal., 642; *Ishan Chandra v. Queen-Empress*, (1893) I. L. R., 21 Cal., 329; *Jogendra Nath Bhaumik v. Sangal Garo*, (1897) 2 C. W. N., 55; *Rajoni Kanto Bose v. Asan Mullick*, (1895) 2 C. W. N., 672; and *Alimuddin v. Queen-Empress*, (1895) I. L. R., 23 Cal., 361, distinguished.

REFERENCE under section 307 of the Criminal Procedure Code by the Sessions Judge of Patna. The material portions of the letter of reference are as given below:—

"In this case two Police Officers, viz., Deodhar Singh, Sub-Inspector of Khajekalan Police Station in Patna City, and Fariduddin, as Head Constable in the same station, were charged respectively with accepting an illegal gratification under section 161 of the Penal Code in three separate instances, and with abetting the same three separate instances. Deodhar Singh was also charged under two heads with an offence under section 218 of the Penal Code, viz., framing a first information and a special diary incorrectly to save two persons from legal punishment.

"These alleged offences were committed in reference to a gambling case under the Gambling Act (Bengal Act II of 1867). The Sub-Inspector was given a warrant by the District Superintendent of Police under this Act to arrest persons found gambling in a certain house. He and the Head Constable, assisted by a large force of constables, arrested a number of persons and brought them to the thannah. It is alleged to have so framed the first information report, and the special diary so as to save two of the men arrested from legal punishment, and then in releasing some of the others on bail he and the Head Constable are respectively alleged to have [146] committed offences and abetment of offences under section 161 of the Penal Code.

"The jury by a majority, viz., three to two, found Deodhar Singh guilty of offences under section 218 of the Penal Code, and I concurred in this portion of their verdict.

"But the jury also found by the same majority that the two accused were guilty of the other charges against them under section 161 and 114 respectively.

"It was contended by the Counsel for the defence that the witnesses to each of the alleged offences under section 161 or to the three instances of bribery, as it is commonly called, were accomplices, and were subject to the rule of law laid down in illustration (6) under section 114 of the Indian Evidence Act, viz., that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. He quoted *Queen-Empress v. Maganlal*, (1889) I. L. R., 14 Bom., 115, and *Rajoni Kanto Bose v. Asan Mullick*, (1895) 2 C. W. N., 672, two cases very similar to this in which the Bombay High Court, and the Calcutta High Court, respectively, acquitted the accused on the ground that the only evidence against them was that of accomplices and that it was uncorroborated.

"In the case of the first charge of bribery in which one Radhay Lall paid Rs. 200 to get one Paltu Lall released on bail, the witnesses besides these two are Babu Radha Kant Datta, a pleader, and Liakat Hossein, Writer Constable. Radhay Lall is clearly an

accomplice, so is Paltu Lall. Babu Radha Kant consented to the bribe as he never informed any competent officer of it until six days after, and then he was called by the Assistant District Superintendent of Police and the bribe was paid in his presence without remonstrance. Liakat Hossein, the Writer Constable, says he saw money before the Sub-Inspector, and he placed it at his order on the Sub-Inspector's bed. His demeanour as a witness was suspicious, and he would appear to be also an accomplice. There is besides this no independent evidence to corroborate these statements. One of the men for whom the second bribe was given, viz., Nur Khan, says in cross-examination that the Sub-Inspector Deodhar Singh showed him Rs. 200 given by Paltu Lall. But Nur Khan is an accomplice in the offence that is the subject of the next charge, and it is a rule of law that tainted evidence cannot be corroborated by other tainted evidence, *Queen v. Baijoo Chowdhury* (1875) 25 W. R. Cr., 43.

"In the case of the bribe given by Mahomed Kasim for Nur Khan these two men were examined and they are clearly accomplices. Besides them, one witness Brij Kishwar, a mukhtear, distinctly admits that he advised the payment of the bribe, and though he was cognizant of the bribery, he [147] made no effort to report it to the authorities, and he made no statement to any competent official to take the matter up until he was sent for by the Assistant District Superintendent of Police. The other witness is Mehdi Hossein. He admits that he and the others arranged to give the bribe. He also is clearly an accomplice and needs corroboration.

"In the case of the bribe given by Rafat Bahadur for the release on bail of Gopi Lall and Gobhan, Rafat Bahadur was examined, and he clearly is an accomplice. Brij Kishwar, the mukhtear, who is a witness to the second bribe, also saw this bribe being paid, and as he is an accomplice in the case of the second bribe his evidence as to this is also tainted and is unworthy of credit. Nur Khan, an accomplice witness in the case of the second bribe, states he saw this bribe paid. As his evidence in regard to the second bribe is tainted, it cannot be regarded as corroborative in this case. Bani Mirza, another mukhtear, saw this payment of Rs. 10. As he consented to payment of a bribe for Nur Khan, he is also to be considered an accomplice, and his evidence is tainted and thus his corroboration is worthless. He also suppressed all mention of the bribe until he was called by the Assistant District Superintendent of Police.

"A sort of general corroboration was attempted to be given by the Crown in examining one Badrul Hossein, an Honorary Magistrate, to whom it was stated Brij Kishwar mukhtear had written at the time complaining of the bribery practised by the Police.

"It was proved that this Honorary Magistrate did get a letter from Brij Kishwar, but it was lost, and as the Crown showed they were entitled to give secondary evidence, it appears that the letter only mentioned the '*zulum*' of the Police. It is doubtful if this would be legal corroboration, as previous statements of an accomplice to third parties at the time of the occurrence cannot be considered independent corroboration.

"In my charge to the jury I pointed out that all the witnesses were in my opinion accomplices and unworthy of credit, and that they had not been corroborated by any independent evidence. Under these circumstances I refer the case to the High Court, and think that following the law laid down in *Queen Empress v. Maganlal*, and in the case *Rajoni Kanto Bose v. Asan Mullick*, the two accused ought to be acquitted of the charges under sections 161 and ¹⁶¹/₁₁₄ of the Indian Penal Code.

Mr. P. L. Roy, Mr. K. N. Sen Gupta, Babu Mohun Chand Mitter, and Moulvi Syed Shamsul Huda, for the Accused.

The Officiating Deputy Legal Remembrancer (Mr. Abdur Rahim) for the Crown.

The judgment of the High Court (Rampini and Pratt, JJ.) was as follows:—

[148] This is a reference by the Sessions Judge of Patna under section 307 of the Code of Criminal Procedure Deodhar Singh, Sub-Inspector, and Fariduddin, Head Constable, were placed upon their trial, the former on three

charges under section 161 and two under section 218 of Indian Penal Code and the latter for abetment of the three offences under section 161.

The jury, by a majority of three to two, found the accused persons guilty on all the charges. The Sessions Judge was willing to accept the finding on the charges under section 218 against the Sub-Inspector, but was of opinion that the charges of bribery and abetment of bribery were not sustainable, because they rested entirely on the testimony of accomplices who had not been corroborated in material particulars. He, therefore, referred the whole case to this Court, being precluded by clause (2) of section 307 of the Criminal Procedure Code from recording a judgment of conviction on the charges under section 218 regarding which he was in agreement with the verdict of the majority of the jury.

The alleged offences are said to have been committed with reference to a gambling case under Bengal Act II of 1867. The accused Sub-Inspector having obtained a warrant under section 5 of that Act from the District Superintendent of Police to arrest all persons found gambling in the house of Paltu Lall, proceeded at about midnight of the 12th November to make a raid upon the premises. With the aid of the accused Head Constable and a large force of constables he arrested a great many gamblers and brought them to the thannah, and all the 25 persons whom he sent up for trial were afterwards convicted, with the exception of one man, who was treated as an approver.

In his first information report purporting to have been written at 1 A.M., the Sub-Inspector does not include Nawab Singh and Rung Lal in the list of persons arrested, and in his special diary, prepared almost simultaneously, he states that they were found at the door of Paltu's house and were not concerned in the gambling within, and so he had promptly let them go. The case for the prosecution is that these two men were arrested with the others inside the gambling house, taken [149] with them to the thannah and not released till 7 or 8 A.M. The Sub-Inspector is accordingly charged under section 218 with framing two incorrect records with intent to save Nawab Singh and Rung Lal from legal punishment.

It is further alleged that the Sub-Inspector did not release some of the other prisoners on bail until he received bribes for the purpose, and that he was aided and abetted by Fariduddin, Head Constable. Three specific instances of the receipt of illegal gratifications have been deposed to and embodied in the charges, viz: (1) Rs. 200 paid by Radha Lall for the release of Paltu; (2) Rs. 50 paid by Mahomed Kasim for the release of Nur Khan, and (3) Rs. 12 paid by Rafat Bahadur for the release of Gopi Lall and Gabhan Lall.

As regards the charges under section 218 two questions arise, one of fact and the other of law. The question of fact is whether Nawab Singh and Rung Lal were actually arrested with the other gamblers and conveyed to the thannah, and there released several hours after their arrest. The Sessions Judge agrees with three of the jurymen that they were, and we are satisfied on the evidence that such was the case. The witness Luchman Sing constable says that 29 men were arrested inside Paltu's house, and that Rung Lal was one of them. Paltu Lall says that both Nawab Singh and Rung Lal were in his house while the gambling was going on. Nadir Ali, constable, who was on sentry duty at the thannah from 2 A.M. to 6 A.M. on the 13th November, says "Deodhar Singh and Fariduddin and others brought 27 persons charged with gambling to the lock up. They were counted in my presence. I know Rung Lal Singh and Nawab Singh *alias* Bindha Singh. I know them for a long time. I saw these men with the accused. 24 were placed in the *hajat*: Rung Lal, Nawab and Nanku were not placed in *hajat*. They were

allowed to remain outside the lock-up, and then they were taken to the Sub-Inspector's room. These three men are well-to-do. They were let go. No money was paid in my presence. I heard the sound of money." Another constable named Mazhur Hossein, whom the Sub-Inspector took with him to the scene, says he was present when the [150] arrests were made, that Rung Lal was one of the persons arrested, and that he was taken to the thannah at 3 A.M.

Hari Charan, the approver in the gambling case, deposes that Nawab Singh and Rung Lal were inside Paltu's house with the other gamblers. Finally we have the testimony of Radha Kant, a pleader of the Judge's Court, who says he knows Rung Lal and saw him at the thannah when he went there at 8 A.M. Some witnesses put the release of the two men at an earlier hour, but the pleader's estimate of time is more likely to be correct. On the whole evidence we are satisfied that the Sub-Inspector released the two men many hours after they had been lawfully arrested, and that he framed incorrect records to save them from punishment, probably because they had made it worth his while to do so.

The question of law raised before us is that the offence does not come within the purview of section 218, because the Sub-Inspector was not "charged" by law or competent authority with the preparation either of a first information report or of a special diary, and that his action was voluntary and superfluous. It is conceded that if the offence for which the warrant of arrest was issued be a cognizable one, the Sub-Inspector was charged with the duty of preparing the documents which he furnished. It is contended that the offence is a non-cognizable one within the meaning of clause (1) (n) of section 4 of the Code of Criminal Procedure.

Now, under the Gambling Act, it is not every Police Officer who can arrest without a warrant. It is only the District Superintendent of Police who can arrest or by warrant direct the arrest of persons gambling in a house. The District Superintendent being a Police Officer who may, under a law for the time being in force, viz., the Gambling Act, arrest without warrant, we think that the requirements of clause (1) (f) of the above sections are satisfied, and that the offence in question is, therefore, a "cognizable offence." We cannot accept the contention that the words in that clause "a Police Officer" mean "any and every" Police Officer. It is sufficient if the Legislature has limited the power of arrest to any particular class of Police Officers. We [151] may add that we do not think the word "charged" in the section is restricted to the narrow meaning of "enjoined by a special provision of law." The District Superintendent says it was the practice to require a first information report, &c., in gambling cases just as in ordinary cognizable cases, and therefore the Sub-Inspector was not acting of his own volition but in pursuance of an order laid upon him.

Therefore, both in law and fact, we find that Deodhar Singh is guilty of the charges under section 218.

Turning next to a consideration of the charge under sections 161 and 161/114, we find that the first refers to a bribe given by Radha Lal on behalf of Paltu. The witnesses in support of it are Paltu, Radha Lal, Mir Khan, who was punished for gambling, Liakat Hossein, Writer Constable, and the pleader, Radha Kant. The Deputy Legal Remembrancer contends that the last named was not an accomplice, though it seems clear that the others were.

The next charge relates to a bribe of Rs. 50 given by Mahomed Kasim to procure the release of Nur Khan. The witnesses to this are Brij Kishwar, mukhtear, Medhi Hossein and Mahomed Kasim; while Beni Mirza gives

corroborative evidence as to the demand of money and other circumstances, though he did not actually see the payment. With reference to this matter Radha Kant says he saw Beni Mirza and Brij Kishwar at the thannah in the Sub-Inspector's room, that they came to bail out Nur Khan and were talking to the Sub-Inspector and Head Constable about releasing Nur Khan on bail, and his impression is that they were talking about money.

The third and last charge relates to Rs. 12 paid by Rafat Bahadur for the release of Gopi Lall and Gabhan Lall. Rafat is not connected with these men, but is related to Paltu. Beni Mirza and Nur Khan say they witnessed the payment. Rafat and Nur Khan are undoubtedly accomplices, but regarding these two latter cases the Deputy Legal Remembrancer thought it sufficient to contend that Beni Mirza was not an accomplice. The question for determination is, therefore, whether Radha Kant [152] and Beni Mirza are accomplices; for if they are not, we think we may safely rely upon their corroboration. Under the existing law the evidence of an accomplice is admissible, and a conviction is not illegal, because it proceeds upon the uncorroborated testimony of an accomplice. But the presumption stated in illustration (b) of section 114 of the Evidence Act that an accomplice is unworthy of credit unless he is corroborated in material particulars has become a rule of practice of almost universal application. The question arises, what is an accomplice? In Wharton's Law Lexicon he is defined as "one concerned with another or others in the commission of a crime." In Webster's Dictionary we find the definition "an associate in the commission of a crime, a participator in an offence whether as principal or an accessory." Mr. Lloyd for the accused contends that the term "accomplice" has a wider signification, and that both Radha Kant and Beni Mirza were accomplices, because they were present when one or more of the bribes was paid, and yet did not inform the authorities for several days. He cited the following cases in the course of his argument: *Queen v. Chundo Chundalinee*, (1875) 24 W. R. Cr., 55; *Queen-Empress v. Maganlal*, (1889) I. L. R., 14 Bom., 115; *Queen-Empress v. Chagan Dayaram*, (1890) I. L. R., 14 Bom., 331; *Queen-Empress v. O'Hara*, (1890) I. L. R., 17 Cal., 642; *Ishan Chundra v. Queen-Empress*, (1893) I. L. R., 21 Cal. 328; *Jogendro Nath Bhaumik v. Sangat Garo*, (1897) 2 C. W. N., 55; *Rajoni Kanto Bose v. Asan Mullick*, (1895) 2 C. W. N., 672; and *Alimuddin v. Queen-Empress*, (1895) I. L. R., 23 Cal., 361.

In *Queen v. Chundo Chundalinee*, (1875) 24 W. R. Cr., 55, persons who were regarded as accomplices were described as "more or less participators in the crime," which was one of murder by poison. One of them was an inmate of the house where the man was poisoned in her presence, the other supplied the poison, and both of them, though aware of the crime, took no means to prevent or disclose it, although bound by section 44 of the Code of Criminal Procedure [153] to give prompt information to the nearest Magistrate or Police Officer.

In *Queen-Empress v. Maganlal*, (1889) I. L. R., 14 Bom., 115, and *Queen-Empress v. Chagan Dayaram*, (1890) I. L. R., 14 Bom., 331, the persons described as accomplices were persons who had either subscribed to the bribe or collected subscriptions or paid the money to the accused. That would bring them within the definition we have previously indicated. In *Queen-Empress v. O'Hara*, (1890) I. L. R., 17 Cal., 642, known as the O'Hara case, PETHERAM, C.J., in delivering the judgment of the Full Bench, observed: "We think that these facts are such as would form sufficient grounds for putting Goldsborough on his trial upon a charge of abetting the murder, and this, notwithstanding the remonstrance which, according to his evidence, he offered to O'Hara just

before the shot was fired. From this point of view, and having regard to the fact that he had received a pardon under section 337, and gave his evidence under that section, Goldsborough was, we think, an accomplice within the meaning of the rule under the law existing in India."

In the case of *Ishan Chandra v. Queen-Empress*, (1893) I. L. R., 21 Cal., 328, the informer Gooroo Pershad revealed a plot, which had for its object the substitution of a forged document for a genuine one in a Collectorate record, and his evidence was that he had joined the conspiracy at the outset, not with criminal intent, but in order to frustrate the plot and bring the criminal to justice. In referring to this the Judges said: "We are not prepared to say that he was an accomplice. He may have been one, but it would be impossible to say in this case that he helped in the commission of the offence. He was undoubtedly cognizant of it, and omitted to disclose it for six days. From any point of view we do not think that his testimony is such as to justify a conviction, except where he is corroborated." From this we may gather that in the opinion of the Court the mere fact that Gooroo Pershad was cognizant of the offence, and omitted to disclose it for six days, was not sufficient to constitute him an accomplice when it did not appear that he helped in the commission of the offence.

[154] In the case of *Jogendro Nath Bhaumik v. Sangat Garo*, (1897) 2 C. W. N., 55, it appears that after the amount of the bribes had been settled with the Head Constable, the persons went home for the money, and next day they took the two witnesses with them to the thannah and made the payments. There the witnesses seem to have aided and abetted the bribe-givers: they accompanied them for the express purpose of paying the bribes, and so were treated as no better than accomplices. In the case of *Rajoni Kanto Bose v. Asan Mullick*, (1895) 2 C. W. N., 672, it was held that persons who went to see and assist in the payment of bribes were accomplices. In the case of *Alimuddin v. Queen-Empress*, (1895) I. L. R., 23 Cal., 36, it was held that where witnesses appeared to have taken an active part in carrying away a person after he had been grievously assaulted and was in a helpless condition, and then leaving him in a field where he was subsequently found dead, their evidence was no better than that of accomplices; at any rate, they took such a part in the transaction as to make it most unsafe for the Court to rely upon their evidence, unless corroborated in material respects.

Now, in the present case, no obligation was imposed by law upon Radha Kant or Beni Mirza to inform the authorities about the taking of bribes. And unless it can be shown that they somehow co-operated in the payment of bribes, or were instrumental in the negotiations for their payment, we think that none of the cases which have been cited is an authority for the proposition that they were accomplices, inasmuch as they witnessed the payment and did not promptly inform the authorities. As regards the pleader witness it is in evidence that, so far from countenancing the payment of a bribe, some angry words passed between him and the Sub-Inspector on the subject. He himself says: "I thought it would be foolishness for me to remonstrate, as I saw they were determined to take. I felt that great oppression was practised by the Police Officers. I told Paltu he could get off on presenting a petition; so far as I remember, I said it was not advisable to give any bribe." Referring to his delay in informing the authorities he said: "After Paltu was [155] released on bail I wanted to inform the Magistrate or the District Superintendent of Police, or the Assistant District Superintendent of Police. I did not do it on that day as there was no hurry. On the following Friday, i.e., four or five days after, I informed the Assistant District Superintendent of Police and

he recorded my statement." He also said, " I took advice what I should do. I went of my own accord to the Assistant District Superintendent of Police, I was advised by elders not to mix in this matter, unless I was asked. . . . I considered there would be no stop put to such *zulum* as I saw at the thannah unless I spoke."

We find nothing blameworthy in Radha Kant's conduct, and we think it was only natural that he should hesitate and take advice before venturing to launch a complaint of bribery against the Police. Beni Mirza is a mukhtear who went to get Nur Khan released on bail, a perfectly legitimate action. The Sub-Inspector told him that Rs. 200 had been settled, and that if he paid that sum Nur Khan would be released. Next Brij Kishwar came and promised Rs. 50. As a matter of fact Beni Mirza did not stop to see the bribe paid, and there is nothing to show that he joined in the negotiations regarding it. He says he told the darogah it was illegal. He actually saw Rafat Bahadur pay Rs. 12 for the release of other men, but that was a matter in which the witness in no way concerned himself. He made his statement to the Assistant Superintendent five days after the occurrence.

We must hold that Beni Mirza was not an accomplice. It is abundantly proved that the Head Constable, whose presence is not denied, was an active agent in obtaining the bribes. All the charges under sections 161 and 161-114 are satisfactorily proved. It will, however, be only necessary to pass sentence regarding one of them.

We find Deodhar Singh guilty of the charges under sections 218 and 161 of the Indian Penal Code, and direct that he be sentenced to six months' rigorous imprisonment on one charge under section 218, and to a further term of six months' rigorous imprisonment on one of the charges under section 161, or to an aggregate of one year's rigorous imprisonment. We pass no sentence on the remaining charges.

[166] We find Fariduddin guilty of the charges under section 161 read with section 114* of the Indian Penal Code, and direct that he undergo six months' rigorous imprisonment.

S. C. B.

NOTES.

[The ruling in this case as regards the corroborative value of the evidence of witnesses to the payment of bribes, was followed in (1906) 33 Cal., 649.

See also (1911) 21 M.L.J., 283 generally on the sufficiency of the evidence of accomplices.]

* [Sec. 114:— Whenever any person, who, if absent, would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.]
Abettor present when offence is committed.

The 16th, 20th and 21st June, and 22nd July, 1899.

PRESENT:

LORDS WATSON, HOBHOUSE, AND DAVEY, SIR RICHARD
COUCH, AND SIR EDWARD FRY.

Beni Pershad Koeri.....Plaintiff

versus

Dudhnath Roy and others.....Defendants.

[On appeal from the High Court at Fort William in Bengal.]

*Grant— Construction of grant—Grant by Zemindar of estate for maintenance—
Pottah "dawami" made to a lessee by the grantee in excess
of his estate to what extent effectual, from circumstances.*

A grant of a village for maintenance was made by a zemindar to his nephew, operating only for life. The grantee survived the grantor, and by ikrarnama acknowledged the succeeding zemindar to be entitled to the village. The grantee had, however, already executed a pottah, described therein as permanent, to a lessee. The latter obtained possession, and from him after the death of the original grantee for life the zemindars who succeeded the grantor accepted rent at the rate stipulated in the pottah, and did not disturb his possession. This suit after the death of the lessee claimed the village as part of the inherited zamindari, the defence being that the lease was perpetual.

Held, (1) that the original grant not having extended to more than the life of the grantee, the pottah was void as against the successor in title of the grantor, and not merely voidable after the grantee's death. The acceptance of rent at the rate in the pottah could not have the effect of confirming it in its entirety, which, according to the construction of the High Court, would have been for a permanent estate. The duration of the pottah could not exceed that of the original grant; nor could an admission, taken by the High Court to have been that the acceptance of rent had confirmed the permanency of the lease, preclude the claim for legal rights, even supposing that admission to have been made. The matter in contest was as to the circumstances under which the lessee was allowed to remain in possession, and their legal effect. And, on the evidence, the lessee had been allowed to remain as a mokurrari tenant for his life.

(2) The suit for possession was not barred under article 91 * of the Limitation Act (XV of 1877) on the ground that a decree declaratory of title [187] to have the pottah cancelled might have been sued for in the lessee's life-time under section 39 of the Specific Relief Act, 1877.

(3) The possession of a tenant for life is not rendered adverse within the meaning of Act XV of 1877 by a notice from the tenant that he claims to be holding on a perpetual or hereditary tenure.

APPEAL from a decree (12th July 1897) of the High Court, reversing a decree (31st December 1894) of the Subordinate Judge of Shahabad.

* [Art. 91:—

Description of suit.	Period of limitation.	Time from which period begins to run.
To cancel or set aside an instrument not otherwise provided for.	Three years	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.]

The appellant was the widow and executrix of the late Sir RADHA PERSHAD SINGH, K. C. I. E., Maharajah of Dumraon, who commenced proceedings on the 7th April 1893. The only respondent who appeared was Dudhnath Roy, the representative of a purchaser claiming upon the estate of the late Ram Golam Raut; other defendants in the suit having been relations of the latter.

The present suit was for the recovery of the proprietary possession of village Dumra, part of the family zemindari granted by the plaintiff's ancestor, Jai Perakash Singh, on the 13th November 1836 to his nephew Barmeswar Baksh Singh for maintenance. The late Maharajah was the third in succession from the grantor, having succeeded to the zemindari in 1871.

In 1849 Dumra was conveyed by Barmeswar to Ram Golam Raut by an instrument purporting to be a dawami istemrari pottah or permanent lease. Barmeswar also in 1857 executed an ikarnama to Maheshwar Pershad Singh, the zemindar of that day, acknowledging his title to the village.

The main question on this appeal was, to what interest in the village was Ram Golam entitled when he died in 1893, the respondent claiming title under him against the estate of the late Maharajah. The terms used in the pottah of 1849 were "pottah dawami."

The Subordinate Judge, Bahu Bhugwan Chunder Chatterjee, was of opinion that, as the conveyance of the 13th November 1836 was only a maintenance grant, the village was not granted for a perpetual, but only for a life estate, and that the property therein belonged to the inheritance of the zemindar at the time being on the death of Barmeswar. The Judge cited, as to the construction of grants for maintenance, *Anund Lal Singh Deo* [158] v. *Dheeraj Gurrood Narayan Deo*, (1850) 5 Moore's I. A., 82, *Salur Zamindar v. Pedda Pakir Raju*, (1881) I. L. R., 4 Mad., 371, *Woodoy Aditto Deb v. Makoond Naram Aditto Deb*, (1874) 22 W. R., 225, and *Uddoy Adittya Deb v. Jadubal Adittya Deb*, (1879) I. L. R., 5 Cal., 113. As to the words relied on by the defendants as denoting perpetuity, he cited *Tulshi Pershad Singh v. Ram Narain Singh*, (1885) I. L. R., 12 Cal., 117 : L. R., 12 I. A., 205, and other cases therein referred to.

He held that the village might have been resumed by the zemindar on the death of the tenant for life, but that Ram Golam was permitted to remain in possession. It was only on the death of the latter that limitation began to run. His decision was, therefore, in favour of the plaintiff.

The defendant, Dudhnath Roy, alone appealed to the High Court. The plaintiff with her co-executor filed cross-objections. A Division Bench (TREVELYAN and STEVENS, JJ.) in giving their judgment stated that the Counsel for the plaintiff "admitted that his client accepted rent from Ram Golam, and that the terms of the lease under which Ram Golam took were binding on his client." Upon this admission they considered that the question for their determination was as to the construction to be placed on the pottah of the 25th February 1849. On this they held that the description of the pottah contained in it, as a "dawami pottah," was conclusive as to its construction and effect; the meaning of the word "dawami" being perpetual. The Subordinate Judge's decree was therefore reversed.

On this appeal,—

Mr. J. D. Mayne and Mr. J. H. A. Branson, for the appellant, submitted that the High Court was wrong in holding that the pottah of 1849 could operate to confer, or was intended to confer, upon Ram Golam any interest greater than that which Barmeswar Buksh possessed under the maintenance grant of 1836. That interest was for the life of the latter only, and upon no

contention could the permission of the successive zemindars be said to have prolonged the estate of Ram Golam beyond his [159] life. It was error in the judgment of the High Court that they held that the acceptance of rent by the zemindars after the death of Barmeswar from Ram Golam had the effect of confirming the pottah of 1849 as a permanent and heritable tenure which would remain in force after the death of the lessor. It was a fact, no doubt, that rent had been accepted by the zemindars after the restoration of the village by the ikrarnama of 1855, and the subsequent death of Barmeswar. But the effect caused by that acceptance was a question of law in this case which had not been correctly answered below by reference to an admission of Counsel, even supposing it to have been made with the intent and understanding as stated by the High Court. At all events it was not relevant. If it was made, it went far beyond what the law would infer under the circumstances of the case from the acceptance of rent from a tenant. That acceptance did not involve that the terms of the lease were adopted, and had become binding upon the zemindar. It simply proved acceptance of Ram Golam as a tenant; but for what period, if any period were fixed, whether at will, or from year to year, or for life, or in perpetuity, was left dependent on the interest of Barmeswar, and on the facts. There was no evidence that could be found sufficient to show that the Maharajah had assented to Ram Golam's holding the village permanently, or that the pottah had been understood to convey a tenure in perpetuity; though, as between Barmeswar and Ram Golam, the former made as permanent a lease as he could. As to the true construction and effect of such a pottah were cited *Anund Lal Singh Deo v. Dheeraj Gurrood Narayan Deo*, (1850) 5 Moore's I. A., 82; *Tulshi Pershad Singh v. Ram Narain Singh*, (1885) I. L. R., 12 Cal., 117; I. R., 12 I. A., 205; and *Modhu Sudan Singh v. Rook*, (1897) I. L. R., 25 Cal., 1; I. R., 24 I. A., 164. As to the effect of the statements of Counsel in regard to the legal rights of a suitor *Mathews v. Munster*, (1887) L. R., 20 Q. B. D., 141, and *The Tasmania*, (1890) L. R., 15 App. Cal., 223, were referred to.

Mr. C. W. Arathoon, for the respondent Dudhnath Roy, argued that the lease to Ram Golam of 1849 created a permanent and heritable right in him. The words of the pottah [160] were clear and distinct, being uncontrolled by any other expressions in the document. If the title of Barmeswar were held insufficient to support the interest created by the pottah, it remained that the instrument purported to create it, and that after the death of Barmeswar the Maharajahs had in succession accepted Ram Golam as a tenant holding under the terms of the pottah by their having received the precise amount of rent specified therein. That Ram Golam held as tenant in perpetuity was supported by the evidence on the record, and the admission made for the plaintiff was to the same effect. Reference was made to *Ram Chunder Singh v. Madho Kumari*, (1885) I. L. R., 12 Cal., 484; I. R., 12 I. A., 188; *Maidin Saibu v. Nagapa*, (1882) I. L. R., 7 Bom., 96; and *Petamber Baboo v. Nilmony Singh Deo*, (1878) I. L. R., 3 Cal., 793.

In regard to the question of limitation, the suit had been at first one claiming a declaratory decree. It was only on the death of Ram Golam, who was a defendant in that suit, that it was amended so as to become a suit for proprietary possession. Such a suit fell within the bar of Act XV of 1877, article 91. A suit of the character of which this suit originally was might have been brought under section 39 of the Specific Relief Act, 1877, at any time after the death of the grantor of the pottah. Again, it was the fact that Ram Golam had constantly asserted his permanent title under the pottah, having set up that title in litigation in such a way as to constitute notice to the

Maharajah of a claim to hold adverse possession against him. The litigation referred to was carried on in 1879 more than twelve years before the Maharajah instituted this suit and there was nothing during that period to prevent him from suing to make good the title on which his representatives now claimed. That Ram Golam was a tenant in perpetuity was consistent with the fact of the Maharajah's permission, and with the probabilities of the case.

Counsel for the appellant were not called on to reply.

The **judgment** of their Lordships was afterwards, on the 22nd July 1899, delivered by

Lord Davey.—This is an appeal from a judgment of the High Court of Calcutta reversing the previous decree of the [161] Subordinate Judge of Zillah Shahabad. The suit was instituted on the 7th April 1893 by the late Maharajah of Dumraon for the purpose of asserting his title to mouzah Dumra. As originally framed, the plaint sought only a declaration of the rights of the Maharajah after the death of one Ram Golam Raut who was the first defendant in the suit. On the death of Ram Golam in August 1893, the plaint was amended and a prayer for possession was added. The Maharajah died pending the suit, and his representatives were substituted in his place as plaintiffs. The Subordinate Judge made a decree in their favour, but the High Court reversed that decree and dismissed the suit with costs. The only appellant in the High Court was Dudhnath Roy, the representative of a purchaser from Ram Golam, and he is the only respondent who appears in this appeal. The question in this appeal turns in the first instance on the construction of a deed, dated the 13th November 1836, by which a former Maharajah, Jai Perakash, granted the village in question with others to his nephew Lal Barmeswar Baksh. In the view which their Lordships take of the case, the construction of the other instrument referred to, being a pottah dated the 25th February 1849 by Barmeswar in favour of Ram Golam, is unimportant. It was contended on behalf of the surviving plaintiff and present appellant that the first deed created only an interest for life in Barmeswar. In consequence of an admission said to have been made by Counsel, the learned Judges in the High Court did not find it necessary to express any opinion on the construction of the first deed, or, as they dismissed the suit on other grounds, on the defence of limitation, and indeed they decided the case entirely on the construction of the pottah. Their Lordships, for reasons which will presently appear, cannot agree with this mode of dealing with the case.

Their Lordships will not discuss at length the terms of the grant to Barmeswar which was expressly made "in lieu of maintenance." It was therefore *prima facie* resumable on the death of the grantor in accordance with the law laid down in the cases cited by the Subordinate Judge. It contains no words purporting to grant a perpetual interest, and as Barmeswar died childless, it is unnecessary to say whether his family would have taken the benefit of it if not resumed. On the 27th January [162] 1857, Barmeswar executed an *ikrarnama*, by which he declared that as large arrears of Government revenue payable by him under the terms of the grant had fallen due to the then Maharajah Maheswar, and as after his death the property according to the custom would revert to the estate of the Raj, and as a money allowance sufficient for his maintenance had been granted, he surrendered all the mehals which had been given to the declarant in lieu of maintenance to Maheswar, who was then the Maharajah in possession of the Raj. Barmeswar died shortly afterwards without issue.

The pottah, however, in favour of Ram Golam is dated the 25th February 1849, and therefore several years before this surrender. It is described as a "permanent pottah in favour of Ram Golam Raut." It states that "mouzah

Dumra, pergunnah Danwar, tuppa Bisi, has been granted under permanent lease at a fixed annual rental of Co.'s Rs. 200, from the beginning of 1256 F., together with malwajhat, sair wajhat and all habubat by Lal Saheb, the proprietor thereof," and after divers provisions for due cultivation and management, such as are usually inserted in instruments of this character, it concludes in the following words: "For this reason these few words are put down in writing by way of pottah dawami that they may be of use when required."

Barmeswar could not of course transfer to Ram Golam a larger interest in the mouzah than he himself had. Ram Golam's tenure therefore came to an end at latest on Barmeswar's death, but he was left in possession by the Maharajah Maheswar, paying the same rent of Rs. 200 as fixed by the pottah. The Maharajah Maheswar abdicated in 1868, and died in 1871. He was succeeded by his son, the late Maharajah Sir Pershad Singh. On his accession, Sir Pershad Singh might have resumed the mouzah or have made a fresh grant either on the terms of the pottah or otherwise, or have allowed Ram Golam to remain in possession paying a rent. But as the pottah was void as against him, and not voidable only, the mere receipt of rent by him, though of the same amount as that fixed by the pottah, would not have the effect of confirming the pottah in its entirety. The High Court seem to have understood Counsel to have admitted [163] that receipt of rent by the Maharajah operated as a confirmation of the pottah, and the only question therefore which remained was the construction of the pottah. In the opinion of their Lordships this admission, if correctly understood, was erroneous in point of law, and does not preclude the Counsel for the appellant on this appeal from claiming his client's legal rights. What happened was that Ram Golam was allowed to remain in possession at his former rent. The Maharajah indeed subsequently contended that the rent should be Rs. 201, but that probably proceeded from a mistake made by his officers, and in the opinion of their Lordships nothing turns upon it. If matters rested there, their Lordships think there could be no doubt that whatever was the interest which the pottah purported to grant Ram Golam was in fact a mere tenant-at-will of the Maharajah and could not set up the pottah against him, except for the purpose of showing the amount of his rent. The parties, however, are in conflict as to the circumstances under which Ram Golam was allowed to remain in possession, and as to the legal effect of certain subsequent proceedings upon which the respondent founds his plea of limitation.

Four witnesses, whose credit was not directly impeached, deposed to oral applications by Ram Golam to the officers, first, of Maharajah Maheswar, and subsequently of the late Maharajah, that he might be allowed to hold the ticca granted to him by Barmeswar for his lifetime, and that the successive Maharajahs consented to do so, but no writing was passed. In the year 1879 Ram Golam commenced a suit against a tenant of the mouzah for arrears of rent, and in his claim he alleged that he held Dumra in perpetual istemrari mokurrari. Thereupon the Maharajah presented a petition of objection, in which he stated that the plaintiff had no mokurrari istemrari pottah, but, on the contrary, the mouzah was held by him under a grant to him subject to the condition of service terminable at the pleasure of the proprietor for his maintenance without any title, and the fixed rent was taken as a matter of grace and as customary. He (Ram Golam) was described by the word "malguzar" and the petitioner prayed to be made a defendant. The Maharajah was ordered to be made a defendant as prayed, but there is no evidence of any further proceedings in that suit. On the 29th May 1885 the Maharajah [164] commenced a suit

against Ram Golam for recovery of arrears of rent. In his plaint he alleged that mouzah Dumra had been for a very long time continuously held on lease by the defendant for service on an annual rental besides road and public work cesses. In the course of the suit the plaintiff's pleader stated that the ticcā was by verbal contract held from Barmeswar by the defendant, and subsequently after consulting his client that it appeared that a terminable lease was granted (not stating by whom) to the defendant on the condition that this lease would continue as long as the defendant remained in the service; when he ceased to be servant the lease would cease to exist, and there was no special time. The defendant (Ram Golam) in his written statement denied that he ever took any ticcā from the then plaintiff, and alleged that Barmeswar, under a registered perpetual mokurrari isteinnari pottah, made a permanent settlement with the defendant in respect of the said mouzah on an annual rental of Rs. 200, and that he was in possession by virtue of the same perpetual pottah. The Subordinate Judge held (quite correctly) that it was not necessary to decide in that case whether the defendant was the mokurraridar or ticcadar of the mouzah, and that question was left open. But he decided that the defendant held at the rent of Rs. 200 fixed by the pottah and passed a decree for the plaintiff on that basis. In his plaint in the present suit, the Maharajah alleged that on the death of Barmeswar all his maintenance properties reverted to the Raj, and that, as Ram Golam was a very faithful servant of Barmeswar, the Jai Nushin did not think fit to resume the property, and he allowed the mokurrari to remain in the possession of Ram Golam during his lifetime.

The Subordinate Judge has held that the evidence of the four witnesses mentioned above is unreliable, i.e., (as their Lordships understand him) taken by itself. For he found that from the evidence, the circumstances and conduct of the parties, Ram Golam was allowed to enjoy the village as a mokurrari tenant for his life and not as a tenant-at-will. Their Lordships agree in this finding. Both in his petition to be allowed to intervene in the suit of 1879, and in his own suit in 1885, the Maharajah alleged that Ram Golam was holding under some form of verbal grant or lease and license, though his pleader in 1880 stated the tenure to be held at his pleasure, and in 1885 that there was no special term. On [166] the other hand it is obvious, from the proceedings in the previous suits, that the Maharajah was dissatisfied with Ram Golam as a tenant, and it is inexplicable why he should not have sued for recovery of possession of the mouzah as he might have done on any construction of the pottah of 1849, instead of suing only for arrears of rent, unless it was known that Ram Golam had been allowed to hold the mouzah for his life. If this be so, no suit could have been brought for recovery of possession until Ram Golam's death.

Their Lordships will now consider the plea of limitation. It is put by the respondents' Counsel in two ways: First, it is said that the Maharajah Maheswar, and afterwards Sir Pershad Singh, might, on the appellant's own showing, have sued for a declaration of his right to possession on Ram Golam's death under section 39 of the Specific Relief Act at any time after Barmeswar's death, and that this suit as originally framed was in fact one of that character, and further that such a suit was barred by article 91 of the Schedule to the Limitation Act. It is sufficient answer to this argument to say that, though such an action might have been brought, the Maharajah was not bound to bring it, and there was no necessity for him to do so. According to their Lordships' view the pottah (whatever its construction) had become a spent instrument, and had no longer any vitality as a grant of the property. As has been already pointed out, this suit was tried, not on the original plaint, but on the amended

plaint which asks for possession. Secondly, it was argued that the plaint in the action of 1879 was notice to the Maharajah that Ram Golam asserted a perpetual istemrari mokurrari title to the mouzah, and from the time when the Maharajah admitted notice of that assertion of right by filing his petition of objection, Ram Golam's possession became adverse, and time began to run against any suit for recovery of possession. Their Lordships are not prepared to acquiesce in this reasoning as applicable to the circumstances of this case. All that the plaint of 1879 gave the Maharajah notice of was that Ram Golam claimed to be holding on an istemrari mokurrari tenure, and not under any title derived from the Maharajah himself. But, as pointed out by the Subordinate Judge, an istemrari mokurrari tenure is not necessarily a perpetual hereditary tenure, and the [166] plaint of 1879 was not therefore a notice to the Maharajah that he claimed to hold as a tenure of that character.

Their Lordships, however, think that the argument fails on a broader ground. They have already expressed their opinion that Ram Golam was at that time entitled to hold the mouzah for his life, and that no suit for possession could then have been brought against him. And they do not think that a mere notice by a person holding for his life that he claimed to be holding on a perpetual or hereditary tenure would make his possession adverse within the meaning of the Limitation Act, so as to bar a suit for possession on the expiration of the life tenancy. Even if, therefore, the plaint of 1879 did convey the notice which the respondent attributes to it, their Lordships do not think it would support the defence of limitation. Their Lordships, taking this view, are not called upon to decide what interest the pottah, according to its true construction, purported to confer. The learned Judges in the High Court differing from the Subordinate Judge have held that it purported to give the grantee a perpetual hereditary interest, and they base their decision on the use of the word "dawami." Whether the use of this word necessarily imports a perpetual hereditary interest, or whether, notwithstanding the use of the word "dawami," it may be held that upon the considerations of the object and provisions of the pottah, as well as the surrounding circumstances, the intention to grant a perpetual lease does not sufficiently appear, is a question of some difficulty and remains unaffected if it ever arises again by any decision of the Board.

Their Lordships will, therefore, humbly advise Her Majesty that the decree of the High Court be reversed, and instead thereof the appeal to that Court should be dismissed with costs. The respondent, Dudhnath Roy, will pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. *Burton, Yeates & Hart.*

Solicitors for the Respondent: Messrs. *Dallimore & Son.*

C. B.

NOTES.

I. A maintenance grant is *prima facie* one for life only:—(1901) 1 C.L.J., 517; (1905) 2 C.L.J., 20; (1902) 6 C.W.N., 796.

II. A tenant, during the tenancy, cannot prescribe for a higher title than that under which he obtained possession:—(1902) 25 Mad., 507; (1900) 24 Mad., 246; (1903) P.R., 56; (1904) 31 O.C., 187; (1904) 7 O.C., 372; (1905) 9 C.W.N., 292; (1907) 12 C.W.N., 68; (1906) 4 C.L.J., 399; (1912) 39 Cal., 439; (1910) 37 Mad., 1.

III. An *istemrari mokurrari* tenure is not necessarily a perpetual hereditary tenure:—(1902) 30 Cal., 20.

IV. A party is not bound by an erroneous admission by Counsel on a point of law:—(1904) 31 Cal., 426; (1906) 11 C.W.N., 340; (1907) 7 C.L.J., 152.

V. A void document is incapable of being confirmed or ratified:—(1908) 12 C.W.N., 1086; 8 C.L.J., 261.]

[167] APPELLATE CIVIL.

The 18th July, 1899.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE STEVENS.

Ram Autar Singh and another.....Defendants
versus
Sanoman Singh and another.....Plaintiffs.*

*Jurisdiction of Civil Court—Bengal Tenancy Act (VIII of 1885),
sections 107 and 108—Landlord and tenant—Record of
rights—Decision of a Revenue Officer.*

An order made by a Revenue Officer under section 107 of the Bengal Tenancy Act, determining the rent payable for a holding, has the force of a decree; and when not set aside by appeal or otherwise, cannot be questioned in a Civil Court.

THE plaintiffs, Sanoman Singh and another, brought a suit for rent against Ram Autar Singh and others, claiming rents for three holdings lying within their *putti*, at the following rates: (1) for a *mourasi* holding, at the rate of Rs. 30-13-6 per annum up to 1302 F. S., and at the rate of Rs. 29-1-0 for 1303 F. S.; (2) for a holding purchased from one Lakhia, at the rate of Rs. 19-0-6 per annum; (3) and for a holding purchased from one Gunga Ram at the rate of Rs. 3-15-0 per annum. The defendants pleaded that the *jama* in each case was less than what was claimed by the plaintiffs, and also pleaded payment.

During the preparation of a record of rights under the Bengal Tenancy Act, there was a dispute as to the amount of rent payable in respect of the said *mourasi* holding, and the Revenue Officer decided that the annual rent was Rs. 29-1-0, apparently with effect from the year 1303 F. S. The decision was affirmed on appeal.

The first Court found that, as regards the *mourasi* holding, the decision of the Revenue Officer was final; that the *jama* of the second holding was as claimed by the plaintiffs, but that the *jama* of the third holding was as admitted by the defendants; but holding that the plea of payment was established, that Court dismissed the suit.

On appeal, the Subordinate Judge agreed with the lower Court [168] as to the rent of the *mourasi* holding, as well as of the second holding above mentioned. He further held that the *jama* of the third holding was as claimed by the plaintiffs, and, disbelieving the plea of payment, decreed the suit.

The defendants Nos. 1 and 2 appealed to the High Court.

Babu Akshya Kumar Banerjee for the Appellants.

Babu Umakali Mukerjee, and Satish Chandra Ghose, for the Respondents.

The judgment of the High Court (Ghose and Stevens, JJ.) was as follows:—

The learned Vakil for the appellant has very fairly stated his case; but it appears to us that there is really no ground for our interference with the judgment of the Court below.

* Appeal from Appellate Decree No. 2320 of 1897, against the decree of Babu Brij Mohun Prasad, Subordinate Judge of Tirhoot, dated the 29th of June 1897, reversing the decree of Babu Tarak Nath Dutt, Munsif of Hajipur, dated the 24th of December 1896.

The only question of law that arises in this appeal is as regards the binding effect of the order of the Revenue Officer made under section 107 of the Bengal Tenancy Act in respect of the rent of what is described in the proceedings in this case as the *mourasi jote*. The Revenue Officer, under the provisions of that section, determined that the *jama* payable for the said *jote* was Rs. 29-1 anna. This determination, according to section 107, has the force and effect of a decree of a Civil Court in a suit between the parties. That section, as also section 108 of the Act, lay down how a decision of a Revenue Officer may be questioned or set aside; and when the decision of the Revenue Officer with which we are concerned was not set aside, by appeal or otherwise, it must be taken that his determination as to the *jama* payable for the *jote* in question is final. This is the view that was accepted by a Divisional Bench of this Court in the case of *Joypal Dhobi v. Palukdhari Das*, (1898) 2 C. W. N., 491. (See also *Gokhul Sahu v. Jodu Nundun Roy*, I. L. R., 17 Cal., 721—Rep.), a view with which we concur.

As regards the rent of the other *jamas*, we think that the Appellate Court has come to a right conclusion, and so also as regards the plea of payment raised by the defendants.

Upon these grounds we think this appeal fails, and we dismiss it with costs.

M. N. R.

Appeal dismissed.

NOTES.

[See also (1902) 30 Cal., 339.]

[169] *The 24th July, 1899.*

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE PRATT.

Amarendra Nath Chatterjee and another, minors, by their mother and guardian Dakshabala Debi.....Defendants

versus

Kashi Nath Chatterjee.....Plaintiff.*

Will—Acknowledgment of signature by testator—Attestation—

Witness—Indian Succession Act (X of 1865), section 50.

The signature of a testator at the commencement of his will, when the witnesses attest it, and his admission to the attesting witnesses that the paper which they attest is his last will, constitute sufficient acknowledgment of his signature to his will, even though the witnesses do not see him sign it, or observe any signature to the paper which they attest.

* Appeal from Original Decree No. 250 of 1898, against the decree of J. Windsor, Esq. District Judge of Burdwan, dated the 6th of May 1898.

The registration of his will by a testator and his signature to the certificate of admission of execution, testified by the signatures of the Sub-Registrar, and of a witness is sufficient attestation to satisfy the requirements of section 50* of Act X of 1865.

Manickbai v. Hormasji Bomanji, (1897) I. L. R., 1 Bom., 547; *Hurro Sundari Dabia v. Chunder Kant Bhattacharjee*, (1880) I. L. R., 6 Cal., 17; and *Nitye Gopal Sircar v. Nagendra Nath Mitter Mozumdar*, (1885) I. L. R., 11 Cal., 429, referred to and followed.

THIS was an application made by Kashi Nath Chatterjee to obtain probate of the will of his father Jadab Chandra Chatterjee, who died in April 1894. The will was written by the testator and his signature appeared at the commencement of the will on the right hand corner. It was in evidence that the testator told the witnesses before they attested it that the paper which they attest is his will, but that he did not sign it in their presence nor did they see his signature when attesting it. The will was registered by the testator, and on the back of the will was the signature of the testator to the certificate of admission of execution testified by the signature of the Sub-Registrar and of one of the attesting witnesses. The grant of probate was opposed mainly on the ground of undue execution.

The Court of First Instance held that, although the signature of the testator on the right hand corner of the will was not there when [170] the witnesses attested it, yet it was duly executed, because the will was written by the testator himself, the signature at the beginning of the will was in the testator's handwriting, the testator told the witnesses that it was his will, and also because the testator registered the will and signed his name on the back before the Sub-Registrar, and in the presence of another witness.

From this decision the caveators appealed to the High Court.

Babu Karuna Sindhu Mukerjee, and Babu Lal Mohan Ganguli, for the Appellants.—The case of *Manickbai v. Hormasji Bomanji*, (1897) I. L. R., 1 Bom., 547, does not apply, because in that case the Court was satisfied that the signature was there before attestation though the witnesses did not see it, whilst here the lower Court has found that the signature of the testator was not there before attestation. Hence there was an undue execution.

Babu Nalini Ranjan Chatterjee for the respondent contended that the lower Court was not right in finding that the signature was not there before attestation as there was no evidence to that effect; and further the registration of the will by the testator, and his signature testified by the signature of the Sub-Registrar and of the witness was sufficient to satisfy section 50 of Act X of 1865. See *Hurro Sundari Dabia v. Chunder Kant Bhattacharjee*, (1880) I. L. R., 6 Cal., 17, and *Nitye Gopal Sircar v. Nagendra Nath Mitter Mozumdar*, (1885) I. L. R., 11 Cal., 429.

* [Sec. 50:—Every testator, not being a soldier employed in an expedition, or engaged Execution of unprivi- in actual warfare, or a mariner at sea, must execute his will leged wills. according to the following rules:—

First.—The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

Second.—The signature or mark of the testator or the signature of the person signing for him shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

Third.—The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.]

The judgment of the High Court (Rampini and Pratt, JJ.) was as follows :—

This is an appeal against the decree of the District Judge of Burdwan, dated the 6th of May 1898, granting letters of administration, with a copy of the will annexed, to the petitioner.

The case relates to the will of one Jadab Chandra Chatterjee who died in April 1894, and he is said to have executed the will on the 22nd of November 1883. The will, now in dispute, is therefore about fifteen years old. It is admitted that the will was written by Jadab Chandra Chatterjee; but, for the defendants, it is urged that it is not a valid will under section 50 of the Indian Succession Act.

The District Judge has found that the will was duly executed [171] by the testator. He finds further that the signature on the right hand corner of the will was not there when the witness signed; but that it was duly executed for two reasons,—*first*, that the will was written by the testator himself; that the signature at the beginning of the will is in the testator's handwriting, and it is in evidence that Jadab told the witnesses that this was his will; and, *second*, that the testator registered the will and signed his name on the back before the Sub-Registrar and in the presence of another witness.

Now, the learned pleader for the appellants, who are the minor grandsons of the testator, contends that neither of these signatures is sufficient to comply with the provisions of section 50 of the Indian Succession Act.

We think, however, that there has been a sufficient compliance with the provisions of the Act, and that we should confirm the finding of the lower Court. It is perfectly clear that the testator wrote this will, and that his signature was at the commencement when the witnesses signed, and he admitted to several of the witnesses that this was his last will and testament. And we hold on the authority of the case of *Manickbar v. Hormasji Bomanji*, (1877) I. L. R., 1 Bom., 547, that this is a sufficient acknowledgment of the testator's signature, and that, therefore, the will is duly signed. We also think that the registration of the will before the Registrar is a sufficient acknowledgment of the testator's signature. It will be seen that on the back of the will there is the signature of the testator to the certificate of admission of execution, and this is attested by the signatures of the Sub-Registrar and of Nilmadhub Mukerjee. No doubt Nilmadhub says that he did not see Jadab sign the will; but we think that there can be no doubt that the testator must have admitted execution of the will before the Sub-Registrar, and that Nilmadhub signed when he did as admitting that the testator had admitted the execution of the will before him.

We think then that there has been a sufficient acknowledgment of the will. In this view we are supported by the decisions in *Hurro Sundari Dabia v. Chunder Kant Bhattacharjee*, (1880) I. L. R., 6 Cal., 17, and [172] *Nitye Gopal Sircar v. Nagendra Nath Mitter Mozumdar*, (1885) I. L. R., 11 Cal., 429, and an unreported case, Appeal from Original Decree, No. 230 of 1892, decided on the 17th May 1892, by GHOSE and GORDON, JJ.

For all these reasons we think that the will in this case has been sufficiently proved, and we dismiss the appeal with costs.

M. R. M.

Appeal dismissed.

NOTES.

[See also (1912) 15 Bom. L. R., 209.]

[27 Cal. 173]

CRIMINAL REVISION.

The 29th August, 1899.

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE PRATT.

Satis Chandra Das Bose.....Petitioner
versus
 Queen-Empress.....Opposite Party.*

Sessions Judge, Power of—Criminal Procedure Code (V of 1898), section 423, clause (b)—Power of Appellate Court to order a retrial.

A conviction and sentence under section 211 of the Penal Code, by a Magistrate[†] having jurisdiction to try the case, was on appeal set aside, and a new trial under the same section was directed by the Sessions Judge. It was contended that the power to order a new trial under section 423, clause (b), of the Criminal Procedure Code could only be exercised when the conviction and sentence was set aside for want of jurisdiction in the trying Magistrate.

Held, that there is nothing in section 423, clause (b) of the Code to limit the power of an Appellate Court to order a retrial.

Queen-Empress v. Maula Bakshi, (1893) I. L. R., 15 All., 205, and *Queen-Empress v. Jabanulla*, (1896) I. L. R., 23 Cal., 975, followed. *Queen-Empress v. Sukha*, (1885) I. L. R., 8 All., 14, disapproved of.

THE petitioner was convicted by the Deputy Magistrate of Burdwan of an offence under section 211 of the Penal Code. On appeal, the Sessions Judge set aside the conviction, because he was of opinion that much necessary evidence had not been adduced and much documentary evidence not exhibited, and that a full and complete enquiry into the real facts was advisable, and [173] ordered that the case should be tried *de novo* under the same section. The petitioner obtained a rule to show cause why the said order should not be set aside on the ground that the Sessions Judge had not exercised his discretion properly in remanding the case after the prosecution had had full opportunity of proving the case.

Mr. P. L. Roy, and Babu Huro Prosad Chatterjee, for the Petitioner.

Mr. M. Hossein, and Babu Nogendra Nath Mitter, for the Crown.

The judgment of the High Court (Rampini and Pratt, JJ.) was as follows :—

This is a rule calling on the District Magistrate to show cause why the order of the Sessions Judge, directing a retrial in this case, should not be set aside.

The facts of the case are that the petitioner was convicted by the Magistrate of an offence under section 211 of the Penal Code and discharged of offences under section 468 and 471. He appealed to the Sessions Judge, who set aside the conviction and sentence under section 211 of the Penal Code, but directed that the case under section 211 of the Penal Code should be retried.

* Criminal Revision No. 542 of 1899, made against the order passed by W. H. Vincent, Esq., Sessions Judge of Burdwan, dated the 19th of June 1899.

It is now urged that the Sessions Judge had no power to pass such an order, and that the power to order a new trial conferred on him by section 423 (1) (b) can only be exercised when the conviction and sentence is set aside for want of jurisdiction in the Magistrate who has tried the case. In support of this contention, the remarks of BRODHURST, J., in *Queen-Empress v. Sukha*, (1885) I. L. R., 8 All., 14, have been cited. These remarks are, however, *obiter dicta*, and as regards the point decided in the case, viz., as to the power of an Appellate Court to order the committal of cases to the Court of Sessions, the decision has been dissented from in the cases of *Queen-Empress v. Maula Baksh*, (1893) I. L. R., 15 All., 205, *Queen-Empress v. Abdul Rahaman*, (1891) I.L.R., 16 Bom., 580, and *Misri Lal v. Bajpie*, (1895) I. L. R., 23 Cal., 350.

[174] On a consideration of the terms of section 423 (1) (b) (1), we think there is nothing to limit the power of an Appellate Court to order a retrial. This seems to us to be expressly laid down in the case of *Queen-Empress v. Maula Baksh*, (1893) I. L. R., 15 All., 205, where it is said : "We find nothing in section 423 of Act X of 1882 to limit the power of the Sessions Judge to do any of the acts which he, as an Appellate Court, is empowered to do by sub-clause 1 of clause (b) of section 420." Again, in *Queen-Empress v. Jabanulla*, (1896) I. L. R., 23 Cal., 975, it is said : "Section 423, clause (b), has no such restriction imposed upon it. There is under that clause only one restriction to the power of the Appellate Court on an appeal from a conviction, and that is that it cannot enhance the sentence." We may add that the ground taken in this rule by the learned Counsel for the appellant was not taken in the written petition to this Court. The question raised in the petition is as to the discretion of the Judge in remanding the case after the prosecution had had full opportunity of proving their case.

We are accordingly of opinion that there is no legal defect in the order passed by the Sessions Judge in this case, and we discharge the rule.

S. C. B.

NOTES.

[This was followed in (1913) 41 Cal., 350; (1912) 40 Cal., 163; (1910) 34 Mad., 545; (1911) 35 Mad., 243; (1911) 34 All., 115; (1902) 7 C.W.N., 301.]

[27 Cal. 175]

The 3rd October, 1899.

PRESENT:

MR. JUSTICE SALE AND MR. JUSTICE STANLEY.

Ishan Chandra Kalla and another.....Petitioners

versus

Dina Nath Badhak.....Opposite-Party.*

Criminal Procedure Code (V of 1898), section 522—Restoration of possession of property— Use of criminal force— Penal Code (Act XLV of 1860), section 350.

In order to support an order under section 522 of the Criminal Procedure Code (V of 1898) there must be a finding that the dispossession was by the use of criminal force as defined in section 350 of the Penal Code.

Ram Chandra Boral v. Jityandria, (1897) I. L. R., 25 Cal., 434, approved of.

[175] ON the 8th of June 1899 the opposite party lodged a complaint against the petitioners in the Court of the Sub-divisional Magistrate of Uluberia, charging them with having committed trespass. The Magistrate convicted the petitioners under section 448 of the Penal Code and sentenced them to pay a fine of Rs. 10 each, and also passed an order, under section 522 of the Criminal Procedure Code, restoring possession of the disputed property to the opposite party, but there was no finding that the dispossession complained of was attended by criminal force.

Mr. *M. Hug* for the Petitioner.

Babu *Boidya Nath Dutt* for the Opposite Party.

The **judgment** of the High Court (**Sale and Stanley, JJ.**) was as follows :—

We think that this rule must be made absolute, and our reason for so thinking is that there is no sufficient finding that the dispossession complained of was attended by criminal force such as is contemplated by section 522, Code of Criminal Procedure. According to the ruling in *Ram Chandra Boral v. Jityandria*, (1897) I. L. R., 25 Cal., 434, in order to support an order under section 522 of the Code of Criminal Procedure, there must be a finding that the dispossession was by the use of criminal force as defined in section 350 of the Indian Penal Code. There has been no such finding here, and the result is that the order made under section 522 of the Code of Criminal Procedure must be set aside and the rule made absolute.

S. C. B.

NOTES.

[See also 5 C.W.N., 250 ; 25 All., 341 ; 26 Mad., 49 ; (1914) 23 I.C., 483 (Punjab).]

* Criminal Revision No. 633 of 1899, made against the order passed by Babu M. C. Ghose, Deputy Magistrate of Uluberia, dated the 10th of July 1899.

[27 Cal. 176]

The 17th July, 1899.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Rakhal Raja.....Petitioners

versus

Khirode Pershad Dutt.....Opposite-Party.*

*Sentence—Enhancement of Sentence—Criminal Procedure Code (V of 1898),
s. 423—Alteration of sentence on appeal—Effect of alteration.*

A sentence of three months' imprisonment was on appeal altered by the Sessions Judge to one month's imprisonment with a fine of Rs. 20, or in default of payment to 15 days' rigorous imprisonment. This alteration of [176] sentence was held not to amount to an enhancement of the sentence such as was contrary to the terms of section 423 of the Criminal Procedure Code.

No general rule can be laid down to determine what is or is not an enhancement of sentence when only a portion of a sentence is altered to a punishment of a lesser degree of severity. In each case the Court has to consider what is the effect of the alteration.

Queen-Empress v. Chagan Jagannath, (1898) I. L. R., 23 Bom., 439, dissented from.

THE petitioners were convicted under section 147 of the Penal Code and sentenced to three months' rigorous imprisonment. On appeal, this sentence was altered by the Sessions Judge to one month's rigorous imprisonment and a fine of Rs. 20, and in default of payment to further like imprisonment for 15 days. The petitioners moved the High Court, and a rule was granted for the purpose of considering whether this alteration of sentence amounted to an enhancement such as was contrary to the terms of section 423 of the Criminal Procedure Code.

Mr. P. L. Roy, and Babu Dasarathi Sanyal, for the Petitioners.

Mr. S. P. Sinha, and Babu Sirish Chunder Chowdry, for the Opposite-Party.

The judgment of the High Court (Prinsep and Hill, JJ.) was as follows:—

In this case the Magistrate sentenced the petitioners to three months' imprisonment. On appeal, this sentence was altered by the Sessions Judge to one month's imprisonment with a fine of Rs. 20, or in default of payment to 15 days' rigorous imprisonment.

A rule was granted by us to consider whether this alteration of sentence amounted to an enhancement of the sentence such as was contrary to the terms of section 423, Code of Criminal Procedure. Our attention has been drawn to the case of *Queen-Empress v. Chagan Jagannath*, (1898) I. L. R., 23 Bom., 439, as well as to a case in the Allahabad High Court, *Queen-Empress v. Isnri*, (1894) I. L. R., 17 All., 67, referred to in that judgment. We find it impossible to lay down any general rule to determine what is or is not an enhancement of sentence, when only a portion of a sentence is altered [177] to a punishment of a lesser degree of severity as in the case before us. Mr. Roy, who appears in support of the rule, contends that an Appellate Court is not competent, under section 423, to pass a sentence such as is now under consideration; that is to say, an Appellate Court cannot modify a substantive sentence of imprisonment by directing that, for a portion of that term of

* Criminal Revision No. 446 of 1899, made against the order passed by B. L. Gupta, Esq., Sessions Judge of Hooghly, dated the 3rd of June 1899.

imprisonment, a sentence of fine shall be substituted. He contends that to "reduce a sentence," as provided for by section 423, clause (b), is to lessen the particular punishment in the sentence, and that to "alter the nature of the sentence" is to pass sentence of a lesser degree of punishment—that is, to alter the sentence as a whole; that an Appellate Court can convert a sentence of imprisonment into one of fine, but that no power is given to alter the nature of the sentence in part so as to leave the nature of the unaltered part unchanged.

We cannot accept this interpretation of the meaning of an alteration of sentence. As we read section 423, clause (b) (3), there is nothing to prevent an Appellate Court from altering a portion of a sentence under appeal so long as it does not thereby enhance the same. Such an alteration would as a matter of fact be both a reduction and alteration of the original sentence, and it would not necessarily be an enhancement. What does or does not amount to an enhancement depends, in our opinion, on the terms of the alteration. We are not prepared to accept the principle on which the learned Judge of the Bombay High Court proceeded, for it may be that the fine imposed in substitution for a portion of a sentence of imprisonment may be so heavy as to make the altered sentence really an enhancement of the original sentence. It is also undesirable, in determining such a matter, that the alternative term of imprisonment imposed on default should be taken into consideration. That is not the real sentence, but a sentence that, under certain circumstances, may be made the sentence. Moreover the law (section 70, Penal Code) does not release a person who has undergone such an alternative sentence of imprisonment from liability to pay the fine. It is sufficient for us in this case to hold that such an alteration of sentence is not necessarily an enhancement. In each case it would be for [178] the Court of Revision, which is called upon to determine whether there has been an enhancement of sentence, to consider what is the effect of the alteration. In the present instance, we think that the substitution of a sentence of fine of 20 rupees for two months' rigorous imprisonment cannot be regarded as an enhancement of sentence. The Sessions Judge certainly did not regard his order as an enhancement of the sentence, and we have no doubt that the petitioners themselves would not consent to receive the original sentence in substitution of that which has been passed. The rule is therefore discharged.

S. C. B.

NOTES.

["Where the aggregate period of imprisonment which the accused may have to undergo is to any extent less than the period of the original sentence, the fact that a fine is imposed by the Appellate Court would not in law be an enhancement of the sentence on a case where such an alteration of the sentence has the effect of rendering it in the circumstances of the case excessive or inappropriate, the interference in revision of a superior Court may be called for :—30 Mad., 103 F.B., see also 23 All., 497.]

[27 Cal. 178]

APPELLATE CIVIL.

The 1st March, 1899.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE HILL.

Pramada Sundari Debi.....Representative of Plaintiff

versus

Kanai Lal Shaha.....Defendant.*

Land Registration Act (Bengal Act VII of 1876), section 78—Suit for rent—

Legal representative of registered proprietor—Landlord and tenant.

A suit for rent was instituted by the registered proprietor of an estate, who died during the pendency of the suit. His widow, the present plaintiff, was then substituted on the record in his place, but her name was not registered under the provisions of the Land Registration Act before the disposal of the suit in the first Court.

Held, that as the present plaintiff was claiming rent due to the deceased plaintiff in a representative character, section 78 of the Land Registration Act did not bar her claim, and she was entitled to a decree.

Belchambers v. Hussan Ali Mirza, (1898) 2 C.W.N., 493, followed.

BADYA NATH BISHI brought a suit for rent on account of a *putni taluk* against the defendant Kanai Lal Shaha, claiming cesses and damages, and alleging the annual rent to amount to Rs. 82-15-3 pies. The suit was instituted on the 9th April 1896. [179] Badya Nath, whose name was registered as proprietor of the estate, died during the pendency of the suit, and his widow and heiress, Pramada Sundari Debi, was substituted in his place, under an order of the Court dated the 9th July 1896.

The defendant, in a written statement, dated the 21st August 1896, objected to the suit proceeding, on the ground that the name of Pramada Sundari Debi was not registered in the Collectorate. He also alleged that the annual rent was Rs. 72-11-3 pies only, and that he was liable to pay only three-fourths thereof, and objected to the claims for cesses and damages as excessive.

The Munsif dismissed the suit on the ground that, although the present plaintiff was rightly substituted in the place of the original plaintiff, and the suit was rightly allowed to proceed, it must fail for want of registration of her name in the Collectorate before decree. Upon the other issues, however, he held, that should the plaintiff succeed in the Appellate Court on the question of registration, she would be entitled to a decree for three-fourths of the rent, &c., at the rate admitted by the defendant and damages at half the rate claimed.

On appeal, the District Judge upheld the decree of the Munsif, and dismissed the appeal.

The plaintiff appealed to the High Court.

Babu *Pramatha Nath Sen* for the Appellant.

Babu *Kishori Lal Sarkar* for the Respondent.

* Appeal from Appellate Decree No. 1596 of 1897, against the decree of A. E. Staley, Esq., District Judge of Rajshahi, dated the 21st of May 1897, affirming the decree of Babu Upendra Chandra Ghose, Munsif of Natore, dated the 15th of December 1896.

The judgment of the High Court (Macpherson and Hill, JJ.) was as follows:—

We think both the lower Courts are wrong in holding that the provisions of section 78 of Bengal Act, VII of 1876 place any obstacle in the present plaintiff's way.

The suit was instituted by the plaintiff as proprietor of an estate to recover the *putni* rent which was due to him as proprietor. He died during the pendency of the suit, and his widow was substituted in his place. According to the plaintiff the substitution was as widow and heiress; according to the District Judge's judgment, it was as executrix under her husband's will.

We do not think it makes much difference in what capacity she was substituted. Both the Courts have held that the substi-[180]tuted plaintiff's name not being registered under the provisions of Act VII, to which we have referred, the present suit cannot proceed at her instance.

In our opinion it cannot be said that the substituted plaintiff is claiming rent which is due to her as proprietor of the estate. She is claiming money which was payable by defendant to the person who was the proprietor up to the time of his death, and she is claiming it in a representative character. Section 78 of Bengal Act VII of 1876 was not intended to and does not cover a claim of this description.

This point was raised and decided in the case of *Belchambers v. Hussan Alli Mirza*, (1898) 2 C. W. N., 493. I certainly see no reason to change the opinion that I then formed of the operation of that section.

We set aside the decree of the Lower Appellate Court, and the parties agree that there should be a decree according to the terms set out in the Munsif's judgment. The decree will be drawn up accordingly, and the appellant will be entitled to costs in all the Courts.

M. N. R.

Appeal decreed.

[27 Cal. 180]

The 29th August, 1899.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE GHOSE.

Kamala Kant Sen.....Plaintiff

versus

Abul Barkat *alias* Habibulla and others.....Defendants.*

Limitation Act (XV of 1877), Schedule II, article 132—Sale for arrears of Revenue—Lien of Mortgagee on balance of Sale-proceeds—Limitation Act, Schedule II, articles 62, 97, 120—Transfer of Property Act (IV of 1882), section 73—Mortgage suit—Charge on proceeds of revenue sale—Revenue-paying estate—Act XI of 1859, section 53.

When a mortgaged property, being a revenue-paying estate, is sold free from all incumbrances for arrears of revenue, the lien of the mortgagee is transferred from the property itself to the balance of the sale-proceeds which remains after satisfying the Government demand.

The time within which a suit can be brought to recover money charged on a mortgaged estate is not, therefore, shortened by reason of the estate [181] having been sold, for arrears of Government revenue; in such a case, a suit brought by the mortgagee for satisfaction of the mortgage-debt out of the surplus sale proceeds will be governed by article 132 † of the Limitation Act.

Even if the original cause of action of the mortgagee to enforce a charge on the mortgaged property be considered to cease when the property was sold for arrears of revenue, and if it be considered that a new cause of action then accrued to him, so as to entitle him to bring a suit for the recovery of the surplus sale proceeds, article 120 ‡ of the Limitation Act would apply to such a suit.

* Appeal from Appellate Decree No. 1707 of 1897, against the decree of G. Gordon, Esq., District Judge of Chittagong, dated the 31st of May 1897, reversing the decree of Mr. P. N. Banerjee, Subordinate Judge of that District, dated the 29th of September 1896.

† [Art. 132 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
To enforce payment of money charged upon immoveable property. <i>Explanation.</i> —The allowance and fees respectively called <i>malikana</i> and <i>haqq</i> s shall, for the purpose of this clause, be deemed to be money charged upon immoveable property.	Twelve years ...	When the money sued for becomes due.]

‡ [Art. 120 :—

Suit for which no period of limitation is provided elsewhere in this schedule.	Six years ...	When the right to sue accrues.]
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**Ram Din v. Kalka Prasad*, (1884) I. L. R., 7 All., 502; L. R., 12 I. A., 12, and *Miller v. Runga Nath Moulick*, (1885) I. L. R., 12 Cal., 389, distinguished.

THE plaintiff, Kamala Kant Sen, who instituted the present suit on the 5th August 1895, alleged that the defendant No. 1, Abul Barkat *alias* Habibulla, borrowed from him the sum of Rs. 200, under a registered *kat-kobala*, dated the 29th of Cheit 1246 M. S., corresponding to the 10th April 1885, agreeing to pay Rs. 120 as profits per annum, and on default interest thereon, and to repay the debt within one year. It was further alleged that the mortgaged property was transferred to Raisunnessa, the defendant No. 2, and to two other persons, the defendants Nos. 3 and 4; that, at last, when it was in the proprietary possession of the defendant No. 2, it was sold by auction for arrears of revenue on the 5th March 1891, and fetched the sum of Rs. 5,150; and that of the said sale proceeds there was a surplus of Rs. 4,353-2-6 pies, which the defendant No. 2 withdrew through the defendant No. 4. The plaintiff prayed that as the mortgaged property had been converted into cash, a decree might be passed directing the defendants to pay the mortgage-debt, and on failure thereof, directing the same to be "paid out of the consideration of the property covered by the *kat*."

The defendant No. 2 contested the suit; she alleged that she knew nothing about the mortgage; that the share of the defendant No. 1 in the *mehal* mortgaged was sold in execution of a decree and purchased by her in August 1885; that Ahsanulla, a co-sharer, having defaulted to pay the Government revenue due by him, the entire *mehal* was put up to sale in 1886 and was purchased by one Hamedulla, who transferred the same to her; [182] that she was the owner of the entire *mehal* sold, according to her, free from all incumbrances, and that the defendant No. 1 and the plaintiff had no right to the said surplus sale proceeds. She further contended that the suit was barred by limitation.

The Subordinate Judge held that the suit was not barred by limitation, as article 132 of the Limitation Act applied to the case. He also decided the other issues affecting the merits of the case, and gave a decree in a modified form against the defendant No. 2.

On appeal, the District Judge held, "in consideration of the general principles of limitation and with special reference to" articles 97 and 62 of the Limitation Act, that the suit was barred by limitation.

The plaintiff appealed to the High Court.

Babu Jatra Mohan Sen, and Babu Dharendra Lal Kastagir, for the Appellant.

Moulvie Mahomed Yusoof, Moulvie Serajul Islam, and Babu Dwarka Nath Chakravarti, for the Respondents.

The judgment of the High Court (Macpherson and Ghose, JJ.) was as follows:—

The facts of this case appear to be these: In April 1885 the first defendant borrowed a sum of money from the plaintiff, which was to be paid within a year, and as security for the re-payment of it he mortgaged by way of conditional sale his share in a revenue-paying estate. The first defendant's interest in that estate was then sold in execution of a money decree which was obtained against him and was purchased by the second defendant. In 1886 the estate was sold for arrears of Government revenue and was purchased by the third defendant, who again sold it to the second defendant. It does not much matter whether the third defendant was or was not, as the first Court found, a *benamdar* for the second defendant. The second defendant was one of the defaulting owners who obtained the property either by purchase at the revenue

sale or by purchase from the purchaser at that sale, and as such under section 53 of Act XI of 1859 he obtained the property subject to all existing incumbrances. In March 1891 the entire estate was again sold for arrears of Government [183] revenue and was purchased by a third party. The second defendant took out the surplus sale proceeds, amounting, it is said, to Rs. 4,353, and on the 5th August 1895 the plaintiff brought this suit to recover from the defendants the amount due on his mortgage, praying, it may be somewhat vaguely that the Court would direct it to be paid out of the consideration money of the property, meaning apparently the surplus sale proceeds appropriated by the second defendant. The second defendant who alone contested the suit raised a plea of limitation. This was overruled by the Subordinate Judge, but was accepted by the District Judge, who without going into any of the other questions raised dismissed the suit as barred by limitation, holding that either article 97 or article 62 of the Limitation Act applied.

In our opinion the decision of the Subordinate Judge is right and that of the District Judge wrong. This was not a suit to enforce as against the mortgagor the remedy which the plaintiff had on a personal covenant to pay. It was a suit to enforce a lien upon the property ; but that property is beyond the reach of the mortgagee owing to its sale for arrears of Government revenue, and the lien has been transferred from the property itself to the balance of the money which remained after satisfying the Government demand. The plaintiff's cause of action is the non-payment of the money which was a charge upon the property ; and the circumstance that owing to the defendants' default to pay the Government revenue the property has been sold, does not, it seems to us, in any way affect the cause of action which the plaintiff had, or limit the time within which he would be entitled to bring the suit if the property is still available.

We have been referred to the observations of their Lordships of the Judicial Committee in the case of *Ram Din v. Kalka Prasad*, (1884) I. L. R., 7 All., 502 : L. R., 12 I. A., 12, in which it is said that article 132 should be read as having reference only to suits for money charged upon immoveable property to raise it out of that property. In the case of *Miller v. Runga Nath Moulick*, (1885) I. L. R., 12 Cal., 389, MITTER and NORRIS, JJ., put the same construction upon that article, saying that it referred only to suits to enforce payment of money charged on immoveable property by the sale of that property. The questions raised [184] in both those cases were very different from the questions raised in this case. There the plaintiff sought to extend the period allowed by article 132 of the Limitation Act to a claim upon the personal covenant of the mortgagor to pay, in other words, he contended that *that* article applied either to a claim to recover on the personal covenant or to recover the money as a charge upon the property. What was decided was that article 132 would not cover the case of a plaintiff suing on the personal covenant, but that it only applied to suits brought to enforce the payment of the money. There is nothing in the cases to which we have referred inconsistent with the view we have now expressed if to the words "to raise the money out of the property" be added "or what is now a substitute for the property." Under section 73 of the Transfer of Property Act, the lien which existed on the property charged is now transferred to the purchase money ; and we do not see anything in the Limitation Act which would shorten the time within which the plaintiff could sue to recover the money, the suit being a suit, not on the personal covenant, but a suit to recover the money as charged on the mortgaged property. We may also add that if it is to be considered that the plaintiff's original cause of action to enforce a charge on the property ceased when the property was sold

for arrears of revenue, and that a new cause of action accrued to him then so as to entitle him to bring a suit for the recovery of the money which the mortgagor or his representatives had taken, then we think article 120 would apply, and in that view the suit would be in time.

The decree of the District Judge must, therefore, be set aside, and the case must go back in order that the Lower Appellate Court may determine all other questions which are raised in the appeal before it. All that we decide is that the plaintiff's claim to recover the mortgage money out of the sale proceeds is not barred by article 132. What does or what does not form a part of the mortgage money, or what sum the plaintiff is entitled to recover as such, are questions which the Court disposing of the appeal will have to decide.

The appellant is entitled to his costs in this appeal.

M. N. R.

Appeal allowed ; case remanded.

NOTES.

[For similar decisions, see also (1901) 5 C.W.N., 356 ; (1904) 31 Cal., 745 ; (1904) 3 C.L.J., 52 ; (1909) 3 I.C., 311 ; (1905) 33 Cal., 92 affirmed in (1914) 41 Cal., 654 P.C. ; (1912) 17 I.C., 351 (Cal.).]

[185] *The 7th July, 1899.*

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE WILKINS.

Aman Ali...Defendant

versus

Azgar Ali Mia.....Plaintiff.

*Mortgage—Limitation—Mortgage by conditional sale—Mortgagee in possession—
Suit for foreclosure and recovery of possession—Redemption.*

A mortgagee by conditional sale, who was put into possession of the mortgaged property from the date of the mortgage and who is entitled under the deed to hold possession, is entitled, when wrongfully dispossessed, to recover possession of the property by a suit brought within time, although his claim for foreclosure may be barred by limitation. The possession recovered is, however, possession as mortgagee subject to the mortgagor's right of redemption.

THIS appeal arose out of a suit for foreclosure and possession, based on a deed of conditional sale, executed by one Mahomed Kalan Chowdhry on the 27th Joisto 1228 Mughi, corresponding to the 9th June 1866, in favour of the plaintiff, Azgar Ali Mia. The defendants Nos. 1 to 6 are the heirs and representatives of the said Kalan Chowdhry, and the defendant No. 7, Aman Ali, is the purchaser of the mortgaged property at a sale in execution of a decree against the defendants Nos. 1 to 6. The deed of conditional sale was executed in consideration of a sum of Rs. 80, and contained a stipulation that on the seller paying back the purchase money within eight years from the date of sale, the land and the purchase deed should be returned to him, and that on failure of such payment being made, the sale should become absolute.

* Appeal from Appellate Decree No. 83 of 1898, against the decree of Babu Shyam Kishore Bose, Subordinate Judge of Chittagong, dated the 24th of September 1897, modifying the decree of Babu Pran Krishna Biswas, Munsif of Fatikcheri, dated the 19th of January 1897.

The plaintiff alleged that he was in possession of the mortgaged property from the date of the mortgage to the year 1254 Mughī, enjoying the profits thereof and paying rent to the superior landlord; that the defendants, though asked by the plaintiff, refused to pay the principal amount of the debt; and that in the beginning of the month of Baisakh 1255 Mughī, the defendant No. 7, in conjunction with the other defendants, took possession of the mortgaged property and illegally dispossessed the [186] plaintiff from the same. On the 6th June 1896, the plaintiff accordingly brought the present suit to recover possession of the land with mesne profits, also for foreclosure.

The Munsif passed the usual foreclosure decree in favour of the plaintiff, holding that, although the plaintiff did not appear to have been in actual possession of the mortgaged property, yet under article 147 of the Limitation Act, the claim for foreclosure was not barred by limitation.

On appeal by the defendant No. 7, the Subordinate Judge held that the plaintiff's claim for foreclosure was barred by limitation, the suit having been brought more than twelve years after the expiry of eight years from the date of the mortgage. He, however, found that the plaintiff was in possession of the mortgaged property within four or five years before the institution of the suit, decreed the plaintiff's claim for possession as mortgagee, and with this modification dismissed the appeal.

The defendant No. 7 appealed to the High Court.

Moulvie *Serajul Islam* for the Appellant.

Babu *Harendra Narain Mittra* (for Moulvie *Syed Shamsul Huda*) for the Respondent.

The judgment of the High Court (**Macpherson and Wilkins, JJ.**) was as follows:—

The plaintiff respondent brought this suit for foreclosure of a mortgage by way of conditional sale, and for possession of the property mortgaged, alleging that he had been put into possession by the mortgagor, and that he had been dispossessed some two or three years before the suit. The Subordinate Judge held that the claim for foreclosure was barred by the law of limitation, but that the respondent was entitled to possession as mortgagee of the property from which he had been ejected. This appeal is preferred by one of the defendants against the order giving the respondent possession of the mortgaged property.

It seems to us that the decision of the Subordinate Judge is right. The property was conveyed to the respondent for a consideration of 80 rupees, and under the deed he was entitled to possess and enjoy the property. There was this condition, however, that, if the consideration money was repaid within eight years, the deed [187] would be returned and possession restored; and that, failing such repayment, the plaintiff would be entitled to foreclosure and make this title absolute. The mere fact that the plaintiff's claim for foreclosure was found barred by limitation cannot, it seems to us, deprive him of the possession to which he was entitled under the deed. It was held in the case of *Khelut Chunder Ghose v. Tara Churn Koondoo Chowdhry* that a mortgagee under a deed such as this, who is entitled to possession on default of payment of the mortgage debt, can maintain a suit for possession without asking for foreclosure; and that the right which he has to possession is not affected by the right which he has to foreclose. He has the double right. It seems to us that a mortgagee who was put into possession from the first, and is entitled under the deed to hold possession, is in no worse position than a mortgagee who is only entitled to

* (1866) 6 W. R., 269. (See S. C. on appeal, *Brojonath Koondoo Chowdhry v. Khelut Chunder Ghose*, 14 Moore's I. A., 144; 8 B. L. R., 104.)—Rep.

[190] The 24th July, 1899.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE STEVENS.

Abdul Karim.....Defendant No. 2

versus

Salimun.....Plaintiff.*

Transfer of Property Act (IV of 1882), section 59—Attestation of mortgage bond—Meaning of the word “attested”—Evidence Act (I of 1872), sections 68, 69, 70, 71—Admission of execution.

The *attestation* required by section 59 of the Transfer of Property Act is an attestation by witnesses of the *execution* of the document, and not of the *admission* of execution.

The word “admission” in section 70 of the Evidence Act relates only to the admission of a party in the course of the trial of a suit, and not to the attestation of a document by the admission of the party executing it.

Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee, (1898) I. L. R., 26 Cal., 246, followed.

THE plaintiff, Mussummat Bibi Salimun, brought the present action for recovery of a debt under a mortgage bond, and the suit was originally decreed against all the defendants. Afterwards, on the application of Sheik Abdul Karim, defendant No. 2, that decree was set aside and the case restored to the file. The main defence of the said defendant was that he did not execute the bond, and that he did not receive any part of the consideration money. In the course of the trial two attesting witnesses were called by the plaintiff, namely, M. Furhat Hossain and M. Vilayat Hossain. Furhat Hossain said that he attested the bond on the admission of the executants as to execution of it. The other witness, Vilayat Hossain, made conflicting statements. In cross-examination he said, “perhaps defendant No. 2 signed his name on the bond in a feigned hand.” In his re-examination he confessed that he did not remember whether or not the bond was signed in his presence. The Subordinate Judge held that, although both the witnesses swore to the admission of execution by Abdul Karim, that was not sufficient proof of the execution of the bond, regard being had to the express provisions of section 68 of the Evidence Act. He was, further, not satisfied on the evidence that defendant No. 2 actually signed the mortgage bond, [191] and accordingly dismissed the suit as against the defendant No. 2, and decreed it as against the other defendants.

The plaintiff appealed to the District Judge. It was contended on behalf of the plaintiff that, as regards the attestation of the bond by the witnesses, if the appellants were met by section 59 of the Transfer of Property Act and section 68 of the Evidence Act, the admission of the defendants to M. Furhat Hossain, read with section 70 of the Evidence Act, was a complete answer.

* Appeal from Appellate Decree No. 243 of 1898, against the decree of H. Holmwood, Esq., District Judge of Gya, dated the 29th of September 1897, reversing the decree of Babu Baroda Prosunno Shome, Subordinate Judge of that District, dated the 31st of March 1897.

With regard to this point, the learned District Judge remarked as follows in his judgment:—

"The question is whether this admission operates under section 70 of the Evidence Act to get rid of the actual absence of proof under section 68 of the Evidence Act that the mortgage was duly executed in the manner laid down by section 59 of the Transfer of Property Act. If one witness is called under section 68, Evidence Act, that witness must of course prove that the document was signed by the executants in his presence, and attested by himself and at least one other witness. Here there is no such evidence; but it is clear that the present defendant, Abdul Karim, admitted execution to M. Furhat Hossain after he had signed the bond and before M. Furhat Hossain attested it. The admission of a party to a document will, so far as such party is concerned, supersede the necessity either of calling the attesting witness or of giving any other evidence. The Subordinate Judge appears not to have considered the bearing of section 70."

Holding this view, and being of opinion that Abdul Karim undoubtedly executed the mortgage bond and that his admission of the fact to M. Furhat Hossain was binding on him, the District Judge decreed the appeal.

The defendant No. 2 then appealed to the High Court.

Moulvi *Mahomed Mustafa Khan* for the Appellant.

No one appeared for the Respondents.

The judgment of the High Court (**Ghose and Stevens, JJ.**) was as follows:—

The only question with which we are concerned in this appeal is whether the mortgage security upon which the suit of the plaintiff was founded was executed by the defendant No. 2 Sheikh Abdul Karim, the appellant before us, as provided by law.

Section 59 of the Transfer of Property Act provides that "where the principal money secured is one hundred rupees or [192] upwards (and in this case the consideration is above one hundred rupees), a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses;" and so on. It appears upon the statement of facts, made to us by the learned Vakil for the appellant (the respondent not being represented before us), that though there are several witnesses to the mortgage deed in question, only two of them have been examined, namely, Vilayat Hossain and Furhat Hossain. So far as the first named witness is concerned, it would appear from the judgment of the Subordinate Judge that this witness was in no way certain whether he was present at the time when the executants put their signatures on the document; for he said in re-examination that he did not remember whether or not the bond was signed in his presence. And we observe that the learned Judge does not say that this witness proves anything to the effect that the defendant No. 2 signed his name in his presence. On the contrary he states as follows: "If one witness is called under section 68, Evidence Act, that witness must of course prove that the document was signed by the executants in his presence and attested by himself, and at least one other witness. Here there is no such evidence, but it is clear that the present defendant Abdul Karim admitted execution to Moulvi Furhat Hossain after he had signed the bond and before Moulvi Furhat Hossain attested it," and so on, clearly indicating that, save and except the evidence of Furhat Hossain, there is no other evidence to prove that the document in question was signed in his presence or in the presence of any other witness by the executants.

Referring, again, to the evidence of Moulvi Furhat Hossain the learned Judge says: "The admission of a party to the document will, so far as such party is concerned, supersede the necessity either of calling the attesting witness

or of giving any other evidence." And later on, he states that the executants admitted before Moulvi Furhat Hossain that they had signed the deed and had received the consideration money.

The learned Judge, having regard to the evidence of the said witness, considers that the requirements of section 59 of the Transfer of Property Act have been complied with; and referring to the provisions of section 70 of the Indian Evidence Act, he is of opinion that the admission of the executants before this wit-[193]ness is sufficient in law to make the mortgage deed in question a good and operative document. Section 68, however, of the said Act provides that "if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence." Now there can be no doubt that the document with which we are concerned is a document which was required by law to be attested; and here the question arises, what is the meaning of the word "attested" as used in section 68 of the Evidence Act, and in section 59 of the Transfer of Property Act. In a very recent case before this Court, namely, the case of *Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee*, (1898) I. L. R., 26 Cal., 246, where a similar question was raised, a Divisional Bench of this Court (MACLEAN, C.J., and BANERJEE, J.) observed as follows: "The attestation required by section 59 of the Transfer of Property Act is an attestation by witnesses of the execution of the document and not of the admission of execution." We entirely concur in this observation. It distinctly meets the view which has been adopted by the learned District Judge in this case; for he is of opinion, as already stated, that the evidence of Moulvi Furhat Hossain is sufficient for the requirements of the law. It will be observed that section 70 of the Evidence Act relates only to the admission of a party in the course of the trial of a suit, and not to the attestation of a document by the admission of the party executing it. And if we refer to sections 68, 69, 70 and 71 of the Evidence Act, it will be found that they all relate to the evidence of witnesses or admission by parties at the trial, and have no relation to anything like that upon which the learned Judge has relied in holding that the admission before Moulvi Furhat Hossain by the executants satisfies the requirements of the law. We think, upon the facts as represented by the learned Vakil for the appellant and upon the facts as disclosed in the judgments of the Courts below, that there has not been an attestation of the mortgage bond in question within the meaning of section 59 of the Transfer of Property Act.

In this view of the matter it follows that, so far as the defen-[194]dant No. 2 is concerned, the plaintiff is not entitled to enforce his mortgage lien. The appeal will, therefore, be allowed, and the decree of the Lower Appellate Court will be set aside, and that of the Court of First Instance dismissing the plaintiff's suit as against the defendant No. 2 will be restored with costs in all the Courts.

M. N. R.

Appeal allowed.

NOTES.

[The view that the attestation required by the Transfer of Property Act, 1882, should be of the *execution* has now the support of the Privy Council decision in *Shamu Patter v. Abdul Kader Ravuthan* (1912) 35 Mad., 607 P.C.]

It was held similarly in (1905) 9 C.W.N., 1001; (1905) 32 Cal., 494; (1905) 32 Cal., 729; (1908) 31 Mad., 216; (1911) 7 N.L.R., 85; 11 I.C., 639; though dissented from in (1902) 27 Bom., 91; (1903) 26 All., 69; see also (1907) 13 C.W.N., 40.]

[27 Cal. 194]

The 7th June, 1899.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE RAMPINI.

Kuloda Prosad Chatterjee and others.....Plaintiffs

versus

Jageshar Koer.....Defendant.*

Transfer of Property Act (IV of 1882), section 39—Transferee for consideration and without notice—Mortgagee—Decree declaring charge on immoveable property for maintenance—Notice of charge—Constructive notice—Vendor and Purchaser.

Section 39 of the Transfer of Property Act does not protect a transferee for consideration, when the immoveable property transferred has already been declared by a decree of Court subject to a charge in favour of a Hindu widow for her maintenance. The fact that the maintenance claimed accrued due subsequent to the transfer does not affect the liability of the property transferred to be sold in execution of a decree for the maintenance so claimed.

THE defendant, Mussummat Jageshar Koer, instituted a suit in the Court of the Subordinate Judge of Mozufferpur against Ruderdeo Narain Sahi and Inderdeo Narain Sahi, for declaration of her right of inheritance to the properties left by her husband. On the 21st May 1886 she obtained a decree under a *solenamah*, declaring that 4 annas of each of the mouzahs Chakna and Kishunnagar was subject to a charge for her maintenance.

Subsequently, by a mortgage bond, dated the 18th September 1889, Ruderdeo Narain Sahi mortgaged 2 annas of mouzah Chakna, 2 annas of mouzah Kishunnagar, and some other properties to Babu Mahes Chunder Chatterjee, deceased, father of the plaintiffs. On the basis of that bond, and of another bond of a subsequent date, the plaintiffs obtained a decree to which [195] the defendant was not a party. In execution of that decree, the plaintiffs purchased the mortgaged property.

In execution of a decree for arrears of maintenance which fell due subsequent to the mortgage created in favour of the father of the plaintiffs, the defendant caused to be advertised for sale a portion of the mortgaged property which was also declared subject to the charge for maintenance. Upon that, the plaintiffs preferred an objection to the right of the defendant to bring the property to sale, but the objection was disallowed.

Hence the plaintiffs brought the present action for a declaration that the defendant had no mortgage lien on 2 annas of mouzah Chakna, and for a further declaration that the plaintiffs were entitled to have the said property absolved from liability to sale in execution of the defendant's decree. On the ground that neither the decree obtained by the defendant, nor the *solenamah* upon which it was based, was registered, the plaintiffs urged that the defendant had no mortgage lien preferential to their mortgage. The defendant, amongst other things, urged that she was not bound by the mortgage decree obtained by the plaintiffs, and that her mortgage lien was preferential to the mortgage lien alleged by the plaintiffs.

* Appeal from Appellate Decree No. 1624 of 1897, against the decree of Babu Nepal Chunder Bose, Subordinate Judge of Mozufferpur, dated the 26th of July 1897, affirming the decree of Babu Thakurdoyal, Munsif of Mozufferpur, dated the 15th of March 1897.

The Munsif held that the only issue was whether the share of the property purchased by the plaintiffs could be sold in execution of the decree obtained by the defendant, and finding the issue adversely to the plaintiffs, dismissed the suit.

On appeal, the Subordinate Judge held that the *solenamah* mentioned above did not *create* any right, but merely defined and made certain what was indefinite before, and that hence it was immaterial whether it was registered or not. He also held that the decree obtained by the defendant being one for a declaration and fixing of monthly allowance, it could be executed whenever the amount might fall into arrears during her life-time. With reference to the contention that the plaintiffs were purchasers without notice, the learned Judge remarked as follows :—

“ It is evident that their predecessors took a mortgage of the properties and caused such properties to be sold. They should be presumed to know everything about the title of their mortgagors in the properties. If the mortgagees or their representatives had inquired the title of the mortgagor, [196] which they should have done, they would have come to know that the mortgagor acquired the property by right of survivorship, and that the defendant had a lien over such property. If they failed to do so, they cannot claim to be purchasers without notice.”

He accordingly dismissed the appeal.

The plaintiffs appealed to the High Court.

Babu *Digambar Chatterjee* for the Appellants.

Babu *Lakshmi Narayan Sinha* for the Respondent.

The judgment of the High Court (**Ghose and Rampini, JJ.**) was as follows :—

The main contention raised in this appeal is that, having regard to the provisions of section 39 of the Transfer of Property Act, the charge created in favour of the defendant under the compromise decree in 1886 could not affect the interest of the plaintiffs, because they (the plaintiffs) were persons who took the property without notice of the right of maintenance in the defendant, the widow. It appears to us, however, that section 39 of the Transfer of Property Act has no application to a case like this, where there has been a decree between the widow on the one hand, and the plaintiffs' vendors on the other—a decree by which certain immoveable property was charged with the maintenance of the widow. The predecessor of the plaintiffs subsequently took a mortgage of the property from the defendant, against whom the said decree was passed ; and therefore they are bound, in the same manner as their mortgagor was bound, by it. Then again the plaintiffs could hardly be said to be transferees without notice of the right of maintenance in the widow, because it does not appear that they, before they took a mortgage, made any inquiry as to the right of the widow, and whether any charge existed upon the property in question.

The learned Vakil for the appellants has further argued that, inasmuch as the maintenance which was claimed by the defendant, and for which the property in question was attached and about to be sold, accrued due subsequent to his client's mortgage, the defendant should be regarded as second mortgagee, the plaintiffs being regarded as first mortgagees. But it is obvious that *that* argument cannot hold good, for the simple reason that [197] the defendant does not claim as mortgagee in the strict sense of the word, but she claims the right of maintenance which was declared by the decree, and by which decree certain specific immoveable property was charged with such maintenance.

Upon these grounds, we think this appeal should be dismissed, and we accordingly dismiss it with costs.

M. N. R.

Appeal dismissed.

NOTES.

[This was followed in (1907) 1 Sind L.R., 104. See also (1906) 28 All., 655 ; (1914) 16 M.L.T., 551.]

[27 Cal. 197]

The 30th June, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,
AND MR. JUSTICE BANERJEE.

Ram Narain Tewari and others.....Plaintiffs
versus
Shew Bhunjan Roy and othersDefendants.*

Right of suit—Fraud—Sale in execution of ex parte decree—Suit to set aside a sale on the ground of fraud, challenging the decree in execution of which the sale took place as fraudulent, although the said decree was set aside on the ground of non-service of summons—Civil Procedure Code (Act XIV of 1852), sections 108 and 244.

An *ex parte* decree for rent was obtained against A and others, and in execution of that decree certain lands of the judgment-debtors were sold and were purchased by a third party. Subsequently, at the instance of A, the said *ex parte* decree was set aside on the ground of non-service of summons, and the original suit was restored, but that was dismissed for default, as the then plaintiff did not proceed with it. An application was then made by A to set aside the sale on the ground of fraud which was rejected because the auction-purchaser was not made a party to the proceedings. A then brought a suit for declaration of title to a portion of the land sold and for confirmation of possession, challenging not only the sale, but also the decree, on the ground of fraud. The defence mainly was that regard being had to the provisions of section 244 of the Civil Procedure Code the suit was not maintainable.

Held, that, although there was no decree to be actually set aside, the plaintiff was entitled to show that the decree under which the sale was held was obtained by fraud against him and that therefore the suit was maintainable.

Abdul Mazumdar v. Mahomed Gazi Chowdhry, (1894) I.L.R., 21 Cal., 605, and *Pran Nath Roy v. Mohesh Chandra Moitra*, (1897) I.L.R., 24 Cal., 546, referred to.

[198] ONE Harnundan brought a suit for rent against the plaintiffs on the allegation that they held a joint holding under him, and obtained an *ex parte* decree on the 16th January 1894. In execution of the said decree the holding was sold and purchased by one Shew Bhunjan Roy, defendant No. 2, on the 18th June 1894, and delivery of possession was given to him on the 25th December 1894. The plaintiffs then made two applications to set aside the decree and the sale, stating that they had no notice of the suit or of the execution proceedings. The application to set aside the decree was allowed, and the

* Letters Patent Appeal No. 22 of 1899 in appeal from Appellate Decree No. 148 of 1898.

suit was restored to the file for retrial, but subsequently it was dismissed for non-appearance of Harnundan ; the application to set aside the sale was rejected on the ground that the auction-purchaser was not made a party to it. The plaintiffs then brought the present suit for declaration of title to a portion of the land sold and for confirmation of possession, challenging not only the sale, but also the decree, on the ground of fraud. The defence of the auction-purchaser, who alone appeared, mainly was that the suit was barred under sections 244 and 312 of the Civil Procedure Code, and was also barred by limitation.

The Court of First Instance having decided the issues against the defendant, decreed the plaintiffs' suit.

On appeal to the Subordinate Judge he confirmed the said decision.

The defendant then appealed to the High Court, and STEVENS, J., sitting alone reversed the decision of the Courts below, and dismissed the suit, holding that section 244 of the Civil Procedure Code was a bar to it.

Against this decision the plaintiffs appealed under section 15 of the Letters Patent.

Mr. C. Gregory for the Appellants.

Dr. Ashutosh Mookerjee for the Respondent.

The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows :—

Maclean, C. J.—In this case I have the misfortune to differ from Mr. Justice STEVENS, who has held that, having regard [199] to the provisions of section 244 of the Code of Civil Procedure this suit is not maintainable.

Shortly the facts are these. There was a rent suit brought against the present plaintiff, and an *ex parte* decree was obtained against him on the 16th January 1894, and under that *ex parte* decree the property was put up for sale, and sold on the 10th June 1894, and the purchaser, who is the respondent on the present appeal, was put into possession on the 25th December in the same year. Subsequently, the present plaintiff, who was the defendant or one of the defendants in the former suit (our information as to the former suit is not very definite), applied to set aside the *ex parte* decree, not upon the ground of fraud, but upon the ground of non-service of the summons upon him, and that *ex parte* decree was set aside. We are not in possession of the actual date when this was done, but it is said that it was in September 1895. The ultimate fate of that suit was that as the then plaintiff did not proceed with it, it was dismissed for default.

On a date, which has not been given to us, the present plaintiff applied to set aside the sale to the present respondent, on the ground of fraud, and that application was rejected on the 21st August 1895, upon the ground that the auction-purchaser, the present respondent, was not made a party to the proceedings. On the 27th July 1896, he brings his present suit, in which he prayed for a declaration that his title to portions of the land sold had not been affected in any way by the fraudulent proceedings (which he alleged in his plaint) and for confirmation of his possession. The fraudulent proceedings of which he complained were not merely the sale of the property under the decree, but the whole proceedings in the suit, and especially the circumstances under which the *ex parte* decree was obtained, and the suit must be taken in effect as a suit challenging, not only the sale, but challenging the decree, on the ground of fraud.

Both the Munsif and the Subordinate Judge held that the suit was maintainable, and made a decree in the plaintiff's favour, but Mr. Justice STEVENS has reversed their decision, holding that the plaintiff is barred by

section 244 of the Code of Civil Procedure. I am unable to share that view. The plaintiff's suit is [200] one not merely to set aside the sale (to which section 244 would have been a bar), but virtually to have it declared that the whole suit, including the decree, was a sham, and fraudulent as against him. Such an issue could not have been tried under section 244, the proceedings under which presuppose the existence of a valid and binding decree. It is perfectly true that as the *ex parte* decree was set aside, there is no decree of the previous suit now to be set aside, but it was set aside for want of due service of the summons on the present plaintiff, and not on the ground of fraud, which the plaintiff by his present suit desires to go into, and which he contends, if proved, will vitiate the whole of the proceedings including the sale. I can see nothing in section 244, which prevents him from doing this, and I think that, even if there be now no decree to be actually set aside, the plaintiff is entitled to show that the decree, under which the sale was held, was obtained by fraud as against him, and this view appears to me to be consistent with the case of *Abdul Mazumdar v. Mahomed Gazi Chowdhry*, (1894) I. L. R., 21 Cal., 605, and the case of *Pran Nath Roy v. Mohesh Chandra Moitra*, (1897) I. L. R., 24 Cal., 546, nor do I think that it clashes with anything that has been said in the case of *Nemai Chand Kanji v. Deno Nath Kanji*, (1898) 2 C. W. N., 691 or in the cases of *Moti Lall Chakerbutty v. Russick Chandra Bairagi*, (1896) I. L. R., 26 Cal., 326, note; *Bhubon Mohun Pal v. Nunda Lal Dey*, (1899) I. L. R., 26 Cal., 324, and *Hira Lal Ghose v. Chundra Kanto Ghose*, (1899) I. L. R., 26 Cal., 539.

This proposition has not been seriously controverted by the respondent's learned Vakil, but he urges that the learned Subordinate Judge has not found as a fact that the decree was obtained by fraud, and he asks for a remand to have that issue determined. I think, however, looking at the judgment as a whole, that that is what the Subordinate Judge intended to find: otherwise it is difficult to appreciate why he should have referred to and relied upon the cases reported in Volumes 21 and 24, Calcutta Series, which I have just cited. He says: "Fraud being the key note [201] of the plaintiff's suit, it is saved from the operation of section 244, as that section has been expounded by the case of *Abdul Mazumdar v. Mahomed Gazi Chowdhry*, (1894) I. L. R., 21 Cal., 605, and by the still more recent case of *Pran Nath Roy v. Mohesh Chandra Moitra*, (1897) I. L. R., 24 Cal., 546." In these cases the distinction is drawn between suits in which the plaintiff asks, not only to set aside the sale, but also to set aside the decree, on the ground of fraud, and that distinction must, I think, have been present to the learned Subordinate Judge's mind.

There are other passages in his judgment, which show that he was dealing with the question of fraud as to the decree and not merely as to the sale. For instance, he says, "the recent case quoted by the appellant of *Keshab Chunder Ghose v. Durga Tarini Ghosh*, (1897) 1 C. W. N., cxi, does not at all touch the present case, inasmuch as the decree and the sale had not been aspersed as fraudulent." And again: "I agree with the Munsif in finding that Amir is the real beneficiary, and this finding goes a long way in bringing home the plea of fraud set up by the plaintiff," the plea of fraud being, not only in regard to the sale, but in regard to the decree.

I, therefore, think that the learned Subordinate Judge intended to find, and has found, that the decree in the previous suit was obtained by fraud, and, that being so, there is no reason which would justify us in remanding the case to have that issue retried. The appeal must be allowed, and the decree of the

Subordinate Judge restored with costs, both before Mr. Justice STEVENS and this Court.

Banerjee, J.—I am of the same opinion.

S. C. G.

Appeal allowed.

NOTES.

[See also (1907) 5 C.L.J., 328.]

[202] *The 12th July, 1899.*

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Biraj Mohini Dassi, widow of Tarini Charan Ghose.....Defendant

versus

Gopeswar Mullick and others.....Plaintiffs.*

*Bengal Tenancy Act (VIII of 1885)—Applicability of Act to lands outside the limits of the Town of Calcutta, but within its municipal boundaries—
Calcutta Municipal Consolidation Act, (Bengal Act II of 1888),
section 3—Town of Calcutta, Municipal boundaries of.*

The Bengal Tenancy Act applies to lands situated outside the limits of the Town of Calcutta, but within its municipal boundaries, as defined by Bengal Act II of 1888.

THIS appeal arose out of an action brought by the plaintiffs for recovery of *khas* possession of a certain plot of land in Dihl Panchanogram situated outside the limits of the Town of Calcutta, but within its municipal boundaries. The allegation of the plaintiffs was that their predecessors held, and they subsequently have been holding, the land in dispute under the Government for a long time ; that one Kailash Chunder Sarkar was the tenant at will of the said land, and that after his death the defendant, his sister, has been in possession of it as *sarbarakar* on payment of rent to them ; and that, notwithstanding they served a notice to quit upon the defendant, she did not quit the land. They, therefore, prayed to recover *khas* possession of it.

The defence, *inter alia*, was that there was no relationship of landlord and tenant between the parties ; that the claim of the plaintiffs was barred by limitation ; that admitting that the defendant was a tenant, she acquired a right of occupancy to the disputed land, it being used for agricultural and horticultural purposes, and as such she could not be ejected ; and that the notice to quit was not properly served upon her. It was found by the Courts below that the defendant was not occupying the land, but had let it out to sub-tenants.

The Court of First Instance dismissed the suit holding that the defendant had acquired a right of occupancy to the disputed [203] land, and was not liable to be ejected. On appeal, the Lower Appellate Court having held

* Appeal from Appellate Decree No. 1890 of 1897, against the decree of F. F. Handley, Esq., District Judge of 24-Pergunnahs, dated the 26th of July 1897, reversing the decree of Babu Shyam Chand Roy, Subordinate Judge of that District, dated the 31st of July 1896.

that the Bengal Tenancy Act did not apply to the case, but that it came under the Transfer of Property Act, that the defendant was not a raiyat, and that she did not acquire any right of occupancy, decreed the plaintiffs' suit.

Against this decision the defendant appealed to the High Court.

Dr. *Rash Behary Ghosh*, and *Babu Purna Chander Shome*, for the Appellant.

Babu Nilmadhub Bose for the Respondents.

The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows:—

Maclean, C.J. (BANERJEE, J., *concurring*)—This is an appeal from the judgment of the District Judge of the 24-Parganas in a suit in which the plaintiffs claim *khas* possession of some two or three bighas of land situated just outside the limits of the Town of Calcutta, but within its municipal boundaries as defined by Bengal Act II of 1888.

The defence set up in the written statement was a varied one; that the relation of landlord and tenant did not exist between the plaintiffs and the defendant; that the land was held in *mokurrari* and *mourasi* right; that the defendant had acquired a title by adverse possession; that the plaintiffs were barred by the statute of limitation, and that, if the defendant were a tenant under the plaintiffs, she was an occupancy raiyat. Of all these varied contentions, the last only has been argued before us. The first Court held that the defendant was an occupancy raiyat and was not liable to be ejected; the Lower Appellate Court reversed this decision; hence the present appeal. It is admitted that, before suit, proper notices to quit had been duly served on the defendant.

The first point argued before us on behalf of the appellant is that the Bengal Tenancy Act applies to the case, the land being outside the Town of Calcutta. The respondents contend that, having regard to Bengal Act II of 1888, the land in question is within the Town of Calcutta, and so exempted from the operation of the Bengal Tenancy Act. I am unable to take the latter view. The term "Town of Calcutta" is one well recognised, and at the time of the passing of the Bengal Tenancy Act its boundaries [204] were well known and well defined, and that expression, as used in the Tenancy Act, can, in my opinion, only relate to the Town as it existed at the time of the passing of the Act. No doubt, the area of the Town has, for municipal purposes, been extended by the Act I have mentioned, and this land is within the extended boundary; but the area was extended for those purposes only, and not for all purposes. It could scarcely be contended, for example, that the effect of the Municipal Act of 1888 was to extend the jurisdiction of the High Court on its Original Side over the new area, as being within the "Town of Calcutta." The Act itself draws a distinction between the "Town of Calcutta," "Calcutta," and the "suburbs" of the Town, and it would be a strong thing to hold that this Act, which was one to extend the "municipal limits of Calcutta," and to consolidate and amend the law relating to the municipal affairs of the town and suburbs of Calcutta, was an extension of the "Town of Calcutta," so as to exclude the newly enclosed area from the operation of the Tenancy Act. It may be noticed that the new boundaries are spoken of as those of "Calcutta," not of the "Town of Calcutta."

The land in dispute then is subject to the operation of the Bengal Tenancy Act.

Then comes the question whether the defendant is an occupancy raiyat, and that may be disposed of in a somewhat summary way. It appears that the plaintiffs are lessees of the Government, and this fact carries the present case outside the *dicta* of the Judicial Committee of the Privy Council in the

case of *Gunga Gobind Mundul v. The Collector of the 24-Pergunnahs*, (1867) 11 Moore's I.A., 345 (361, 362).

But I fail to see how, on the facts of this case, the defendant can successfully urge that she is an occupancy raiyat. It is clear, on the findings of fact, both by the Subordinate Judge and the District Judge, and which are binding on us on second appeal, that the defendant was not occupying this land, but had let it out to sub-tenants. How then can she successfully say she is an occupancy raiyat within the meaning of the Tenancy Act?

[205] This appears to me to dispose of the case, and it becomes unnecessary to consider whether, if she were herself occupying the land, and were growing flowers and vegetables for the market, she could be said to be "cultivating" the land within the meaning of that Act.

On these grounds I think that the judgment of the Court below was right and the appeal must be dismissed with costs.

S. C. G.

Appeal dismissed.

NOTES.

[As regards jurisdiction of the High Court, see also (1909) 13 C.W.N., 605.

As regards the applicability of the Bengal Tenancy Act, see (1903) 8 C.W.N., 301.]

[27 Cal. 205]

The 1st August, 1899.

PRESENT:

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,
AND MR. JUSTICE BANERJEE.

Umrao Bibi and another.....Defendants

versus

Mahomed Rojabi.....Plaintiff.*

Landlord and tenant—Suit for rent against a person holding land within a municipality and the land not proved to have been let out for agricultural or horticultural purposes—Bengal Tenancy Act (VIII of 1885) section 5, sub-section 1 ; section 7, sub-section 3 and Schedule III—Limitation Act (XV of 1877), Schedule II, article 116—Tenure-holder—Transfer of Property Act (IV of 1882) chapter V, section 117.

The mere fact that a person has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rent, is not sufficient to prove that he is a tenure-holder within the meaning of the Bengal Tenancy Act. It must be proved that the land was let out as a holding for agricultural or horticultural purposes.

In a suit for rent for a period of six years by an *ijaradar* upon the basis of a *kabuliat* alleged to have been executed by the predecessor of the defendant, it was contended for the first time before the Appellate Court that the suit was barred by limitation, being one for rent for a period of more than three years. It was found that the land was not let out for agricultural or horticultural purposes.

* Appeal from Appellate Decree No. 232 of 1898, against the decree of Babu Amrita Lal Pal, Subordinate Judge of Dacca, dated the 9th of November 1897, affirming the decree of Babu Nabin Chandra Nag, Munsif of that District, dated 14th of January 1897.

Held, that inasmuch as the land was not let out for agricultural or horticultural purposes, the Bengal Tenancy Act did not apply, and therefore the suit was not barred by limitation.

Semle :—When a question raised before the Appellate Court is a mixed one of law and fact, and one which was not raised before the Court of First Instance, it is doubtful whether the Appellate Court should allow it to be raised.

[206] THIS appeal arose out of an action for rent. The plaintiff, as an *ijara-dar* of a certain plot of land situated within the Dacca Municipality, brought a suit for rent for the years 1297 B.S., to 1302 B.S. upon the basis of a *kabuliat* alleged to have been executed by the predecessor of the defendants.

The defence was that the *kabuliat* was not executed by the predecessor of the defendants, and that there was no relationship of landlord and tenant between the parties.

The Court of First Instance, overruling the objections of the defendants, gave the plaintiff a decree.

On appeal to the Lower Appellate Court, a new plea was taken for the first time that the suit was barred by limitation, being one for rent for a period of more than three years. The Subordinate Judge deciding this point against the defendants, dismissed the appeal. The material portion of his judgment was as follows :—

"It is not a pure question of law, i.e., of limitation, but a mixed question of law and fact. Besides, even if such a question can be entertained, where is the proper evidence to show that the case comes under the Bengal Tenancy Act. It is clear on the evidence that the lands lie within the Municipality of Dacca, and there is nothing to show that the lands were let out as holdings for agricultural or horticultural purposes. The mere fact, as appeared from the evidence, that one of the plots is a *sone sonda* * and portions of some other plots are cultivated with kitchen vegetables, is not sufficient. I overrule the plea of limitation."

Against this decision the defendants appealed to the High Court.

Babu *Basunt Kumar Bose* for the Appellants.

Moulvie *Abdul Jawad* for the Respondent.

The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows :—

Maclean, C J.—I am doubtful whether the Lower Appellate Court ought to have allowed the point now argued before us to have been raised. It was never raised in the pleadings, and never raised in the Court of First Instance. The case raised in the Court of First Instance was that the defendants never executed the *ijara* in question: they fought that out and they [207] were beaten. It is not very easy to say whether this particular lease is or is not within the provisions of the Bengal Tenancy Act. It is found by the Court below that the lands lie within the municipal area of Dacca, but there is nothing to show that the land was let out as a holding for agricultural or horticultural purposes, though there appears to have been some evidence as to some of the plots being used for growing vegetables and *sone sonda*. I think we must take it, upon the findings, that this land was not used for agricultural or horticultural purposes, and, that being so, I see no reason to dissent from the view taken by the lower Court. The appeal must be dismissed with costs.

Banerjee, J.—I am of the same opinion. The two questions raised before us are, *first*, whether this suit, which was one for arrears of rent due under an *ijara* lease, which is a registered document, is governed by the three years rule of limitation prescribed in the Bengal Tenancy Act, or the six years rule of limitation under article 116 of the second schedule of the Limitation Act; and,

* A place where grass for thatching is grown.—Ed.

second, whether interest is recoverable at any rate exceeding 12 per cent. per annum, the rate prescribed by section 57 of the Bengal Tenancy Act. These questions, as has been pointed out in the judgment of the learned Chief Justice, were not raised in the first Court; and it is very doubtful whether the Lower Appellate Court ought to have allowed them to be raised at all, because these questions are not pure questions of law, but are mixed questions of law and fact, their determination depending upon the questions whether the Bengal Tenancy Act applies to this case—a question which again depends for determination upon the question whether the land the subject of the lease, was used for agricultural or horticultural purposes, or for purposes other than those.

Upon the last-mentioned question the finding of the Lower Appellate Court is against the appellants. But the learned Vakil for the defendants (appellants) contends that the question is a pure question of law, and that, having regard to the terms of the lease, the plaintiff was a tenure-holder within the meaning of section 5 of the Bengal Tenancy Act, quite irrespective of the question whether the land was held for agricultural or horticultural purposes, or for any other purpose; and he bases his argument upon that part of the definition of the term "tenure-holder" in section 5, sub-section 1, of the Tenancy Act, which runs in these terms: "'Tenure-holder' means primarily a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rents." It is argued that the lease shows that the plaintiff acquired from the proprietor or another tenure-holder a right to hold the land in question for the purpose of collecting rents from the occupants of the land, whether they are agricultural and horticultural tenants, or shop-keepers, or any other description of tenants.

I am of opinion that this contention is not sound. For, although the part of the definition of the term 'tenure-holder,' quoted above, may be comprehensive enough to lend some colour to the appellants' contention, yet we must take the provisions of the Act relating to tenure-holders as a whole, and see whether the term "tenure-holder," as contemplated by the Bengal Tenancy Act, would include a person such as the plaintiff has been found to be in this case. One of these provisions applicable to tenure-holders is that contained in section 7 of the Act, and that section, especially clause (a) of sub-section 3 of it, to my mind, clearly indicates that a tenure-holder within the contemplation of the Act must be a person who holds land which is used for agricultural or horticultural purposes. For sub-section 3 enacts that, "in determining what is fair and equitable, the Court shall not leave to the tenure-holder as profit less than ten per cent. of the balance which remains after deducting from the gross rents payable to him the expenses of collecting them, and shall have regard to (a) the circumstances under which the tenure was created—for instance, whether the land comprised in the tenure, or a great portion of it, was first brought under cultivation by the agency or at the expense of the tenure-holder or his predecessors in interest, whether any fine or premium was paid on the creation of the tenure, and whether the tenure was originally created at a specially low rent for the purpose of reclamation."

The view I take is in accordance with that taken in the case [209] of *Durga Sundari Dassi v. Umdatamissa*, (1872) 9 B.L.R., 101:18 W. R., 234, decided under the former Rent Law, Act X of 1859. I may also add that this view receives considerable support from the provisions of section 117 of the Transfer of Property Act. For we find in Chapter V of the Transfer of Property Act, in which section 117 occurs, certain provisions of the law relating to leases of immoveable property, which obtain simultaneously with the provisions of the Bengal Tenancy Act, and the two enactments being different in many

respects, it could not have been the intention of the Legislature that a case might, at the option of any party, be brought indifferently under the provisions of the one enactment or the other. The two enactments must have been intended to have separate application ; and the line of demarcation between the two is, to a certain extent, indicated by section 117 of the Transfer of Property Act, which enacts that none of the provisions of the Chapter in which that section occurs applies to leases of immoveable property for agricultural purposes, except in certain cases. This indicates that the distinction between cases coming under the Transfer of Property Act, and those coming under the ordinary Rent Law, is constituted by the fact of the land being non-agricultural or agricultural.

For these reasons, and having regard to the finding that the land in dispute is not shown to be used for agricultural or horticultural purposes, I think that the Lower Appellate Court was quite right in holding that the Bengal Tenancy Act has no application to the present case.

S. C. G.

Appeal dismissed.

NOTES.

[See also (1909) 13 C.W.N., 949.]

[210] *The 15th August, 1899.*

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Harendra Lal Roy Chowdhry.....Decree-holder

versus

Sham Lal Sen.....Judgment-debtor.*

*Limitation Act (XV of 1877), Schedule II, article 179—Step in aid of execution—
Application for execution of decree against some of the joint judgment-
debtors, out of time—Realization of a portion of the decretal
amount by such execution, effect of, as against other
judgment-debtor who was not a party to the
execution proceeding—Application
in accordance with law.*

A judgment-debtor, who was not a party to a previous application for execution of a decree or to any order made upon it, is not precluded from showing that the said application was barred by limitation, and that therefore it was not in accordance with law.

A decree was obtained against four persons on the 13th August 1890. An application for execution was made against all of them on the 7th October 1893. A subsequent application was made against two of them on the 17th February 1897, and a portion of the decretal amount was realized. On a further application for execution against persons who were parties to the previous execution proceeding and also against a person who was not a party to

* Appeal from Original Order No. 355 of 1898, against the order of Babu Rajendra Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 17th of August 1898.

the said proceeding, objection was taken by the latter that the application for execution as against him was barred by limitation.

Held, that the application was barred by limitation, inasmuch as the objector was not a party to the previous execution proceeding, which was itself barred by limitation and therefore it had not the effect of keeping the decree alive.

THIS appeal arose out of an application for execution of a mortgage decree. The decree was obtained against four persons on the 13th August 1890, and the order absolute was made on the 8th December of the same year. Applications for execution of the said decree were made from time to time. The third application for execution was presented on the 7th October 1893, and it was made against all the four judgment-debtors. On the 30th December following a notice was directed to be issued to one of them only. On the 24th February 1894, there was an order by the Court to the following effect: "Notice to the judgment-debtor to show cause why he should not be arrested if *talabana* be paid in three [211] days," but no *talabana* having been paid the execution case was struck off on the 17th March 1894. The next application for execution was filed on the 17th February 1897, only against two of the judgment-debtors Nos. 1 and 2, and a certain sum of money was realized from them. The present application was made on the 21st July 1898 against the judgment-debtors Nos. 1, 3 and 4, and a notice was issued to the objector judgment-debtor No. 4, to show cause why he should not be arrested in execution of the decree. His objection was that the execution had been barred when the application for execution was made on the 17th February 1897 and whatever steps were taken in that case by the decree-holder for the realization of the part of his due from the judgment-debtors Nos. 1 and 2 could not have the effect of enlarging the period of limitation.

The Court of First Instance allowed this objection, and held that the application for execution as against the objector was barred by limitation.

From this decision the decree-holder appealed to the High Court.

Mr. O'Kinealy, Babu Akshoy Coomar Banerjee, and Babu Bepin Behary Ghosh, for the Appellant.

Mr. Jackson, and Babu Prosonno Gopal Roy, for the Respondent.

The following **judgments** were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.) :—

Maclean, C.J.—This is an appeal by the decree-holder from the decision of the Second Subordinate Judge of the 24-Parganas, holding that the decree-holder's application for execution, dated the 21st July 1898, was barred by limitation.

The point we have to decide is a short one, and it will only be necessary for me to deal briefly with a few dates and undisputed facts.

The suit was one to enforce a mortgage, and there were four defendants to that suit, of whom defendant No. 4, is the present respondent. A final decree was passed on the 8th of December 1890 for a sum of Rs. 18,000 or so. Applications for execution [212] were made from time to time, but it is sufficient for present purposes if we start from the application made on the 7th October 1893 against all the defendants.

In my opinion the decree which was passed was a joint decree against all the defendants.

On the 17th February 1897, which is more than three years after the date of the application of the 7th October 1893, a further application was made against the defendants Nos. 1 and 2 only, and that application resulted in a

substantial sum being recovered by the decree-holder. Defendant No. 4 was not served with notice of, and was not, in anywise, a party to, that application.

Then comes the present application of 21st of July 1898 against the defendants Nos. 1, 3 and 4, the latter of whom, as I said before, is the only respondent on this occasion.

These being the facts, two questions arise: *First*, whether the application of the 17th of February 1897 was out of time, and, *secondly*, if it were out of time, whether it is open to the defendant No. 4 to raise that objection on the present occasion.

I entertain no doubt that the application of the 17th of February 1897 was out of time. The last previous application was made on the 7th of October 1893, though an ingenious attempt was made to lead us to prosume that having regard to the entry in the order sheet of the 24th February 1894, some application subsequent in point of date to that of October 7th, 1893, must have been made. I am not disposed to take that view. In my opinion the notice referred to in that entry was consequent only upon the application that had been previously made on the 7th October 1893. There is nothing to show that there was any such application as would meet the requirements of article 179 of the second schedule to the Limitation Act after the 7th October 1893, and I am therefore clearly of opinion that the application which was made on the 17th of February 1897 was out of time.

But then it is contended that having regard to the case of *Mungul Pershad Dicht v Griya Kanta Lahiri*, (1881) I.L.R., 8 Cal., 51 : L.R., 8 I.A., 123, it is not open [213] to the present respondent to take that objection, and that as an order was made on the 17th February 1897 against the defendants Nos. 1 and 2, the defendant No. 4 is barred from saying that that application was out of time.

I am unable to accept that view. To my mind the case in the Privy Council proceeds upon an entirely different footing. In that case, to put it shortly, the parties had been served with the application for execution, and an order on that application, adverse to them, had been made in their presence, by a Court of competent jurisdiction, and the Privy Council held that under these circumstances, although the execution of the decree might have been actually barred by time at the date of the application in question, yet if an order for such execution has been regularly made by a competent Court having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid. But that case has no application to the present, where the defendant No. 4 was not a party to the application of the 17th of February 1897 nor a party to the order made upon that application. He knew nothing whatever about it, and it is difficult to see why, upon this, his first opportunity, he should be disentitled to show that that application was out of time.

Great reliance is placed by the appellant upon the language of the explanation attached to article 179 of the second schedule of the Limitation Act, which says that "where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them or against his or their representatives, shall take effect against them all." That means that the application may take effect against them all, if the application be such an application as is mentioned in the 4th clause of article 179, that is to say, an application "made in accordance with law to the proper Court for execution or to take some step in aid of execution." But the application of the 17th February 1897 was not an application in accordance with law, because it was out of time, and that being so there is nothing, in my judgment, in the language of this explanation to show that a person who was not a party to the

application, or to any order made upon it, is prevented from showing that the [214] previous application was out of time. The explanation does not say that any order made on such an application is to be binding on a person who was not a party to the application. The present respondent could not have taken any objection to the application of the 17th February 1897, or to the order made upon it, for he knew nothing about it.

I have now dealt with the only two points which have been raised: they both fail, and the appeal must be dismissed with costs.

Banerjee, J.—I am of the same opinion. The question for determination in this case is whether the present application, which was made on the 21st July 1898, for execution of the decree obtained by the appellant on the 13th August 1890, is barred by limitation. The Court below has answered that question in the affirmative, and hence the present appeal by the decree-holder. The contention of the learned Counsel for the appellant is, that the view taken by the Court below is wrong, *first*, because the present application is made within three years from the date of the next preceding application, which was made on the 17th of February 1897, and behind which it is not competent for the parties to go; and, *secondly*, because even if it were competent to the judgment-debtor No. 4 to go behind the application of the 17th February 1897, that application was a good application as it was made within three years from the date of the previous application which must have been made on the 24th February 1894, as the order made by the Court on that day would show.

I shall consider these two contentions separately. It is quite true that an application for the execution of the decree of the 13th August 1890 was made on the 17th February 1897, and that application was granted and some property of the judgment-debtors was attached upon that application. It is equally true that, according to the case of *Mungul Pershad Dichit v. Grija Kant Lahiri*, (1881) I.L.R., 8 Cal., 51: L. R., 8 I. A., 123, the judgment-debtors who are bound by the orders made upon the previous application are, in that state of facts, precluded from going behind that application, and from [215] contending that it was not in time and was not, therefore, a good application. But the only parties against whom the application of the 17th February 1897 can have this effect are the parties against whom that application, and the orders passed upon it, were made. It is clear, from the language of the judgment of the Privy Council in *Mungul Pershad Dichit v. Grija Kant Lahiri*, that the ground of that decision is shortly this, that where once an application has been made, and granted, upon notice to the judgment-debtor, and proceedings are taken upon such application, it is not competent to such judgment-debtor to question the validity of the orders made, and the proceedings taken upon such previous application, on the ground that that application was barred by time. But that effect the application can have only against the parties against whom the application was made and upon whom notice of the application was issued. In the present case, the application relied upon was made, not against the judgment-debtor No. 4 who objects to the execution proceeding in the present instance, but only against the judgment-debtors Nos. 1 and 2. The case cited, therefore, cannot support the decree-holder's contention that the judgment-debtor No. 4, the respondent before us, is not entitled to go behind the application of the 17th February 1897, and to show that application was barred by limitation.

Then it is contended that, although the case of *Mungul Pershad Dichit v. Grija Kant Lahiri*, (1881) I. L. R., 8 Cal., 51: L. R., 8 I. A., 123, taken by itself may not have that effect, yet, taken along with explanation 1 of article 179 of the second schedule of the Limitation Act, it ought to have that effect:

as the application of the 17th February 1897 was an application made for the execution of a decree passed jointly against all the judgment-debtors.

Let us then examine the language of the explanation. It says that "where decree has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all." That means that an application for execution which is itself an application made according to law, that is, which is not itself time barred, though made [216] against some only of several persons against whom a decree is passed jointly, shall take effect against all of them. It does not say, however, that not only an application so made, but all orders made upon such application, shall have effect against the judgment-debtors other than those against whom the application was made. Now, it is necessary, for the success of the appellant's contention, that not only must the previous application have effect against all the judgment-debtors, but the orders made upon that application must also have a similar effect; for, otherwise, it could not be said that the judgment-debtor No. 4 was precluded from showing that the previous application relied upon was time barred. It is not the application itself, then, that would be sufficient for the appellant's purpose; but it must be the application taken with the order made thereon that can preclude a party from going behind the application and contending that it was time barred; and there is nothing in the explanation to the effect that, not only the application, by which must be understood an application according to law, that is, an application within time, but orders made upon an application which would preclude persons against whom they are made from going behind the application, shall have effect against judgment-debtors other than those against whom such orders were made. I do not, therefore, think that the contention urged on behalf of the appellant is correct. If the application, independently of the rule laid down in *Mungul Pershad Dicht v. Grija Kant Lahiri*, was itself an application good in law, that is, made before the time for making it expired, then it would be sufficient, not only as against the person against whom it was made, but also against other judgment-debtors against whom the decree was jointly made.

This brings me to the consideration of the second contention urged on behalf of the appellant, namely, that the application of the 17th February 1897 was not barred by limitation, as it was made within three years from the date of a previous application which must have been made on the 24th February 1894. Now there is no application of the 24th February 1894, or of any other date in February 1894, forthcoming; and the only ground upon which the appellant's contention rests is this, that [217] the order sheet in the case shows that a notice on the judgment debtor to show cause why he should not be arrested was ordered to be issued on the 24th February 1894, and as that order could have been made only upon an application for the issue of such a notice, we must presume that an application for the issue of such a notice, which would be an application to take some step in aid of execution, was made. I do not think that that inference at all follows; for the order of the 24th February 1894 might well have been made, and, in my opinion, was, in fact, made, not upon any fresh application made on that day, but upon the original application for execution made on the 7th October 1893, which contained a prayer that after service of notice on the judgment-debtors named in the column of names a warrant of arrest might be issued against them. That being so, the contentions urged before us both fail, and the appeal must be dismissed with costs.

S. C. G.

Appeal dismissed.

[27 Cal. 217]

The 30th August, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,
AND MR. JUSTICE BANERJEE.

Amrita Lal Mukerjee.....Petitioner

versus

Rakhali Dassi Debi.....Opposite Party.*

*Civil Procedure Code (Act XIV of 1882), sections 370, 102—Insolvency
Act (11 and 12 Vic., C. 21), section 7—Whether section 370 of the
Civil Procedure Code applies to a case, where there has not
been a completed bankruptcy or insolvency—Dismissal of
the suit for non-appearance of plaintiff or of the
Official Assignee—Civil Procedure Code,
sections 102, 103, 157, 371.*

Section 370 of the Code of Civil Procedure does not apply to a case where there has been only an application to declare the plaintiff to a suit an insolvent and a vesting order made, but the proceedings are subsequently annulled, and the party is not declared either a bankrupt or an insolvent ; therefore in such a case, where a suit has been dismissed for the non-appearance of the plaintiff or the Official Assignee on the date fixed for hearing, section 103 of the Civil Procedure Code applies.

ONE Amrita Lall Mukerjee instituted a suit for an account in the Court of the Second Subordinate Judge of Hooghly on the 16th [218] November 1897, and a Commissioner was appointed to take accounts, with a direction to submit his report on the 20th June following. On the 20th May, the defendant applied to the Subordinate Judge to add the Official Assignee as a party to the suit, inasmuch as the plaintiff had applied to the High Court to be adjudicated an insolvent, and his properties had been vested in the Official Assignee. Thereupon the Court granted a fortnight's time to the plaintiff to bring the Official Assignee on the record. The plaintiff again applied for further time to show to the Court that his application to be declared an insolvent had been withdrawn, and the case was postponed to 13th June 1898. On that day neither the plaintiff nor the Official Assignee appeared, and the Court, purporting to act under section 370 of the Civil Procedure Code, dismissed the suit. The plaintiff then applied to set aside the order of dismissal on the ground that his application to be declared an insolvent was dismissed by the High Court. The Subordinate Judge rejected the petition, holding that the case came under section 370 of the Civil Procedure Code, and the petitioner's remedy was by way of an appeal.

Against this decision the petitioner appealed to the High Court.

Babu *Boidya Nath Dutta* for the Appellant.

Babu *Golap Chunder Sarkar* for the Respondent.

The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows :—

* **Maclean, C.J.**—This is a suit for an account. The taking of the account was referred to a Commissioner. Subsequently to that reference proceedings in

* Appeal from Order No. 382 of 1898, against the order of Babu Radha Krishna Sen, Subordinate Judge of Hooghly, dated the 27th of August 1898.

bankruptcy were taken against the plaintiff, and a vesting order was made, vesting the property in the Official Assignee. Subsequently to that an application was made by the defendant on the 20th May 1898, that the Official Assignee should be made a party to the suit. That came on before the Court on the 13th June 1898. After one or two adjournments, neither the applicant nor the Official Assignee appeared, and the Court, purporting to act under section 370 of the Code of Civil Procedure, dismissed the suit.

The first question is whether the Court was right in holding that that section applied, and, secondly, whether it [219] was right in dismissing the suit as coming within the purview of that section. I think not. I think that section 370 of the Code only applies to a case where there is an actual bankruptcy or insolvency. The language of the section, to my mind, clearly indicates that. It indicates that there must be a completed bankruptcy or insolvency, in which there is an Assignee or Receiver appointed. That does not apply to a case such as the present, where there has been an application to declare the plaintiff an insolvent and a vesting order made, but the proceedings are subsequently annulled and the plaintiff is not declared either a bankrupt or an insolvent. I think this is clear from the language of section 370, coupled with the language of section 7 of the Insolvency Act (11 and 12 Vic., C. 21), which says that if "after the making of any such vesting order, the petition of any such petitioner shall be dismissed by the said Court, such vesting order made in pursuance of such petition shall from and after such dismissal be null and void to all intents and purposes." Here the petition was subsequently dismissed, and in my opinion section 370 of the Code does not apply to such a case as that.

But, then, was the suit properly dismissed for non-appearance on the part of the plaintiff. I think it was, nor has that been contested by the appellant. His contention is, that it must be treated as a dismissal, not under section 370 of the Code, but as a dismissal under section 102. If it be a dismissal under section 102, then section 103 would apply, and the appellant would be entitled to show that he was prevented by sufficient cause from appearing when the suit was called on for hearing. The learned Judge in the Court below has considered that the case does not fall within sections 102 and 103 of the Code. He has, therefore, not gone into the question whether or not there was sufficient cause, and that is the main ground of the appeal in the present case. I think he was wrong in that view, that is in the view that this was a dismissal under section 370. I think that under the circumstances it must be taken to have been a dismissal under section 102, in which case I think section 103 applies. There must be a remand in order that the Judge may go into the question of whether the plaintiff was prevented from appearing [220] when the suit was called on for sufficient cause. The costs of this appeal will abide the result.

Banerjee, J.—I am of the same opinion. The question before us is whether the present application for setting aside the order made by the Court below on the 13th of June 1898 dismissing the suit was entertainable under section 103 of the Code of Civil Procedure. The Court below has answered that question in the negative, being of opinion that the order was made, not under section 102 of the Code of Civil Procedure, to which alone section 103 is applicable, but under section 370 of the Code to which section 103 has no application. As pointed out in the judgment of the learned Chief Justice the order of the 13th of June 1898 dismissing the suit for default of appearance could not have been made under section 370 of the Code of Civil Procedure, when that section had no application to a case like this, in which no adjudication, declaring the plaintiff an insolvent, had been made.

That being so, the question now arises whether the order dismissing the suit can be treated as one made under section 102 of the Code of Civil Procedure, and whether, even if it could be so treated, it is open to the appellant to treat it as such by his present application, or whether his remedy was not by way of appeal from that order or review of judgment.

The learned Vakil for the respondent contends that, granting that the order could not have been made under section 370 of the Code, under which it purports to have been made, still as it purports to have been made under that section, the only remedy for the present appellant was either by an appeal from that order, or by an application for review of judgment.

There might have been some force in that contention, if the non-applicability of section 370 of the Code to the case could have prevented the order from being what it was, that is to say, if it could be said that because section 370 of the Code was not applicable to the case, therefore the Court ought not to have dismissed the suit. But clearly that could not have been so. The plaintiff failed to appear on the day fixed for the hearing of the case, and the Official Assignee made no application to be allowed [221] to appear in place of the plaintiff, and the only course left open to the Court was to dismiss the suit for default of appearance. The order, therefore, that was made was the only order that could have been made under the circumstances. The only thing that is wrong in the order is, that a wrong section is relied upon in support of it. The proper section to which the Court ought to have referred was section 157 of the Code of Civil Procedure, which would import section 102 into the case. That being so, I do not think that there is any force in the contention urged on behalf of the respondent that the only remedy against the order of the 13th June 1898 was by way of an appeal or by an application for review. As that order was made and must be regarded as having been made under section 102, the application for setting it aside under section 103 of the Code was clearly entertainable.

S. C. G.

Appeal allowed ; case remanded.

[27 Cal. 221]

PRIVY COUNCIL.

The 6th, 7th and 21st July, 1899.

PRESENT :

LORD WATSON, LORD HOBHOUSE, SIR RICHARD COUCH, AND
SIR EDWARD FRY.

Udit Narain Singh and others.....Plaintiffs

versus

Golabchand Sahu and others.....Defendants.

[On appeal from the High Court at Fort William in Bengal.]

*Onus of Proof—Accretion—Right of Riparian Proprietors—Title to alluvial
land contested between villages on opposite banks—Possession—
Prescription—Limitation.*

The plaintiffs were the proprietors of a village on the southern bank, who disputed with those of a village on the northern bank the ownership of alluvial land formed by the Ganges. The current, after having encroached upon the southern bank, went away from that side of the river towards the northern, leaving the tract of alluvial land now in dispute. This appeared on its previous site to the south of the main stream. It was then carried away by diluvion, and again appeared after that. This land was claimed by the plaintiffs, not as part of their old land, but on the strength of their having held possession, adversely and without interruption, for more than twelve years before their dispossession by the defendants, by whom they alleged themselves to have been ousted within less than twelve years before they brought this suit.

[222] The evidence did not support their claim, the burden of proof being on them. It was shown that after the second recession of the river towards the north, and after the reappearance of the alluvial land on the south of the current, the land had been taken by the Government into their possession, and that the latter had made over the greater part of it to the defendants who had since held this part. There had not been shown to have been any actual possession held of the remainder by the plaintiffs, who had thus failed as to the whole to prove the continued possession necessary to their acquiring title.

APPEAL from a decree (30th March 1896) of the High Court, reversing a decree (28th June 1893) of the Subordinate Judge of Patna.

The plaintiffs, appellants, maliks of the village Chitnawan on the southern bank of the Ganges, brought this suit on the 20th June 1892 for the proprietary possession of alluvial land formed in the river. They alleged that they had been dispossessed forcibly in 1889 by the defendants, the maliks of mauza Ganghara on the northern bank, after having held possession since the 26th September 1869, and relied on having acquired title by possession, continuous and adverse, until they had been ousted, their ouster having taken place within twelve years of the date of their suit.

The defences were that (1) the plaintiffs had not held the land in their possession for twelve years, but that, on the contrary, the tract of land was within the boundary of the defendants' revenue-paying mehal; and (2), that the suit was barred by limitation.

These riparian owners contested their right to some hundreds of bighas of land which had been formed by the action of the river. In the course of years

alternate appearance and disappearance of this alluvial deposit had taken place, consequent upon changes in the course of the main stream. These changes and their effect on the site are stated in their Lordships' judgment.

The questions on this appeal were mainly, (1) whether the plaintiffs had proved an uninterrupted possession of the tract for twelve years, thus acquiring title by prescription; (2) whether they had sued within time after ouster by the defendants.

The Subordinate Judge gave the plaintiffs a decree for the greater part of their claim. In his judgment they were entitled to add to their period of possession a prior period during which [223] the land had been occupied by another opponent, viz., the neighbouring village Magarpal, against whom the plaintiffs had obtained a decree in 1869. They had then held till 1879 without interruption; and assuming an ouster to have taken place by the defendants, as the latter alleged, in 1881, they, the plaintiffs, had been in possession for fifteen years ending within twelve years of their filing this suit.

The High Court (TREVELYAN and BEVERLEY, JJ.) on appeal found no sufficient proof by the plaintiffs of their continuous possession for twelve years before their ouster by the defendants. There was a break in the plaintiffs' possession. After the tract of land had been submerged, it again appeared, on the departure of the river's current in the northward direction, on the former site on the south side. Then it apparently had been claimed by the plaintiffs. But this later claim, not shown to have been followed by their obtaining possession, could not be held sufficient. The possession, which dated from 1869, had been interrupted by the diluvion of the disputed land which took place on or about 1874. Again in 1879 the tract had re-appeared on another change in the current towards the north. The Court did not find that there had been on the evidence any effective possession after the land had reached the surface in that year. On the contrary, the evidence showed that the Government having taken possession of the land as diara had made the greater part of it over to the defendants. Even if the possession by the village Magarpal were to be tacked on to the possession of the plaintiffs, continuous possession would not appear to be made out for the period of twelve years. There had been no proof of possession by the plaintiffs in 1881, and no title had been created before the diluvion of 1874. The decree of the Court of First Instance was reversed.

On this appeal by the plaintiffs,—

Mr. J. H. A. Branson, for the Appellants, contended that the right inference had not been drawn from some of the evidence, which, had it received due weight, would have led the High Court to a conclusion in their favour. It should have been found that continued possession was held by the plaintiffs' village for twelve years before they were ousted by the defendants. If the date of [224] that ouster was taken to be no later than 1881, the plaintiffs would still have shown a twelve years' continuous possession, from 1869 to a date in 1881, which was sufficient to entitle them to claim that their possession had been matured by time into a right of property. And also it had been shown that the date of their dispossession was within the twelve years before the date of their filing this suit in June 1892. The facts on which he relied were, mainly, that beginning with the first re-appearance of the alluvial land now claimed on its former site, the plaintiffs had obtained possession after their litigation with the Magarpal village in September 1869. The tract again disappeared in or about 1874-75, being washed away by the returning stream; but during submergence the original site remained the property of the plaintiffs, and there was no change of the right on their part to take possession as soon

as the river receded, and the land was again above the surface of the water. The plaintiffs were not deprived of possession by the defendants at that time, and there was no ouster in the legal sense. The alluvial land was again above the level of the river in 1879, on the same site. The plaintiffs again had possession, and the evidence went to establish that they were not ousted by the defendants till 1881, at the earliest. Thus their claim to be entitled by adverse and continuous possession for twelve years was made good.

He referred to *Radha Gobind Roy v. Inglis*, (1880) 7 C.L.R., 364 : 3 Suth. P.C., 809; *Rains v. Buxton*, (1880) L.R., 14 Ch. D., 537; *Rajkumar Roy v. Gobind Chandra Roy*, (1892) I. L. R., 19 Cal., 660 : L. R., 19 I.A., 146, and *Lee v. Johnston*, (1869) L.R., 1 App. Ca. H. L., 426 (433). He then referred to section 4, Regulation XI of 1825, and to decisions in the Court of Sudder Dewani, giving to that section a wider scope than it should have received on the subject of alluvial accretion to land in rivers previously to 1870. In that year the construction had been corrected by the judgment of the Judicial Committee in *Lopez v. Muddon Thakur*, (1870) 13 Moore's I.A., 467 : 5 B.L.R., 521. But according to the view entertained till about that time, and prevailing in the earlier days of the present case, of alluvion and diluvion, the rule was that, where a river being the boundary between two estates [225] encroached on one bank and receded from the other, the river remained the boundary, and any alluvial accretion to the estate from which the river receded belonged of right thereto. Thus the plaintiffs would, as a matter of course, have followed the receding river taking possession of all the alluvial deposit left by it as far as it receded. The evidence for the plaintiffs was supported by the probability of the case as to their having obtained possession before the diluvion of 1874-75 to the furthest point of the river's recession from their bank. During that diluvion and its effects, till 1879, when the land again appeared, the river having returned to a course northward, the site remained the plaintiffs'. The decision in *Lopez v. Muddon Thakur*, (1870) 13 Moore's I. A., 467 : 5 B. L. R., 521, was that when land had been washed away, and the site had remained capable of being identified, the land newly appearing on that site belonged to the estate which had all through the change comprised that site. Hence the right of the plaintiffs to take possession in 1879 was again in support of their having done so, and of their having remained undisturbed by the defendants till 1881. By this last date their title by non-claim had been acquired, and their ouster, if it had taken place as early as that year, was within twelve years of June 1892, when this suit was filed. He referred to *Rao Kavan Singh v. Bakar Ali Khan*, (1882) I. L. R., 5 All., 1 : L. R., 9 I. A., 99, to section 29 of Act IX of 1871 and section 28 of Act XV of 1877, and to articles 142 and 144 of the latter Act. Also to *Rajrup Koer v. Abul Hossein*, (1880) I. L. R., 6 Cal., 394 (402) : L. R., 7 I.A., 240; *Kally Churn Sahoo v. The Secretary of State for India*, (1881) I. L. R., 6 Cal., 725 (734), and *Manomohun Ghose v. Mathura Mohun Roy*, (1881) I. L. R., 7 Cal., 225 (234).

Mr. C. W. Arathoon, for the Respondents, argued that the evidence had not established that the appellants had possession of the land within the twelve years preceding the suit. And against the facts alleged as the foundation of the plaintiffs' title, their having had possession continued and adverse for more than twelve years before their ouster by the defendants, there were the concurrent findings of two Courts that the Government had [226] taken possession of the disputed land as diara on its appearance above water in 1879, and that the greater part of the land had then been made over by the authorities to the defendants. As to the remainder of the alluvial land, there had

been no clear evidence of the plaintiffs having obtained possession of any of it. The suit had therefore been rightly dismissed by the High Court.

Mr. J. H. A. Branson replied.

Afterwards, on the 21st July, the judgment of their Lordships was delivered by

Sir Edward Fry.—The plaintiffs and present appellants are maliks of the village of Chitnawan, and the defendants and present respondents are maliks of the village of Ganghara.

In 1843 the two villages were separated by the river Ganges, Ganghara lying on the northern, and Chitnawan on the southern, shore of the river.

The lands in question were formerly made over to the maliks of Ganghara, and the plaintiffs do not claim them as part of their old lands; but the propositions on which they rely are these: *first*, that for a period of twelve years they were in possession of the land and thereby acquired title; and, *secondly*, that they brought this action within twelve years of their dispossession by the defendants. The burthen of proving both these propositions rests on the plaintiffs.

In 1859 the Ganges receded northwards, and all that remained of it in its ancient site was a dead stream or stagnant pool known as the Dhab; and between that and the new bed of the Ganges to the north there was formed a diara or mass of alluvial deposit which seems to have emerged from the face of the waters about the year 1860. This diara included the lands now in controversy. When the land emerged it was taken possession of by the maliks of Magarpal, a village to the north-west of Chitnawan. The maliks of Chitnawan thereupon sued those of Magarpal for possession of the land in controversy, apparently founding their claim on the custom of *dhar-dhura*, *i.e.*, a supposed right of a riparian owner to follow the receding bank of the river and to claim all land between the old and the new shore. In this claim the maliks of Chitnawan were successful, and on the 15th June 1869 the High [227] Court affirmed a decree of the inferior Court, whereby they were held entitled to recover 597 bighas of land; and on the 26th September 1869 possession was duly delivered to the plaintiffs' predecessors in title, not only of the decreed lands, but of other land which had during the pendency of the litigation been added to them by the further retreat northward of the river's course. The lands then delivered to the maliks of Chitnawan include the lands now in controversy; and the plaintiffs start with their possession on this 26th September 1869 as the terminus from which they seek to make out their title by possession.

In or about 1874 the course of the river again moved, and this time southwards, and again submerged the lands in question; but they appeared above the waters in or about 1879, and at this point arises the most material issue of fact.

The plaintiffs allege that their possession before the submergence of the lands continued during that submergence; that when the land re-appeared they continued to possess it down to 1889, when they were forcibly dispossessed by the defendants; and that they, the plaintiffs, brought the present action in June 1892, from whence they conclude that they had in the year 1881, *i.e.*, twelve years from 1869, acquired a title by possession, and that they brought their action within less than twelve years from their dispossession in 1889.

The defendants, on the other hand, allege that on the emergence of the land in 1879 Government took possession of it; that on 23rd September 1879 a suit was brought by the maliks of Ganghara against the Government claiming

these lands as part of their village; that a compromise was come to and embodied in a decree of the 25th March 1881; and that, in pursuance of that decree, the defendants were on the 15th of January 1881 put into possession of the larger and northern part of the lands now in question, and that as to the southern portion of the lands, it remained the subject of actual and sometimes of physical controversy between the two villages, and that the plaintiffs have not shown any possession of it upon which they can rely.

These views are substantially accepted by the High Court, who, in reversal of the decree of the Subordinate Judge, dismissed the suit.

[228] Their Lordships, on a consideration of the evidence before them, are of opinion that the plaintiffs have not sustained their case; their Lordships think that the well-known practice of the Government to take possession of land re-appearing in river beds makes the evidence of the defendants as to what took place in 1879 far more probable than the suggestion of the plaintiffs that they entered into actual possession of the land when it re-appeared, and they believe that in fact the Government did enter into possession in 1879; furthermore, their Lordships conclude that in 1881, and probably before the 26th September of that year, the whole of the controverted land to the north of the green line on the Amin's map made in this action and marked D was delivered into the possession of the maliks of Ganghara; and they are further of opinion that, as to the land in question to the south of the green line, the evidence shows not so much that the plaintiffs were in possession as that they claimed so to be. The report of the Special Deputy Collector of the 25th July 1888 shows in what an ambiguous position this southern portion of the land continued to be down to the year 1888.

In coming to the conclusions above stated, their Lordships have treated the maps G and H as evidence in the case. Both these maps were used in the Courts below; and though objected to in the Court of First Instance, it does not appear that they were objected to in the High Court, and in the appellant's case their acceptance in evidence is not mentioned as a reason for the appeal. If the objection to the admission of these maps had been successfully urged in India, other evidence might have been forthcoming to give the required information; and their Lordships cannot now give effect to these objections.

Their Lordships, for the reasons above stated, are of opinion that the appellants have failed to prove a continuous possession for twelve years to give them title, and they will therefore humbly advise Her Majesty to confirm the judgment of the High Court and to dismiss this appeal. The appellants will pay the costs.

Appeal dismissed.

Solicitors for the Appellants: Messrs. T. L. Wilson & Co.

Solicitors for the Respondents: Messrs. Dallemore & Son.

C. B.

NOTES.

[The case in (1902) 29 Cal., 518 P.C. is exactly similar.

This was followed in (1905) 3 C.L.J., 316; (1907) 35 Cal., 961; 6 C.L.J., 735; 12 C.W.N., 127; (1909) 10 I.C., 742; 8 A.L.J., 247.]

[229] APPELLATE CIVIL.

The 13th June, 1899.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE RAMPINI.

Sheo Nath Saran.....Defendant

versus

Sukh Lal Singh and others.....Plaintiffs.*

Oaths Act (X of 1873), section 9—Civil Procedure Code (Act XIV of 1882), section 462—Offer by guardian of minor defendant to be bound by oath of plaintiff.

The offer of the guardian of a minor defendant on behalf of the minor to abide by the deposition to be given by a plaintiff on oath taken in a particular form under the Indian Oaths Act, stands on a very different ground from an agreement or compromise contemplated by section 462 of the Civil Procedure Code. In such a case, the minor is bound by the consent of his guardian, although given without the leave of the Court provided that there is no fraud or gross negligence on the part of the guardian.

Chengal Reddi v. Venkata Reddi, (1889) 1. L. R., 12 Mad., 483, approved of.

THE plaintiffs, Sukh Lal Singh and others, were owners of a share of *mouzah* Dharamwali, valued at Rs. 3,300. The defendant No. 1, Ram Kishun Pershad, and Ganga Bishun Pershad, father of the defendant No. 2, were the owners of a share of *mouzah* Rampur Serai, valued at Rs. 2,000. By registered deeds of exchange (*mabadala*), dated 11th January 1891, the parties mutually transferred the ownership of the properties, with the further stipulation that the defendant No. 1, and the father of defendant No. 2, would pay to the plaintiffs Rs. 1,300, the difference of the values of the properties, with interest. The present suit was instituted to recover from the defendants the said sum with interest. The main defence was that the defendant No. 1 had paid to the plaintiffs on different dates Rs. 1,035 out of Rs. 1,300.

After the defendant No. 1 had been examined, the defendants filed an application making what is called *hassar* on the testimony of the plaintiff No. 3, *i.e.*, agreeing that, if the said plaintiff should [230] swear in accordance with a particular kind of oath that he had or had not received the money said to have been paid, the defendants would abide by the result. The application was made by the defendant No. 1 on his own behalf and as guardian of the defendant No. 2, who was a minor. The plaintiff No. 3 accordingly took that form of oath and swore that he had not received the money; and the first Court decreed the suit.

On appeal by the minor defendant, it was contended before the District Judge that, under section 462 of the Civil Procedure Code, the guardian was not competent to bind the ward in regard to the particular form of oath aforesaid, without the permission of the Court. The plea was overruled and the appeal was dismissed.

The minor defendant then appealed to the High Court.

Babu Jnanendra Nath Bose (for Dr. Ashutosh Mukerjee), for the Appellant.

* Appeal from Appellate Decree No. 2237 of 1897, against the decree of G. W. Place, Esq., District Judge of Sarun, dated the 19th of August 1897, affirming the decree of Babu Dwarkanath Bhattacharji, Subordinate Judge of that District, dated the 11th of November 1895.

Babu *Jadu Nath Kanji Lal*, for the Respondents.

The judgment of the High Court (**Ghose and Rampini, JJ.**) was as follows :—

This appeal arises out of a suit upon a bond executed by the defendant No. 1 and the father of the minor defendant No. 2. The defence was simply one of payment. The guardian of the minor defendant No. 2, having regard to the provisions of section 9 of the Indian Oaths Act of 1873, stated that, if the plaintiff should swear in accordance with a particular form of oath whether he had or had not received the money said to have been paid, he would abide by the result. Accordingly, the plaintiff did take the form of oath required, and deposed that no payment had been made, and that the whole of the money was due to him. The Court of First Instance, thereupon, gave a decree to the plaintiff, and that decree has been affirmed in appeal by the District Judge.

The only point raised before us in this second appeal is that, under section 462 of the Code of Civil Procedure, it was not open to the guardian of the minor defendant, without the leave of the Court, to enter into the agreement that he did enter into, in respect to the decision of the Court depending upon the evidence to be given by the plaintiff. We think, however, that the matter does not really come within the scope of section 462. [231] There was no agreement or compromise properly so called that was entered into by the guardian of the minor defendant. What he did was simply this : The burden of proof of payment being upon him, he cited the plaintiff as a witness, and stated that, if the plaintiff would take a particular form of oath and depose that the whole of the money was actually due to him and was not paid by the defendants, he would abide by the result. That, we think, stands on a very different ground from an agreement or compromise contemplated by section 462. We observe that in the case of *Chengal Reddi v. Venkata Reddi*, (1889) I. L. R., 12 Mad., 483, the Madras High Court has held that in circumstances like these the minor defendant is bound by the consent of his guardian, if there is no fraud or gross negligence on the part of the latter, and although the Court did not sanction the agreement under section 462 of the Code of Civil Procedure. We think that this is a correct exposition of the law ; and taking the same view as the Madras High Court did, we dismiss this appeal with costs.

M. N. R.

Appeal dismissed.

NOTES.

[The minors are bound by the consent of the guardian to an application under sec. 506 C. P. O. 1882 :—(1905) 28 All., 35.

In (1900) 24 Mad., 326 it was held that the agreement to refer there fell within sec. 462.]

[27 Cal. 231]

The 30th May, 1899.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE STEVENS.

Banka Behary Dass.....Plaintiff

versus

Raj Kumar Dass.....Defendant.*

Benami transaction—Suit by real owner against benamdar—Colourable transaction in fraud of creditors—Fraudulent purpose given effect to by claim successfully preferred by the benamdar.

A suit does not lie for a declaration that a conveyance executed by the plaintiff is a *benami* and fictitious transaction, when the alleged transaction has been used to accomplish the fraudulent purpose for which it was intended. The fraudulent purpose is accomplished when the property conveyed being attached by a decree-holder, the *benamdar* is allowed to prefer a claim to it, and the claim is allowed by the Court.

THE plaintiff, Banka Behary Dass, instituted a suit in the Court of the Subordinate Judge of Sylhet for a declaration that a deed of sale, dated the 5th Assar 1296 B. S., of certain immoveable properties, executed by the plaintiff's father in favour of [232] the defendant, Raj Kumar Dass, was a *benami* and fictitious deed. It was alleged in the plaint that the plaintiff's father was largely involved in debt, and one of his creditors began to make attempts to bring to sale the whole of his property. Thereupon, on a representation made to him by the defendant, who was an intimate relation, he was induced to execute the aforesaid *benami* deed of sale for a nominal consideration of Rs. 2,000, which was never paid. The present suit was instituted, because, after the death of the plaintiff's father, the defendant, in July 1893, attempted to set up a claim to some of the properties covered by the deed of sale by applying for mutation of names.

The defendant contended that the plaintiff was estopped by his own act and conduct, and that the *kobala* was a real transaction. He further stated that after the conveyance, two of the creditors of the plaintiff's father, Loke Nath Sarma and Raman Behary Sarma, attached some of the properties conveyed, to which he (the defendant) preferred a claim, and the properties were released from attachment on the 18th September 1890.

The Subordinate Judge, after a remand by the High Court as to the question of the proper court-fee payable, held, following the case of *Goberdham Singh v. Ritu Roy*, (1896) I. L. R., 23 Cal., 962, that the plaintiff was precluded from maintaining the suit, as "the fraud, as set out in the plaint upon which the plaintiff asked the Court to grant him relief, was not only attempted, but actually carried into effect."

The suit was accordingly dismissed.

The plaintiff appealed to the High Court.

Dr. *Rash Behary Ghose*, and *Babu Jay Gobindo Shome*, for the Appellant.
Babu Tara Kishore Chowdhry, for the Respondent.

The judgment of the High Court (*Macpherson and Stevens, JJ.*) was as follows :—

The object of this suit is to obtain a declaration that the *kobala* of the 5th Assar 1296, executed by the appellant's father in favour of the respondent,

* Appeal from Original Decree No. 322 of 1897, against the decree of *Babu Joy Gopal Sinha*, Subordinate Judge of Sylhet, dated the 30th of June 1897.

is a *benami* and fictitious deed not affecting the appellant's right to the property which it purported to [233] convey, and to get such further relief as the Court may think fit to give in confirmation of the appellant's title and possession. The plaint discloses that the deed in question was executed at the respondent's suggestion to secure the property against persons who had obtained decrees against the appellant's father, that it was a purely colourable transaction without consideration or any transfer of possession, and that the respondent was now fraudulently setting up a title to the property. The respondent put in a written statement, in which he claimed title to the property under the *kobala* impugned by the appellant, alleging that there was a good and valid sale for consideration. Admittedly the deed in question was used to give effect to the fraudulent purpose for which, according to the appellant's case, it was executed. The holder of a decree against the appellant's father attached the property; the respondent was allowed to put forward a claim to it on the strength of this deed; and the claim was allowed by the Court. On the allegations in the plaint, coupled with the undisputed facts mentioned, the Subordinate Judge, without taking any evidence, dismissed the suit on the ground that the plaintiff could not maintain it.

In our opinion the decision is right and the appellant cannot ask the Court to relieve him from the consequence of an accomplished fraud. He cannot be allowed to show the true nature of the conveyance which gave a good legal title to the respondent, when the conveyance has been successfully used to give effect to the fraudulent purpose for which it was executed. In none of the cases decided in England and in this country, which have been cited in the argument, except perhaps the case of *Param Singh v. Lahr Mal*, (1877) 1. L. R., 1 All., 403, does it appear that relief has been given in a case such as this; and in the recent cases of *Goberdhan Singh v. Ritu Roy*, (1896) I. L. R., 23 Cal., 962, and of *Kali Charan Pal v. Rasik Lal Pal*, (1894) I. L. R., 23 Cal., 962, note, where there was a colourable conveyance in fraud of creditors, and the fraud had been carried into effect, this Court refused to give the plaintiff relief. The same course was adopted by the Madras Court in *Rangammal v. Venkatachari*, (1895) I. L. R., 18 Mad., 378, and in *Chenvirappa v. [234] Puttappa*, (1887) I. L. R., 11 Bom., 708, WEST and BIRDWOOD, JJ., dissented from the Allahabad case mentioned above.

It is argued that there is no real distinction between cases in which there is a fraudulent conveyance to cheat creditors, but nothing more is done in furtherance of the fraud, and cases in which the fraudulent purpose is effected wholly or partially by means of the fraudulent conveyance; and we have been referred to a number of cases in which it is said that the stricter and broader rule adopted in the earlier cases in this Court, *e. g.*, in *Alooksoondery Goopto v. Horo Lal Roy*, (1866) 6 W. R., 287, and in *Kalee Nath Kur v. Doyal Kristo Deb*, (1870) 13 W. R., 87, has been relaxed and relief given without any such distinction being drawn. The cases referred to are *Luteefoonissa v. Goor Surun Doss*, (1872) 18 W. R., 485 (494); *Sree Nath Roy v. Bindoo Bashinee Debia*, (1873) 20 W. R., 112; *Debia Chowdhraim v. Bimola Soonduree Debia* (1874) 21 W. R., 422; *Gopee Nath Naik v. Jodoo Ghose*, (1874) 23 W. R., 42; *Bykunt Nath Sen v. Goboollah Sikdar*, (1875) 24 W. R., 391, and *Thacoor Prosad v. Baluck Ram*, (1882) 12 C. L. R., 64.

All these cases purport to follow the decisions of the Judicial Committee in *Ram Surun Singh v. Pran Pearee*, (1870) 13 Moore's I. A., 551, and *Oodey Koowur v. Ladoo*, (1870) 13 Moore's I. A., 585; 6 B. L. R., 283. In the former case the plaintiff sued for possession on a conditional deed of sale executed by the defendant, who pleaded that the deed had been merely nominally

executed without any consideration to protect the property against persons claiming it as heirs of her husband. In a previous suit brought by those persons for the property and charging that the conveyance was made to deprive them of their rights, the plaintiff and defendant both asserted that the deed was a good deed for consideration. The suit was dismissed on the sole ground that [235] there was no right of suit in the widow's lifetime. It was contended that the respondent was estopped by her pleadings and admissions in that suit, and could not deny or contest the validity and legal effect and operation of her deed, or set up her own fraud to prevent the operation of it. Their Lordships held that the deed created no estoppel, that it was a case of a common mortgage in which it was open to the mortgagor to deny the receipt of the money and to cut it down to a nominal sum or nothing, and that that being so, and the instrument being relied on by a person out of possession seeking to recover possession through the medium of a foreclosure suit, there was nothing to prevent the defendant from showing the real truth of the transaction. As regards the estoppel by pleading, they said that a pleading by two defendants against the suit of another plaintiff could not amount to an estoppel as between them.

In the latter case, the plaintiff claimed the property as heir of her deceased son Shib Lall, and denied that the latter had been given in adoption to the defendant, who was the widow of Shib Lall's brother. In a previous suit brought by the respondent for herself and as guardian of Shib Lall to redeem a property mortgaged by the plaintiff's husband, it was objected that she was not the guardian of Shib Lall and could not maintain the suit. The plaintiff intervened in that case and put in a petition supporting the adoption and disclaiming any interest in the property. Their Lordships said that if the petition was to prevent the plaintiff from recovering the property, it would only do so either because it operated as a conveyance or a contract to convey, or by way of estoppel; that it could not operate as a conveyance or contract, because the plaintiff had at that time no interest in the property, and never contemplated a conveyance of the right which she now had; that it did not operate as an estoppel, because the fact that the plaintiff professed to resign some supposed interest as heir of her husband could not estop her from setting up her real right as heir of her son when that right accrued; and they added that there was no consideration, and no misrepresentation to the defendant, who knew the actual facts and did not alter her position in any way.

These were not therefore cases of a fraudulent convey-[236]ance by a deed of absolute sale, to which effect had been given in aid of the intended fraud, and they furnish, we think, no authority for the broad contention now put forward. It is unnecessary to allude in detail to the cases cited from the Weekly Reporter; the facts are not fully stated, and in none of them do the facts appear to be similar to the facts of this case. In *Luterfoonnissa v. Goor Surun Dass*, it was held, citing the case of *Ram Surun Singh v. Pran Pearee* (1870) 13 Moore's I. A., 551, that a party against whom the admission of a deed of gift is sought to be used may explain the matter and show the real nature of the transaction. In *Sreenath Roy v. Bindoo Bashinee Debia*, the question was whether a jote had a real existence, or was, as the defendant contended, only colourably created. It was held that the defendant was not stopped by a statement of the person from whom he derived title by purchase from showing that the jote was only colourably created, and the two cases in the 13th volume of Moore were cited as an authority. In *Debia Chowdhraim v. Himola Soonduree Debia*, the defence in substance was that the persons from whom the plaintiff derived title by purchase were really the *benamdars*

of the defendant, who was the real owner. It was held again, citing the cases in the 13th volume of Moore, that the defendant was not estopped from showing the true nature of the transaction by some admission which she had made in a previous suit. In *Gopeenath, Naik v. Jodoo Ghose*, the facts are not at all stated, but MARKBY and MITTER, JJ., said they adopted the view of the law taken in *Debia Chowdhraim v. Bimola Soonduree Debia*. In *Bykunt Nath Sen v. Goboolah Sikdar*, there is also on report of the facts, but MARKBY, J., said that he dissented from the Judge's statement that "it is a settled principle that when a father makes a fictitious sale to cheat his creditors, neither he nor his heirs can afterwards impugn its validity;" and he added that this principle was inconsistent with the decisions in the 13th volume of Moore and in the 21st volume of the Weekly Reporter. In none of those cases does it appear that the plaintiff was asking for relief against his own fraudulent conveyance which had been successfully used to defraud a creditor. It is true that in *Sreenath Roy v. Bindoo Bashnee* [237] *Debia*, and in *Debia Chowdhraim v. Bimola Soonduree Debia*, Sir RICHARD COUCH made some remarks of a general character, which must, however, be taken in connection with the facts of the particular case before him. In the former case he said that the questions "to what extent a person shall be at liberty to allege and prove fraud in a matter to which he was a party, or shall be at liberty to allege and prove that any admissions made by him were made with a fraudulent purpose and were not true, and also to what extent persons claiming under any one who had made such admissions will be at liberty to do the same," had been much discussed in the Courts in England. Then he said that in this respect there was no difference between the law in England and the law in India, and for the law in England he cited *Symes v. Hughes*, (1870) L. R., 9 Eq., 475, and said that the law in India had been settled in the case reported in the 13th volume of Moore, page 551. In *Symes v. Hughes*, which Sir RICHARD COUCH cited in both the cases referred to, Lord ROMILLY, M. R., said: "Where the purpose for which the assignment was given is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object, when the assignment was executed, does not deprive the assignor of his right to recover the property from the assignee, who has given no consideration for it;" and he added that in that case no harm had been done to any creditor, and that the suit was now being prosecuted to enable the creditor to recover something. We cannot suppose that Sir RICHARD COUCH would have cited this case as stating the law in England without recognising the distinction referred to in it.

The case which at first sight seems most in the appellant's favour is that of *Thacoor Prosad v. Baluck Ram*, (1882) 12 C. L. R., 64. There Thacoor Prosad, who was a member of a family to which apparently the Mitakshara rules applied, claimed as exclusively his a property which had been acquired in his name. The defendants were the purchasers of the rights and interests of the other members of the family. Thacoor Prosad had mortgaged the property, and to defeat the claims of the mortgagee he and the other members of the family set up in execution proceedings a partition deed by which no part of the property in ques-[238]tion had been allotted to Thacoor Prosad. It was found that the partition deed was not a real transaction, and that the property had been acquired in Thacoor Prosad's name for all the members of the family. MITTER and MACLEAN, JJ., held, citing the case in the 13th volume of Moore, page 551, that Thacoor Prosad was entitled to show the real character of the partition deed in the suit between himself and the purchasers of the rights of the persons whose fathers had joined with him in setting it up. The defendants had not, however, acquired the interests of Thacoor Prosad, the

latter had not parted with his interest, and it was found that although not entitled to the whole property, he was entitled to his share as a member of the family.

The English cases cited do not help the appellant. In *Bowes v. Foster*, (1858) 2 H. & N., 779; 27 L. J., Ex., 262, there was a pretended sale, but the plaintiff had not parted with the title to the goods and nothing further was done in furtherance of the intended fraud. So also in *Taylor v. Bowers*, (1876) L. R., 1 Q. B. D., 291, the title to the goods was still in the plaintiff, and, as Lord Justice JAMES said, he was not obliged to state a fraud of his own as part of his title. Nothing moreover had been done to carry out the fraudulent or illegal object beyond the delivery of the goods.

The argument that in the case of a fraudulent conveyance there is no distinction between the cases in which the fraudulent object has been carried into execution and the cases in which it has not, might, if sound, be a good ground for holding that the Court would not give relief in either case, but not for holding that it would give relief promiscuously in both. It is said that by refusing relief the Court is aiding the defendant to commit a fraud; but this is a lesser evil than giving the plaintiff relief against a fraud which he had successfully perpetrated. He is asking the Court to undo what he did for a fraudulent purpose by means of a fraudulent conveyance which was used to accomplish that purpose, and the authorities, we think, show that the Court will not give him any relief.

It is said that the money due under the decree referred to at [239] the commencement of this judgment was afterwards paid, that the creditor received Rs. 5,000 in satisfaction of his claim for Rs. 8,000 and gave a receipt in full, and that the plaintiff ought to have been allowed to give evidence in support of his case. We think this makes no difference, and if the plaintiff would not succeed on the facts as stated, it was not necessary to go into evidence. The appeal is dismissed with costs.

M. N. R.

Appeal dismissed.

NOTES.

[The distinction between executed fraud and executory fraud is well settled :—(1908) 31 Mad., 485; (1906) 33 Cal., 967; (1903) 8 C.W.N., 620; (1900) 28 Cal., 370.]

[27 Cal. 239]

The 7th June, 1899.

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE HANDLEY.

Rachhea Singh.....Defendant

versus

Upendra Chandra Singh.....Plaintiff.

Rent, Suit for—No alternative claim for use and occupation—Damages for use and occupation—Variance between pleading and proof—Ferry tolls.

In a suit for rent, when no alternative claim is made for use and occupation, no damages can be decreed for use and occupation.

* Appeal from Appellate Decree No. 2198 of 1897, against the decree of Babu Jogesh Chundra Mitter, Subordinate Judge of Bhagulpur, dated the 22nd of May 1897, reversing the decree of Babu Bankim Chunder Mitter, Munsiff of Madhepura, dated the 24th of July 1896.

Lukhee Kanto Dass Chowdhry v. Sumeeruddi Lusker, (1874) 13 B. L. R., 243 : 21 W. R., 208, and *Surendra Narain Singh v. Bhai Lal Thakur*, (1895) I. L. R., 22 Cal., 752, referred to and followed.

The rent law in Bengal does not apply to ferry tolls.

Nityanund Ghose v. Kissen Kishore, (1864) W. R., Sp. No. Act X, 82, and *Lalun Monee v. Sona Monee Dabee*, (1874) 22 W. R., 334, distinguished. *Hari Mohan Sirkar v. Moncrieff*, (1870) 9 B. L. R., Ap. 14, applied.

THE plaintiff was the proprietor of a $3\frac{1}{2}$ annas share of the taluq Gangapur in which certain ghats are situated. The defendant took a lease of the $12\frac{1}{2}$ annas share of the ghats from the plaintiff's co-sharer, Krishto Kamini Dasi, but the defendant used and occupied the 16 annas share and collected the whole 16 annas of the ferry tolls. The plaintiff sued the defendant for the rent of his $3\frac{1}{2}$ annas share. In the plaint no alternative claim was made for use and occupation.

[240] The Court of First Instance, finding that there was no lease between the plaintiff and the defendant, dismissed the suit.

The plaintiff appealed from this decision, and the Lower Appellate Court found that the defendant collected the whole 16 annas of the ferry tolls, and that though the defendant entered into no contract with the plaintiff for the collection of these tolls and the payment to him of rent, yet he had made himself the plaintiff's tenant in respect of these ghats by use and occupation. The Subordinate Judge accordingly gave the plaintiff a decree for the rent sued for.

From this decision the defendant appealed to the High Court.

Babu Saroda Churn Mitter, and Babu Haro Coomur Mitter, for the Appellant.—The plaintiff is not entitled to compensation for use and occupation in a suit for rent, especially when he has not asked for it in the plaint. *Lukhee Kanto Dass Chowdhry v. Sumeeruddi Lusker*, (1874) 13 B. L. R., 243 : 21 W. R., 208, and *Surendra Narain Singh v. Bhai Lal Thakur*, (1895) I. L. R., 22 Cal., 752, lay this down.

Babu Norendra Chundra Bose for the Respondent.—Though there is no express contract, yet there is evidence that the plaintiff approved of what his co-sharer did. [RAMPINI, J.—But still there may be no privity.] The defendant held the ghats and therefore the rent law is applicable; and it was laid down in *Nityanund Ghose v. Kishen Kishore*, (1864) W. R., Sp. No. Act X, 82; and *Lalun Monee v. Sona Monee Dabee*, (1874) 22 W. R., 334, that in rent suits, though there is no contract to pay rent, yet rent must be paid for use and occupation.

Babu Saroda Churn Mitter in reply.—The cases cited for the appellant are cases on agricultural land and have no bearing on this case.

The judgment of the High Court (Rampini and Handley, JJ.) was as follows :—

The plaintiff sues the defendant for the rent of certain ferry ghats. The plaintiff is proprietor of a $3\frac{1}{2}$ annas share of the taluq Gangapur, in which the ghats are situated. The defendant [241] admits that he took a lease of the $12\frac{1}{2}$ annas share of these ghats from the plaintiff's co-sharer Krishto Kamini Dassi, and contends that he and the plaintiff's servants used to collect the ferry tolls in the proportion of $12\frac{1}{2}$ and $3\frac{1}{2}$ annas. The Subordinate Judge has, however, found that the defendant collected the whole 16 annas of the ferry tolls during the period in suit. He further finds that the defendant entered into no contract with the plaintiff for the collection of these tolls and the payment to him of rent, but nevertheless holds that he has made himself the plaintiff's tenant in respect of these ghats by use and occupation, and has accordingly given the plaintiff a decree for the rent sued for.

The defendant appeals, and on his behalf it is urged that the rulings upon which the Subordinate Judge relies are rulings under the rent law and relate to the rent of agricultural land. The rulings in question are *Nityanund Ghose v. Kissen Kishore*, (1864) W. R., Sp. No. Act X, 82, and *Lalun Monee v. Sona Monee Dabee*, (1874) 22 W. R., 334. On the other hand, the pleader for the appellant cites the cases of *Surendra Narain Singh v. Bhai Lal Thakur*, (1895) I. L. R., 22 Cal., 752, and *Lukhee Kanto Dass v. Sumeeruddi Lusker*, (1874) 13 B. L. R., 243 : 21 W. R., 208, and contends that under them the plaintiff is not entitled to compensation for use and occupation of the ferry ghats, as he did not ask for such compensation in his plaint. It is clear, we think, that the rulings relied on by the Subordinate Judge do relate to agricultural lands and lay down how an implied tenancy in respect of such land may be constituted. But the subject of the present suit is not agricultural land. The suit relates to ferry tolls, to which it would appear the provisions of the rent law are not applicable : [see *Hari Mohan Sirkar v. Moncrieff*, (1870) 9 B. L. R., Ap. 14]. The cases of *Nityanund Ghose v. Kissen Kishore*, (1864) W. R., Sp. No. Act X, 82, and *Lalun Monee v. Sona Monee*, (1874) 22 W. R., 334, therefore, would not seem to justify the decree which the Subordinate Judge has given the plaintiff in this suit.

[242] Then, in the case of *Lukhee Kanto Dass Chowdhry v. Sumeeruddi Lusker*, (1874) 13 B. L. R., 243 : 21 W. R., 208, it was held that if a landlord sued for rent, he could not recover damages for use and occupation unless he made a claim to this effect in his plaint. This case was followed in that of *Surendra Narain Singh v. Bhai Lal Thakur*, (1895) I. L. R., 22 Cal., 752, which was a suit for the rent of a *hit*, and in which it was found that there was no lease, and consequently the plaintiff could not recover rent. The learned Judges who decided this case declined to allow the plaintiff a decree for damages for use and occupation, as to do so, it was said, would amount to allowing an amendment of the plaint in such a way as to convert a suit of one character into a suit of another and an inconsistent character.

The plaintiff in this suit, it is evident, never asked for anything but rent, and that being so, we consider the Subordinate Judge was not justified in giving him the decree he has given him. We accordingly allow this appeal and set aside the decree of the Subordinate Judge with costs.

M. R. M.

Appeal allowed.

NOTES.

[The landlord is not entitled to compensation for use and occupation in the alternative in the absence of a claim in the plaint : (1909) 10 C.L.J., 538 ; 17 C.W.N., 311.

In (1910) 7 M.L.T., 419, this was distinguished on the facts of the case.]

[27 Cal. 243]

The 25th July, 1899.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Ram Chandra Mukerjee and others.....Defendants

versus

Ranjit Singh.....Plaintiff.*

Limitation Act (XV of 1877), Sch. II, arts. 11, 118 and 124—Suit for possession of immoveable property on a declaration that a certain adoption was invalid—Civil Procedure Code (Act XIV of 1882), sections 244, 281—Effect of claim preferred on behalf of a minor by the manager without the sanction of the Court of Wards—Court of Wards Act (Bengal Act IX of 1879), section 55—Gift of immoveable property without delivery of possession, where the donor supports it, whether valid—Question in execution of decree—Right of suit.

An order which was passed during his minority is not binding upon a person whose estate is under the management of the Court of Wards, if the proceeding in which it was passed was not instituted by the manager [243] with the sanction of the Court of Wards, i.e., of the Commissioner to whom the Court of Wards delegated its authority to grant such sanction.

In a suit brought by the plaintiff, as *shebait* of an idol, for recovery of possession of certain immoveable properties, or in the alternative in his own right as an heir to the last full owner, on a declaration that certain execution proceedings which were taken against a person who was not the legally adopted son of the last full owner, and therefore the sales held therein were not binding upon him, the defence (*inter alia*) was that the suit was barred by limitation under articles 11 † and 118, ‡ schedule II, of the Limitation Act.

Held, that inasmuch as the order under section 281 of the Civil Procedure Code was passed during the plaintiff's minority, and as the proceeding in which the said order was

* Appeals from Original Decrees Nos. 114 and 134 of 1897, against the decree of Babu Bipradas Chatterjee, Subordinate Judge of Moorshidabad, dated the 22nd of December 1896.

† [Art. 11 :—

Description of Suit.	Period of limitation	Time from which period begins to run.
By a person against whom an order is passed under sections 280, 281, 282 or 335 of the Code of Civil Procedure, to establish his right to, or to the present possession of, the property comprised in the order.	One year	The date of the order.]

‡ [Art. 118 :—

To obtain a declaration that an alleged adoption is invalid, or never in fact took place.	Six years	When the alleged adoption becomes known to the plaintiff.]
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passed was not instituted by the manager with the sanction of the Court of Wards, the suit was not barred under article 11, schedule II, of the Limitation Act, although it was brought more than one year after the claim was rejected.

Held, also, that article 118, schedule II, of the Limitation Act did not apply to a suit for possession of immoveable property, though it might be necessary for the plaintiff to prove the invalidity of an adoption.

Jagannath Prasad Gupta v. Runjit Singh, (1897) I. L. R., 25 Cal., 354, referred to.

A gift of immoveable property, followed shortly afterwards (pursuant to the terms of the gift) by mutation of names without any objection being made by the donor, was not invalid for the mere reason that the donor did not deliver actual possession.

Kalidas Mullick v. Kanhaya Lal Pundit, (1884) I.L.R., 11 Cal., 121; and *Dharmodas Das v. Nistarini Dasi*, (1887) I. L. R., 14 Cal., 446, referred to.

In a suit brought upon a mortgage bond after the death of the executant, who was the widow of the last full owner of the properties mortgaged, the present plaintiff, who was a minor at that time, appeared, represented by the manager under the Court of Wards and denied the widow's right to mortgage the properties in dispute. He subsequently withdrew his defence, but remained a party on the record, and a decree was made in his presence. At an execution proceeding taken against the minor son of the alleged adopted son of the last full owner without any notice to the present plaintiff, some of the mortgaged properties were sold. In a suit by him (the plaintiff) for recovery of possession of the said properties, the defence was that the suit was not maintainable by virtue of the provisions of section 244 of the Civil Procedure Code.

Held, that inasmuch as the plaintiff was a party to the suit in which the decree was passed, his remedy, if he could object to the sale, was by an application under section 244 of the Civil Procedure Code, and not by a separate suit.

[244] THESE appeals arose out of a suit for redemption of certain properties after declaration of the plaintiff's title to them as *shebait* of an idol, or in the alternative in his own right as an heir to the last full owner. The allegation of the plaintiff was that he was the great-grandson by adoption of the brother of Kumar Ram Chand's father, and that the disputed properties, which were four in number, belonged to the Nashipur Raj, and while being held by two of the plaintiff's ancestors in the Raj, namely, the said Kumar Ram Chand and his cousin Raja Kishen Chand, were made over to their cousin's widow Rani Jorao Kumari; that by a registered *ikrar*, dated the 12th Kartic 1266 B. S., Kumar Ram Chand dedicated (amongst others) his half share of the said properties (which was the subject-matter of the present suit) to the idol, appointing his wife Rani Anandamoyi *shebait* of the said idol; that on the death of Rani Jorao Kumari and of Kumar Ram Chand, Rani Anandamoyi, his widow, held possession of the disputed property as a *shebait*; that Rani Anandamoyi in 1288 B. S., being under the legal necessity of making a loan for the said idol, borrowed certain sums of money from defendants 3 and 7, and executed a usufructuary mortgage which the plaintiff was entitled to redeem; that in execution of a money decree obtained by one Bidyadhar Pandit against Rani Anandamoyi, properties Nos. 1 and 2 were sold and purchased by defendant No. 1, property No. 3 was purchased by defendants Nos. 3, 4, 5 and 6 through their agent one Sadanunda Chowdhry, and property No. 4 was purchased by Bidyadhar Pandit himself; that the said decree and the sale and the proceedings in connection therewith were collusive and fraudulent, and that the properties being *debutter* could not be sold for the debts, if any, of Rani Anandamoyi; that the defendants Nos. 1, 3, 4, 5 and 6 derived no right title or interest in those properties by their purchases, especially as the execution proceedings were carried on against one Hari Singh, said to be the son of one Sreenarayan Singh

who was insane, and who was not the legally adopted son of Rani Anandamoy ; that subsequently two of the properties in dispute were again brought to sale in execution of a decree obtained by one Bishunchand Dhudhuria on an invalid mortgage said to have been executed by Rani Anandamoyi and were purchased by some of the defendants ; that these purchases were all invalid, and that the plaintiff, as the great-grandson by adop-[245]tion of Kumar Ram Chand's father, became entitled to the properties in dispute as heir of Kumar Ram Chand and Rani Anandamoyi, since the death of the latter on the 27th of September 1883, as the *shebait* of the idol, or if the properties were held not to constitute a valid *debutter*, then in his own right.

The defence in substance mainly was that the suit was barred by limitation, inasmuch as it was brought more than one year after the rejection of the claim which was made to the properties in dispute on behalf of the plaintiff, upon those properties being attached in execution of Bidyadhur Pandit's decree, and also because Rani Anandamoyi held adverse possession for twelve years ; that the properties in dispute had never been really and validly dedicated to the idol, but were held and owned by Rani Anandamoyi as her *stridhan* ; that the plaintiff was not the heir of Rani Anandamoyi or Kumar Ram Chand, but Sreenarayan Singh was the heir of those two persons as the adopted son, and after him his son Hari Singh became entitled to those properties ; that the proceedings in execution of Bidyadhur Pandit's decree and of Bishun Chand's decree were properly held, and the sales in execution of those decrees were valid and binding ; and that the plaintiff was not entitled to redeem the mortgage before the expiry of the lease in favour of the defendant No. 3.

The Subordinate Judge held that the suit was not barred by limitation, the adverse order in the claim case not being binding on the plaintiff, the claim having been preferred on his behalf by the manager under the Court of Wards, without the sanction of the Court of Wards ; that the properties in dispute had been validly dedicated to the idol ; that the plaintiff was entitled to be the *shebait* ; that the adoption of Sreenarayan was invalid by reason of want of authority on the part of Rani Anandamoyi from her husband ; that the proceedings in execution of the decrees of Bidyadhur Pandit and Bishun Chand were valid, but could not affect the properties in dispute which were *debutter* ; and that the plaintiff was entitled to redeem the mortgage to defendants 3 and 7, notwithstanding the non-expiry of the term of usufructuary mortgage, upon payment of the full amount due, and he accordingly gave the plaintiff a decree.

[246] Against this decision both parties appealed to the High Court.

Babu Sharoda Churn Mitter, and Babu Promotho Nath Sen, for the Appellants in appeal No. 114 of 1897.

Dr. Rash Behary Ghose, Babu Lal Mohan Dass, Babu Satis Chundra Ghose, and Babu Sridhur Dass Gupta, for the Respondent in that appeal.

Babu Lal Mohan Dass, Babu Satis Chunder Ghose, and Babu Sridhur Dass Gupta, for the Appellant in appeal No. 134 of 1897.

Babu Saroda Churn Mitter, and Babu Promotho Nath Sen, for the Respondent.

The judgment of the High Court (Banerjee and Stevens, JJ.) was as follows :—

These two appeals arise out of a suit brought by the plaintiff Raja Ranjit Singh of Nashipur, for declaration of his title to certain immoveable properties and for recovery of possession of the same as *shebait* of the idol Sri Sri Lakshmi Narain Deb Thakur, or if the properties are found not to be *debutter*

properties, then in the alternative in his own right as the heir of Kumar Ram Chand and his widow Rani Anandamoyi. The material allegations upon which the claim is based are, that the properties in suit which belonged to Kumar Ram Chand and were held by Rani Jorao Kumari, a female member of his family, for her maintenance, were dedicated by him by a deed dated the 4th of Kartick 1266, to the god Sri Sri Lakshmi Narain; that on the death of Jorao Kumari and of Kumar Ram Chand shortly after, Rani Anandamoyi, his widow, held possession of the properties as a *shebait*; that Rani Anandamoyi in 1288, as *shebait*, borrowed certain sums of money from defendants 3 and 7, and executed a usufructuary mortgage which the plaintiff was entitled to redeem; that in execution of a collusive decree obtained by one Bidyadthur Pandit against Rani Anandamoyi the properties in dispute were fraudulently brought to sale after substituting in place of Rani Anandamoyi one Hari Singh, son of Sreenarayan Singh, who was not the heir and legal representative of Rani Anandamoyi, and were purchased by defendants Nos. 1 to 6; that subsequently two of the properties in dispute were again brought [247] to sale in execution of a decree obtained by one Bishun Chand Dhudhuria on an invalid mortgage said to have been executed by Rani Anandamoyi, and were purchased by some of the defendants; that these purchases were all invalid; and that the plaintiff, as the great-grandson by adoption of the brother of Kumar Ram Chand's father, has become entitled to the properties in dispute as the heir of Kumar Ram Chand and Rani Anandamoyi since the death of the latter on the 27th of September 1883, as *shebait* of the idol Sri Sri Lakshmi Narain, or if the properties he held not to constitute a valid *debutter*, then in his own right.

The defendants put in separate written statements, and their defence, so far as it is necessary to consider it in these appeals, in substance was that the suit is barred by limitation, because it is brought more than one year after the rejection of the claim which was made to the properties in dispute on behalf of the plaintiff, upon those properties being attached in execution of Bidyadthur Pandit's decree, and also because Rani Anandamoyi held adverse possession of the same for twelve years; that the properties in dispute had never been really and validly dedicated to the idol Sri Sri Lakshmi Narain, but were held and owned by Rani Anandamoyi as her *stridhan*; that the plaintiff is not the heir of Rani Anandamoyi or Kumar Ram Chand, and Sreenarayan Singh was the heir of those two persons as their adopted son, and, after him his son, Hari Singh, became entitled to those properties; that the proceedings in execution of Bidyadthur Pandit's decree and of Bishun Chand's decree were properly held, and the sales in execution of those decrees were valid and binding; and that the plaintiff was not entitled to redeem the mortgage before the expiry of the lease in favour of defendant No. 3.

The Court below has held that the suit is not barred by limitation, the adverse order in the claim case not being binding on the plaintiff, as the claim was preferred on his behalf by the manager under the Court of Wards without the sanction of the Court of Wards; that the properties in dispute had been validly dedicated to the idol Sri Sri Lakshmi Narain; that the plaintiff was entitled to be the *shebait*; that the adoption of Sreenarayan was invalid by reason of want of authority on the part of Rani Anandamoyi from her husband; that the proceedings in execution of the decree of Bidyadthur Pandit and Bishun Chand were valid, but could [248] not affect the properties in dispute which were *debutter*; and that the plaintiff was entitled to redeem the mortgage to defendants Nos. 3 and 7, notwithstanding the non-expiry of the term of the

usufructuary mortgage, upon payment of the full amount due; and it has accordingly given the plaintiff a decree.

Against that decree both parties have appealed, the appeal of the defendants being appeal No. 114, and that of the plaintiff appeal No. 134 of 1897.

In the appeal of the defendants it is contended, *first*, that the Court below is in error in holding that the properties in dispute were *debutter* properties; *secondly*, that the Court below is wrong in holding that the suit was not barred by limitation under article 11 of the 2nd schedule of the Limitation Act; *thirdly*, that the Court below ought to have held that the suit was barred by limitation by reason of Rani Anandamoyi having held possession of the properties in suit in her own right for more than twelve years; *fourthly*, that the Court below is wrong in holding that the adoption of Sreenarayan was invalid, whereas it ought to have held that it was valid, or that, at any rate, the plaintiff's right to question that adoption was barred by limitation; *fifthly*, that the Court below ought to have held that the plaintiff's claim as heir of Kumar Ram Chand was not made out; *sixthly*, that the Court below ought to have held that the proceedings taken and the sales held in execution of the decrees of Bidyadhur Pandit and Bishun Chand Dhudhuria were binding on the plaintiff; and, *seventhly*, that the Court below ought to have held that the plaintiff was not entitled to recover possession before the expiry of the term of the usufructuary mortgage.

In the appeal of the plaintiff the only point urged is that the Court below is wrong in making the plaintiff liable for certain collection charges and interest for lapse of instalments under the mortgage which he is declared entitled to redeem.

We shall consider the appeal of the defendants first.

The first contention is sought to be based upon three grounds, namely, *first*, that the deed of dedication is not proved; *second*, that the endowment, even if otherwise good, must be invalid under the Hindu law, as the properties endowed were at the time of dedica- [249] tion in the possession of Rani Jorao Kumari and the gift could not have been accompanied by possession; and, *third*, that even if the deed of dedication be genuine, it is fictitious and colourable only.

In support of the first ground, it is urged that the deed does not bear the signature of Kumar Ram Chand, but only bears his seal; that it was not produced in any case before the present; and that, taking the evidence of the plaintiff's witness Dhananjoy Mitter, who says Rani Jorao Kumari died a short time after the death of Kumar Ram Chand, along with the statement in paragraph 5 of the plaint that Rani Jorao Kumari died in Kartick, the registration of the deed must have taken place after Kumar Ram Chand's death.

But we are of opinion that these considerations are not sufficient to outweigh the effect of the direct evidence in favour of the deed, namely, the evidence of the witness Dhananjoy Mitter, whom the Court below considered a truthful witness, and whom we see no reason to disbelieve on this point, when that direct evidence is taken in connection with the fact that the deed was registered within three months after its execution, and was referred to in an application by Rani Anandamoyi to the Collector for mutation of names. As for the statement of the witness Dhananjoy Mitter that Rani Jorao Kumari died after Kumar Ram Chand, that must obviously be a mistake, as will appear from the deposition of Hanuman Das. Nor is the second ground urged in support of the first contention valid. It is by no means clear that under the Hindu law delivery of possession is absolutely necessary to make a gift of immoveable property valid. But it is unnecessary to consider that point in this case, as the gift was followed within a short time by mutation of names pursuant to its terms upon

the death of Rani Jorao Kumari, without any objection from the donor. The view we take is in accordance with that taken in the cases of *Kali Das Mullick v. Kanhay Lal Pundit*, (1884) I. L. R., 11 Cal., 121 : L. R., 11 I. A., 218, and *Dharmodas Das v. Nistarini Dasi*, (1887) I. L. R., 14 Cal., 446.

But we are of opinion that the first contention is entitled to succeed on the last of the three grounds urged in its support, namely, that the dedication was nominal and colourable only, [250] made with a view to protect the property covered by it against the claims of creditors.

About the time of the execution of the deed of dedication, Kumar Ram Chand was heavily involved in debt, as is clear from the evidence of Dhananjoy Mitter, one of the plaintiff's own witnesses, and of Hanuman Das, who was cited by both parties, and from the application by Mehdi Ali for execution of decree against Kumar Ram Chand, dated the 27th June 1859 (Ex. A 28) ; and the Court below is wrong in holding that the fact of Rani Anandamoyi having purchased Mehdi Ali's decree shortly after the death of Kumar Ram Chand is sufficient to remove the doubt arising against the *bona fide* character of the endowment. The learned Subordinate Judge does not refer to the circumstances under which that decree was purchased by Rani Anandamoyi and to the transactions that followed her purchase of the decree ; and they are, so far as may be gathered from the evidence on the record, of importance in the determination of the present question.

The deed of dedication was executed when Mehdi Ali's application for execution of his decree for realization of upwards of one lakh of rupees in execution case No. 100 of 1859 was pending ; see Exhibits A 28 and A 12. This last-mentioned application was struck off in September 1860 ; and the decree was purchased by Rani Anandamoyi *benami* in the name of Kali Kumar Guha. What led to the purchase of the decree by her is not very clear ; but it appears from the recital in the bond (Ex. A 40), which she executed in favour of defendant No. 3, and which the plaintiff admits he is bound to pay off, that she purchased the decree after the endowment had been held void, and the properties covered by it ordered to be sold in execution of that decree. This recital may not be strictly binding on the plaintiff ; but what followed clearly shows that it is true.

For after the purchase of the decree by Rani Anandamoyi, who then became both judgment-debtor and judgment-creditor, what she did was not to enter up satisfaction, but to take out execution in the name of her *benamdar*, to bring to sale the properties covered by the deed of endowment, and to purchase them *benami* in the name of Kali Kumar Guha and to take a conveyance (Ex. 23) in December 1864 from Kali Kumar Guha. These fictitious and [251] collusive transactions are wholly incompatible with the theory of the endowment being a real and *bona fide* one, and become intelligible only if the dedication was made with the object of protecting the properties against the claims of creditors.

We may add that the deed of dedication itself bears evident marks of its being the result of such a design. For the deed says that the properties mentioned in it are dedicated to the idol Sri Sri Lakshmi Narain, because the donor had appropriated to his own expenses the sum of Rs. 8,000 belonging to the idol, and he had no other property out of which to pay off the debt due to the idol. Now this statement is evidently false, as there is no reliable evidence in support of it ; and the object of inserting such a statement was obviously to make the dedication appear to be a transfer for value, and therefore valid against creditors.

In dealing with the question whether an endowment is real or nominal only, the manner in which the dedicated property is held and enjoyed is the

most important point for consideration. Now in the present case there is no sufficient and reliable evidence to show how, during the few months for which the donor lived after the dedication, the income of the properties in dispute was spent; nor is there any such evidence in respect of any period subsequent to his death. It is true there is some vague oral evidence that Rani Anandamoyi all along performed the worship of the idol Sri Sri Lakshmi Narain; but the idol being a family idol, she would perform its worship, as every Hindu does, whether there is any endowment in favour of the idol or not. No accounts have been filed such as a rich and respectable family like that of the donor is expected to have, showing how the income of the properties in dispute was spent. On the contrary, Rani Anandamoyi, though she got her name registered in the Collectorate in respect of these properties as *shebait*, brought them to sale in execution of Mehdi Ali's decree through her *benamdar* Kali Kumar Guha, purchased them herself, and then mortgaged them in several instances, treating them as her own. It is true, as has been pointed out by the Privy Council in *Juggutmoheene Dossee v. Sookheemonee Dossee*, (1871) 14 Moore's I. A., 289: 10 B. L. R., 19: 17 W. R., 41, that a mere abuse of trust by a trustee for the time being cannot affect the validity of an endowment [252] where there is no question about its being a real and valid endowment originally; but when the question is whether an endowment is real or fictitious, the mode of dealing with it by the donor and his successors must be an important matter for consideration.

Lastly, we find that after Rani Anandamoyi's death, and after the plaintiff had attained majority, when the properties in dispute were attached in execution of a decree against Rani Anandamoyi or her legal representatives, the plaintiff claimed them in his own right as the heir of Kumar Ram Chand, without making any mention of the properties being *debutter* (see. Ex. D). For all these reasons we are of opinion that this endowment is not a real one, but is only colourable and fictitious.

The second contention of the appellants is, in our opinion, not well founded. It is quite true that a claim was put in on behalf of the plaintiff by the manager of his estate under the Court of Wards, and that claim was disallowed under section 281 of the Code of Civil Procedure, and this suit is brought more than one year after the rejection of the claim; but the question is whether the claim was preferred by the manager with the sanction of the Court of Wards, that is, of the Commissioner, to whom the power of granting such sanction has been delegated, so as to make the order passed upon it binding on the plaintiff. Section 55 of the Court of Wards Act (Bengal Act IX of 1879) enacts that no suit shall be brought on behalf of any ward by a manager unless the same be authorised by some order of the Court of Wards, and the term "suit" in this section has been held in the case of *Bhoopendro Naram Dutt v. Baroda Prosad Roy Chowdhry*, (1891) I. L. R., 18 Cal., 500, to include miscellaneous proceedings, so that the order in the claim case upon which the plea of limitation is based can be binding on the plaintiff only if the proceeding in which it was passed was instituted by the manager with the sanction of the Court of Wards. This the learned Vakil for the appellants does not dispute. But he argues that in the absence of evidence to the contrary, the presumption should be in favour of the claim case having been properly instituted. Granting that that is so, we have such evidence furnished by the correspondence filed in the case (see Exhibits B and D) as it shows that the claim was preferred [253] with the sanction of the Collector, but without that of the Commissioner, to whom alone the Court of Wards has delegated its authority to grant such sanction (see Wards' Manual, p. 50, Rule 8). The claim not having been

instituted with the necessary sanction, the plaintiff is not bound by the order made in the claim case; and the suit is not, therefore, barred by limitation under article 11 of schedule II of the Limitation Act.

The third contention of the appellants may be shortly disposed of. The properties in dispute not being *debutter*, and the plaintiff being entitled to them, if at all, only in his own right as the heir of Kumar Ram Chand, limitation runs against him under article 141 of schedule II of the Limitation Act only from the date of Rani Anandamoyi's death; and her possession cannot affect the plaintiff prejudicially.

In support of the first branch of the fourth contention, namely, that the validity of the adoption of Sreenarayan Singh has been made out, the learned Vakil for the appellants relies upon the registered deed of the 4th of Fal-goon 1275 corresponding to some day of February 1869 (Ex. I), by which Sreenarayan was given in adoption, and on the fact of Sreenarayan Singh having been recognised as the adopted son of Kumar Ram Chand, and he asks us to presume from the fact of such recognition that the adoption was made by Anandamoyi with her husband's authority. The recognition of the adoption by the members of the family, granting that the evidence on the point is perfectly reliable, is not shewn to have been of a nature such as would justify our inferring the existence of authority, in a case like the present, in which it is not alleged that time has destroyed evidence, and in which a written authority is filed, the attesting witnesses to which are living, but have not been examined. The defendants tried to prove the existence of authority by actually producing a deed of permission (Ex. J.), whereof proper custody is not proved; and they cited four witnesses (two of whom are attesting witnesses to the deed), but omitted to examine any of those witnesses, without giving any good reason for such omission. In these circumstances, we think the Court below was quite right in holding that no authority to adopt Sreenarayan has been proved.

We come next to the second branch of the fourth contention, namely, that even if the adoption of Sreenarayan was invalid, the [254] plaintiff's right to question its validity is barred by article 118 of schedule II of the Limitation Act. In support of this contention, the learned Vakil for the appellant relies upon the cases of *Jagadamba Choudhrani v. Dakkhina Mohun Roy Choudhri*, (1886) 1. L. R., 13 Cal., 308; L. R., 13 I. A., 84, and *Mohesh Narain Munshi v. Taruck Nath Motra*, (1892) 1. L. R., 20 Cal., 487; L. R., 20 I. A., 30, and he argues that though the present suit is not one for obtaining a mere declaration that the adoption of Sreenarayan Singh is invalid, yet, so far as it is necessary for the plaintiff's success that that adoption should be declared invalid, the suit must fail. We are of opinion that this contention is not sound. The period of limitation prescribed in article 118 applies, as the plain language of the article shows, only to a suit to obtain a declaration that an adoption is invalid, that is, to a suit for a declaratory decree, and it does not apply to a suit for possession of immoveable property, though it may be necessary for the plaintiff in such a suit to prove the invalidity of an adoption. The language of the corresponding provision of the Limitation Act of 1871, with reference to which the two cases cited for the appellants were decided, was different from that of the present law; and the period now prescribed, namely, six years, is one-half of that under the former Act. It is not likely, therefore, that the Legislature could have intended to make article 118 of the present law applicable to a suit for possession of immoveable property, though it may involve the question of the invalidity of an adoption, when the plaintiff would have twelve years' time to institute such a suit, even where it may be necessary for him to establish the illegitimacy of the defendant. Moreover, if

the appellant's contention were correct, it would lead to another very anomalous result. A widow having daughters and daughters' sons, who are the next reversioners, may, without authority from her husband, adopt a son, and no suit may be brought by the daughters or their sons for setting aside the adoption within six years; the widow may survive her daughters and their sons; and ultimately on her death a distant relative may become entitled to succeed as the reversionary heir; and he would find himself barred long before he had any chance of becoming entitled to the inheritance. The effect of the two cases cited for [256] the appellants upon the present law was considered by this Court in the case of *Jagannath Prasad Gupta v. Ranjit Singh*, (1897) I. L. R., 25 Cal., 354, and the view we now take is in accordance with that taken in that case. What is strongly relied upon in this case for the appellant is a passage in the judgment of their Lordships of the Privy Council in *Mohesh Narain Munshi v. Taruck Nath Moitra*, (1892) I. L. R., 20 Cal., 487 : L. R., 20 I. A., 30, in which their Lordships, referring to the words of the present law, say : "It seems to be more than doubtful whether, if these were the words of the Statute applicable to the case, the plaintiff would thereby take any advantage." With reference to this passage, this Court, in the case of *Jagannath Prasad Gupta v. Ranjit Singh*, (1897) I. L. R., 25 Cal., 354 (363), observed : "What their Lordships considered to be more than doubtful, even if the language of the old law (article 129 of Act IX of 1871) were the same as that of the present law (article 118 of Act XV of 1877), was not whether that would make any change in the law, but whether the plaintiff would take any advantage, that is, whether the plaintiff in the case before their Lordships would succeed under the circumstances of the case;" and then the reason for taking this view is further explained in the passage that follows. We take the same view in this case.

The fourth contention of the appellants must therefore fail.

In support of the fifth contention, all that is urged is that the evidence adduced to show that the family of the plaintiff is governed by the law of the Benares School, is insufficient. We have considered that evidence, and we see no reason to dissent from the conclusion arrived at by the Court below.

In support of the sixth contention, the learned Vakil for the appellants argues that the Court below, having found that the proceedings in execution of the decrees of Bidyadhar Pandit and Bishun Chand Dhudhuria were properly taken, ought to have held that the sales in execution of those decrees were binding on the plaintiff. On the other hand, it was urged for the respondent by way of cross-objection that the Court below was wrong in holding that the proceedings in execution were rightly taken. We think this contention of the respondent is valid. The property not being [256] *debutter*, Sreenarayan Singh not being the validly adopted son of Kumar Ram Chand, and the plaintiff being, by the Hindu law of the Benares School which governs the parties, the heir of Kumar Ram Chand and of Rani Anandamoyi, any proceedings taken in execution, in the absence of the plaintiff and on the substitution of Sreenarayan Singh or his son as the legal representative of Rani Anandamoyi, must be ineffectual in affecting the plaintiff's right. The cases relied upon by the Court below in support of the opposite view, namely, the cases of *Prosunno Chunder Bhattacharjee v. Kristo Chytunno Pal*, (1878) I. L. R., 4 Cal., 342 ; *Dumput Sing Bahadoor v. Rajessuree*, (1871) 15 W. R. 476, and *Sankara Subbayyar v. Ramasami Ayyangar*, (1897) I. L. R., 20 Mad., 454, are distinguishable from the present. In the first mentioned case, namely, that of *Prosunno Chunder Bhattacharjee v. Kristo Chytunno Pal*, (1878) I. L. R., 4 Cal., 342, the facts were of a very peculiar nature, the party entitled to represent the deceased, namely, the executor to his will, having kept secret the existence

of the will until after the creditor had obtained his decree against a party in possession of the estate of the deceased. Moreover, the hardship and injustice to the creditor, which led the learned Judges to take the view they have taken, no longer exists, as by sections 21 and 23 of the Probate and Administration Act (V of 1881) the creditor himself can obtain letters of administration to the estate of his deceased debtor. The next case, *Roodro Narain Roy v. Nittyanund Doss*, (1867) 8 W. R., 195, has very little bearing upon the present question. The third case relied upon, namely, that of *Dunput Sing Bahadoor v. Rajessuree*, (1871) 15 W. R., 476, was decided with reference to section 210 of the former Code of Civil Procedure (Act VIII of 1859), according to which execution might be had against the legal representative *or the estate of the deceased judgment-debtor*. But under the present law, section 234 of the Code of Civil Procedure (Act XIV of 1882), which corresponds to section 210 of the old Code, the words "or the estate" have been left out. The [257] last case cited merely followed the case of *Prosunno Chunder Bhuttacharjee v. Kristo Chytunno Pal*, (1878) 1 L. R., 4 Cal., 342.

But, though that is so, so far as the grounds common to the execution proceedings under the two decrees are concerned, the case in which Bishun Chand Dhudhuria was the decree-holder stands on a different footing. Unlike the decree of Bidyadhur Pandit, which was obtained against Rani Anandamoyi, the decree of Bishun Chand Dhudhuria was passed in a suit which was brought after Rani Anandamoyi's death, and in which the present plaintiff Ranjit Singh was made a defendant. He was then a minor under the Court of Wards, and was represented by the manager under the Court of Wards. He made his defence denying Anandamoyi's right to mortgage the properties then in dispute (see Ex. A 2), though subsequently he retired from his defence as the judgment (Ex. A 5) shows; but it is clear from the decree (Ex. A 4) that he remained a party on the record, and the decree was made in his presence. Therefore, though the subsequent execution proceedings were taken against Hari Singh, minor son of Sreenarayan Singh, represented by his mother, Luchmi Bibi, without any notice to the present plaintiff, Ranjit Singh, yet he being a party to the suit in which the decree was passed, his remedy, if he could object to the sale that has taken place, was by an application under section 244 of the Code of Civil Procedure, and not by a separate suit which is barred by that section. Moreover, we think it more than doubtful whether, after having been made a party to the suit along with the minor Hari Singh, and having retired from his defence, he can now object to any sale of the properties covered by the mortgage bond on which the suit was based. In our opinion, therefore, this suit, so far as it relates to the properties Nos. 2 and 4 of the plaint, namely, Taraf Kulubaria and Bajitpur and Taraf Chutipur, which were included in the suit of Bishun Chand (see Exs. A 3 and A 4) and were sold in execution of his decree (see Exs. A 19 and A 21) must be dismissed.

It was argued for the appellants that the suit as regards the properties sold in execution of Bidyadhur Pandit's decree was likewise barred by section 244 of the Code of Civil Procedure. [258] We do not consider this argument correct, because that decree was passed against Rani Anandamoyi, and the present plaintiff was not a party to the suit in which that decree was passed, nor does he claim to be a representative of the Rani. He claims as the heir of the Rani's husband, Kumar Ram Chand.

The seventh and the last contention of the appellants is, that the plaintiff is not entitled to redeem the mortgage to defendants 3 and 7 before the expiry of the term of the usufructuary lease. We do not consider this contention correct. The lease, as has been found by the Court below, and as is admitted

in the argument for the appellants, is part of the mortgage transaction, and so the mortgagee is entitled to the mortgage money with interest and costs, but is not entitled to make any profit by the lease. That being so, and the redemption decree that has been made directing the payment by the plaintiff to the mortgagee, not merely of the present worth of the money due, but of the entire amount due, the defendants can have no reason to complain of the decree made.

It remains now to consider the appeal of the plaintiff. The contention in that appeal is, that of the amount which the plaintiff has been ordered to pay for the redemption of the mortgage, one portion consisting of two items, namely, the sum of Rs. 388-14, he is not bound to pay under the terms of the mortgage. This contention is admitted by the learned Vakil for the defendants (appellants) to be well founded and must therefore prevail.

The result then is that the decree of the Court below must be set aside, and in lieu thereof a decree will be made, dismissing the plaintiff's prayer for a declaration that the properties in suit are *debutter* properties of the idol Sri Sri Lakshmi Narain Deb Thakur, dismissing also his claim for possession of properties Nos. 2 and 4 of the schedule to the plaint, and decreeing his claim for possession of the other two properties, namely, properties Nos. 1 and 3, in his own right, and directing that on his depositing in the Court below, within six months after this date, the sum of Rs. 9,006-8 due in respect of the *ijara* to Rani Mena Kumari Bibi, defendant No. 7, the plaintiff be put in possession of the two properties Nos. 1 and 3. The parties will pay and recover costs in this Court and the Court below in proportion to their success and failure.

[259] It has been brought to our notice by the learned Vakil for the plaintiff (respondent) that the mortgagee, defendant, being in possession as usufructuary mortgagee, the amount that should have to be actually paid for redemption of the property ought to be only the amount of the mortgage debt that remains to be satisfied after giving the mortgagor credit for the amount realisable for the period during which the appeals have been pending, in addition to the amount for which credit has been given by the Court below. After hearing the learned Vakil for the mortgagee, we think that the objection taken is well founded, and that the amount that is payable by the plaintiff for the redemption of the property should be only the total of the amounts that are realisable for the years 1306 and 1307 B. S. at the rate of Rs. 2,071-8-0 per annum according to the account adopted by the Court below; and we, therefore, direct that the decree be drawn up accordingly.

S. C. G.

Decree varied.

NOTES.

I. As regards the applicability of Art. 118 of Limitation Act, 1877, this was followed in (1904) 9 C.W.N., 222; (1908) P.R., 96; (1908) 30 Cal., 990; see also (1902) 26 Mad., 291.

II. An ancient deed may be interpreted by the acts done under it.—(1913) 20 C.L.J., 312.

III. As regards the scope of sec. 47, C.P.C., 1908, see also (1902) 30 Cal., 142; (1904) 8 C.W.N., 843; (1904) 32 Cal., 265.]

[27 Cal. 259]

CRIMINAL REVISION.

The 22nd August, 1899.

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE PRATT.

Sri Mohan Thakur, 1st Party.....Petitioner

versus

Narsing Mohan Thakur and others, 2nd Party.....Opposite Party.*

Criminal Procedure Code (V of 1898), section 145—Dispute regarding right to collect rents—Jurisdiction of Magistrate—Appointment of Receiver of the joint estate.

There is no want of jurisdiction in a Magistrate to proceed under section 145 of the Criminal Procedure Code, because the dispute is one regarding the right to the collection of rents between joint owners governed by the Mitakshara School of Hindu Law. Nor can the appointment of a Receiver of the joint estate, subsequent to the passing of the order by the Magistrate, affect the question of the jurisdiction of the Magistrate at the time when he passed the order.

THE first party and the second party were the joint owners of a property, and they appointed a common manager for the purpose of collecting rents jointly. The first party alleged that sub-[260]sequently he dismissed the manager, and from the date of dismissal by him the manager had no authority to act on his behalf. Disputes arose as to the right of the first party to collect rents separately on his own behalf. The Magistrate took proceedings under section 145 of the Criminal Procedure Code, and made an order in favour of the second party.

Mr. Jackson, and Babu Lal Mohun Ganguli, for the Petitioners.

Mr. Pugh, Babu Dwarka Nath Chakrabarty, and Babu Joy Gopal Ghose, for the Opposite party.

The judgment of the High Court (Rampini and Pratt, JJ.) was as follows :—

This is a rule calling upon the opposite party to show cause why the order of the Magistrate in this case, passed under section 145 of the Code of Criminal Procedure, dated the 24th April 1899, should not be set aside for the reasons stated in the affidavit.

Mr. Pugh for the opposite party has appeared to show cause. It is quite clear that, under the provisions of section 145, as now amended, no order under that section can be set aside by this Court in its Revisional jurisdiction, except under the provisions of the Charter, and on the ground of want of jurisdiction. This is apparent, not only from the terms of section 435, clause (3), but from the ruling of this Court in the case of *Hurbullubh Narain Singh v. Luchmeswar Prosad Singh*, (1899) I. L. R., 26 Cal., 188.

The learned Counsel (Mr. Jackson) who appears on behalf of the petitioner has urged that the Magistrate had no jurisdiction upon two grounds—*first*, that the dispute in this case is as to the right to collect rent; and, *secondly* that it is a dispute between two joint owners governed by the Mitakshara law. He further contends that the order should be set aside, because a Receiver to

* Criminal Revision No. 487 of 1899, made against the order passed by J. G. Ritchie, Esq., District Magistrate of Bhagulpur, dated the 24th April 1899.

the property has subsequently been appointed by this Court in its Civil jurisdiction.

Now, with regard to the first two of these grounds, we need only say that, under the provisions of section 145, clause (2), we think there is no want of jurisdiction on the part of the Magistrate because the dispute in this case was a dispute regard-[261]ing the collection of rent between joint owners governed by the Mitakshara law ; and, moreover, it appears to us that this point has already been decided in this very case by a Division Bench consisting of O'KINEALY and STANLEY, JJ., on the 3rd February 1899 * when an attempt was made to stay these proceedings, and the Bench directed that the proceedings should go on, and we think that the purport of their order is that there was no want of jurisdiction in the Magistrate with regard to this case. Then as to the subsequent appointment of Mr. Grey as Receiver, we do not think that that can affect the question of jurisdiction at all. Mr. Grey was not appointed as Receiver until after the order of the Magistrate in this case was passed, and his subsequent appointment cannot affect the question of the jurisdiction of the Magistrate at the time he passed the order.

Mr. Jackson, however, urged that Mr. Grey's appointment as Receiver has superseded the order of the Magistrate under section 145. If that be so, on which we express no opinion, then [262] we can only say that it is unnecessary for us, in our Criminal jurisdiction, to set aside an order which, we are told, has been already superseded by this Court in its Civil jurisdiction. For these reasons we think that this rule should be discharged, and we accordingly discharge it.

S. C. B.

Rule discharged.

NOTES.

[A manager of a joint Hindu Family can be protected in his possession under the Criminal Procedure Code, 1898, sec. 145 :—(1908) 31 Mad., 318.

The possession of joint property is outside sec. 145 :—(1906) 10 C.W.N., 1088 (*Debutter property*) ; (1909) 36 Cal., 986 (tolls) ; (1910) 11 C.L.J., 412₃(fishery).]

* Criminal Revision 952 of 1898. In this case an application was made to set aside the order of the Magistrate on the ground that it was not a matter concerning which he had jurisdiction to make an order under section 145 of the Criminal Procedure Code. The High Court (PRINSEP and STANLEY, JJ.) said :—

" This is a Rule calling upon the Magistrate of the district and the opposite party to show cause why the proceeding of the Magistrate, dated the 5th December, drawn up under section 145 of the Code of Criminal Procedure, should not be set aside on the ground that section 145 does not apply to joint owners of a Mitakshara family.

The real owners of the property are the son and grandson of one Brojo Mohan Thakur, and they appointed a person to collect the rents of this property. One of the owners now claims to have dismissed the person so appointed to collect the rents and to go in and collect the rent himself direct. There is no dispute as to the shares, but the dispute is as to the right to go in and collect the rents and break up the present arrangement by which the rents are collected on behalf of all. That is certainly a dispute concerning rents, and the question of possession is one to be found by the Magistrate on evidence. We are not in a position to prejudge the case and to do what the Magistrate has to do.

We therefore think that at this stage of the case it will not be right in us to interfere with the proceedings, and we accordingly discharge the Rule."

[27 Cal. 262]
CRIMINAL REFERENCE.

The 6th November, 1899.

PRESENT :

MR. JUSTICE SALE AND MR. JUSTICE STANLEY.

Woolfun Bibi.....Complainant

versus

Jesarat Sheikh and another.....Accused.*

Defamation—Statements made by persons in the course of their evidence as witnesses in Court of Justice—Relevancy of statements to issue in case—Penal Code (Act XLV of 1860), section 500.

Where certain statements alleged to be defamatory were made by certain persons in the course of their evidence as witnesses in a Court of Justice and were relevant to the issue in the case under enquiry, *Held*, that such persons could not be prosecuted for defamation in respect of those statements.

THE accused in this case were witnesses for the defendant in a certain Civil suit in the Court of the Munsif of Lalbagh. In the course of their depositions they made the following statement regarding the complainant: "Hasil's daughter (that is complainant) was caught with a chamar and lives with him." The Magistrate who tried the accused on the woman's complaint found that the statement made by them was not true, and was not made in good faith. He therefore convicted the accused under section 500 of the Penal Code for defamation, and sentenced them each to pay a fine of Rs. 25 or in default to suffer one month's simple imprisonment. The Sessions Judge referred the case for orders to the High Court under section 438 of the Code of Criminal Procedure.

The material portion of the letter of reference was as follows:—

"1. The petitioners before me, Jesarat Sheikh and Panchu Sheikh, were witnesses for the defendant in a certain civil suit in the Court of the Munsif of Lalbagh. In the course of their depositions they made the following statement regarding the complainant 'Hasil's daughter (that is complainant) was caught with a chamar and lives with him.' The Magistrate [263] who tried the petitioners on the woman's complaint has found that the statement made by them was not true and was not made in good faith. He has therefore convicted the petitioners under section 500, Indian Penal Code.

"2. The order recommended for revision is the order of the Honorary Magistrate of Lalbagh, dated the 29th July 1899, convicting the petitioners under section 500 of the Penal Code and sentencing them each to pay a fine of Rs. 25, or, in default, to suffer one month's simple imprisonment.

"3. The cases of *Manjaya v. Sesha Shetti*, (1888) I. L. R., 11 Mad., 477; *Empress v. Babaji*, (1892) I. L. R., 17 Bom., 127; and *Empress v. Bal Krishna Vilhal*, (1893) I. L. R., 17 Bom., 573, are authorities for the proposition that witnesses cannot be prosecuted for defamation on account of statements made when giving evidence in the witness box. I do not find any reported decisions of the Calcutta High Court directly in point, but the case of *Bhikumber Singh v. Becharam Sircar*, (1888) I. L. R., 15 Cal., 264, and the Privy Council case of *Gunnesh Dutt Singh v. Mugneeram Chowdhry*, (1872) 11 B. L. R., 321, would appear to favour the view taken in Madras and Bombay.

"4. I should also point out that the reasons given by the Magistrate for holding that the statement was not made in good faith do not appear to be sound. On this point he says :

* Criminal Reference No. 222 of 1899, made by W. Teunan, Esq., Sessions Judge of Murshedabad, dated the 11th of October 1899.

"In the present case there is no proof that the accused had to make the statement in answer to a question." Now the statements were proved, not by the production of certified copies of the depositions, but by the admissions of the accused. It should have been presumed that statements made by a witness in the witness box were in answer to questions put to him and were not irrelevant. In the depositions of the pleaders who were engaged in the civil suit, there is also evidence that the statements were relevant (*vide* the last sentence in the deposition of witness Debendra Nath Sen.

"5. The Honorary Magistrate in his explanation refers to his judgment and offers no further remarks."

The judgment of the Court (Sale and Stanley, JJ.) was as follows:—

It is clear that the statements alleged to be defamatory were made by the accused in the course of their evidence as witnesses in a Court of Justice, for these statements were relevant to the issue in the case under enquiry. Under these circumstances, upon the authorities cited by the Officiating Sessions Judge, we think that the accused cannot be prosecuted for defamation in respect of these statements, and that the conviction and sentence must be set aside, the fine, if paid, to be refunded.

D. S.

NOTES.

[The privilege of judicial proceedings is only partial according to Calcutta and Allahabad High Courts (1907) 29 All., 685; (1905) 32 Cal., 756, also the Punjab Chief Court (1912) 15 I.C., 494, but absolute privilege is given in Madras and Bombay, 30 Mad., 222; 16 Mad., 235; 11 Mad., 477; 17 Bom., 127; 17 Bom., 573.]

[264] ORIGINAL CIVIL.

The 26th July, 1899.

PRESENT :

MR. JUSTICE SALE.

Ram Narain and another

versus

Dwarka Nath Khettry.

Sale in execution of decree—Sale by Sheriff—Civil Procedure Code (Act XIV of 1882), section 244, clause (c), sections 287, 311, 313—Belchamber's Rules and Orders of High Court, Calcutta, 382-386—Deficiency in area of land—Application by purchaser to set aside sale or for compensation.

A purchaser at an execution sale of immoveable property held by the Sheriff applied to set aside the sale or for compensation on the ground of deficiency in the area of the land sold.

Held, that such an application in relation to sales held by the Sheriff was not sanctioned by any provisions of the Civil Procedure Code, and section 313 did not apply.

Held, also, that as the interest of the purchaser was adverse to the interest of the judgment-debtor the former was not the representative in interest of the latter, and therefore section 244 of the Civil Procedure Code did not apply.

Ishan Chunder Sirkar v. Beni Madhub Sirkar, (1896) I. L. R., 24 Cal., 62, applied.

* Suit No. 14 of 1892.

Sales by the Sheriff differ from sales by the Registrar of the Original Side of the High Court. The rules of the Court governing sales by the Registrar direct that compensation shall be allowed for errors and misstatements, if capable of compensation, while no such condition is imposed on sales by the Sheriff.

THIS was an application, made in Chambers by a purchaser of immoveable property at a sale held by the Sheriff in execution of a decree, for an order that the sale might be set aside, or he be allowed to retain out of the balance of the purchase-money a sum of Rs. 1,628 as compensation for an alleged deficiency in area of the land sold to him. The sale proclamation signed by the Sheriff and issued under the provisions of section 287 of the Civil Procedure Code contained the statement that the property to be sold was "rent-free land measuring about 1 cottah 15 chittacks and 5 square feet, with a three-storeyed house and premises erected thereon." The purchaser alleged that the statement in the notification as to the area of the land sold was incorrect, that there was a deficiency in [265] this respect of 4 chittacks and 10 square feet, and that he had been misled by this misstatement and had been induced in consequence to pay a higher price than he would otherwise have done. The only question raised in the suit was whether the purchaser was entitled to adopt this summary procedure for the purpose of obtaining the relief he sought.

Mr. Dunne (Mr. Chakravarti with him) for the auction-purchaser.—This is an application under section 244 of the Civil Procedure Code to set aside the sale on the ground of misdescription and fraud. Section 244 applies. In *Bhubon Mchan Paul v. Nunda Lal Dey*, (1899) I. L. R., 26 Cal., 324, it was held that an application to set aside a sale on the ground of fraud would come under that section, even though the purchase was made by a person who was a third party. [SALE, J.—If such applications can be brought under section 244, why was section 311 enacted?] That section provides for a procedure, while section 313 deals with the rights of the purchaser. These sections provide for particular cases only.

Mr. Sinha for the judgment-creditor.—There is no provision in the Code, or anywhere else, under which the auction-purchaser can apply to set aside a sale held by the Sheriff. A separate suit must be instituted for this purpose. Section 244 provides a summary procedure for parties to the suit only. Section 311 provides a summary procedure for the relief of the decree-holder, but only in the case of material irregularity. Section 313 deals with the rights of the purchaser and provides a summary procedure for his relief, but only in cases where the judgment-debtor had no saleable interest in the land sold. A misstatement of fact as regards the quantity of land to be sold is no ground for setting aside a sale. *Durga Sundari Devi v. Govinda Chandra Addy*, (1883) I. L. R., 10 Cal., 368; see also *Protap Chunder Chuckerbutty v. Panioty*, (1883) I. L. R., 9 Cal., 506; and *Ram Coomar Dey v. Shushee Bhooshun Ghose*, (1883) I. L. R., 9 Cal., 626. Unless the auction-purchaser can come in under section 313 of the Civil Procedure Code, he must bring a separate suit. *Birj Mohun Thakur v. Rai Umanath Chowdhry*, (1892) I. L. R., 20 Cal., 8: I. L. R., 19 I. A., 154. The case of *Bhubon Mohun Paul v. [266] Nunda Lal Dey*, (1899) I. L. R., 26 Cal., 324, is distinguishable. The real distinction is that where the parties to the suit initiate proceedings, section 244 applies, and their right is not affected by the presence of the auction-purchaser in those proceedings; but where the auction-purchaser initiates proceedings, he must bring a suit; he cannot take advantage of section 244. *Hira Lal Ghose v. Chandra Kanto Ghose*, (1899) I. L. R., 26 Cal., 539.

Babu Atul Chundra Ghose for the judgment-debtor cited *Hira Lal Chatterji v. Gourmoni Debi*, (1886) I. L. R., 13 Cal., 326.

Mr. Dunne, in reply.—The Court, while deciding the case of *Birj Mohun Thakur v. Rai Umanath Chowdhry*, (1892) I. L. R., 20 Cal., 8 : L. R., 19 I. A., 154, do not appear to have had their attention directed to section 244, and they did not have that section in their minds while deciding that case.

Sale, J.—This is an application by a purchaser of immoveable property at a Sheriff's sale for an order either that the sale may be set aside, or that he be allowed to retain out of the balance of purchase money a sum of Rs. 1,628 as compensation for an alleged deficiency in area of the land sold to him. The sale proclamation signed by the Sheriff, and issued by him under the provisions of section 287 of the Civil Procedure Code, contained the statement that the property to be sold was "No. 56, Lower Chitpore Road, being rent-free land measuring about 1 cottah 15 chittacks and 5 square feet with a three-storeyed house and premises erected thereon."

Section 287 provides, amongst other things, that the sale proclamation shall specify as fairly and accurately as possible the property to be sold, any incumbrance to which the property is liable, the amount for the recovery of which the sale is ordered, and "every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property"; and for the purpose of ascertaining the matters so to be specified the Court is empowered to summon and examine witnesses and to order the production of documents.

[267] In this Court the necessary enquiry for ascertaining the particulars required to be stated in proclamations for Sheriff's sales is held by the Registrar, who acts under the powers given him by certain rules of the Court. See rules 382-386, Belchambers' Rules and Orders, page 188.

The purchaser in the present case alleges that the statement in the notification as to the area of the land sold is incorrect; that there is a deficiency in this respect of 4 chittacks and 10 square feet; and that he has been misled by this misstatement, and has thereby been induced to offer a higher price than he would otherwise have done.

The question is, whether the purchaser is entitled to adopt this summary procedure for the purpose of obtaining relief.

It is clear that the application is not sanctioned by any provision of the Civil Procedure Code; *Birj Mohun Thakur v. Rai Umanath Chowdhry*, (1892) I. L. R., 20 Cal., 8 : L. R., 19 I. A., 154. The only section in the Code which authorises an application to the Court by the purchaser at an execution sale is section 313, but that authority is limited to the case where the judgment debtor has no *saleable interest* in the property sold.

It was argued that the question raised by this application is a question arising on the execution of a decree, and that therefore the purchaser might come in under section 244, clause (c) of the Code. But the answer is that the question in this application is not a question arising between the parties to the suit or their representatives. The word "representatives" as used in the section has been held to extend to representatives *in interest*; but then the purchaser in this case has not purchased an interest of the judgment-debtor *which is affected by the decree*, nor can he be said to represent the interest of the judgment-debtor upon this application, because the object of it being to reduce the amount of the purchase money, the interest of the applicant is adverse to the interests of the judgment-debtor. *Ishan Chunder Sirkar v. Beni Madhub Sirkar*, (1896) I. L. R., 24 Cal., 62.

There are many instances where, at the instance of a purchaser [268] at a Registrar's sale, the Court has allowed a reduction of the purchase-

money where it appeared that the property sold was actually less in area than it was represented to be in the sale notification; but in one important respect sales by the Registrar stand on a different footing from Sheriff's sales in execution of decrees. Sales in execution of decrees are governed exclusively by the Civil Procedure Code; whereas sales by the Registrar, not being provided for by the Code, are regulated by rules framed by this Court which were passed to supplement the procedure introduced by Act VIII of 1859. These rules provide that for the purpose of sales of immoveable properties directed by the Court, the Registrar is to prepare notifications of sale, abstracts of title, and conditions of sale. One of the usual conditions under which property is sold by the Registrar is that errors and misstatements as to the particulars or description of the property shall not, if capable of compensation, annul the sale; but that compensation shall be allowed therefor. No condition of this kind governed the sale in the present instance; nor could any such condition be made applicable to a Sheriff's sale in this Court without introducing a distinction between these sales and sales in execution by other Courts, which does not seem to be contemplated by the Civil Procedure Code. Formerly, all that was advertised for sale, and was in fact sold in execution of a decree, was the right, title and interest of the judgment-debtor, see section 249 of Act VIII of 1859; and there was a wide difference between a sale of this character and a sale by the Registrar, where the title to the property and the incumbrances affecting it were fully disclosed in the abstract of title. But this distinction has in substance been swept away by the present Procedure Code and the practice which has grown up thereunder, with the result that an intending purchaser at a Sheriff's sale is now made fully acquainted with all the important particulars of the property he proposes to purchase. As, then, the position of a purchaser at an execution sale is the same in all material respects as that of a purchaser at a Registrar's sale, I can see no reason why, where a purchaser can show he has been misled by a misstatement in the sale notification, he should not have the benefit of the same summary remedy, whether it be he has [269] purchased at a Sheriff's sale or a Registrar's sale. But it seems to me this is an amendment of the law which can only be effected by the Legislature.

The result is that the present application must be refused with costs, and I will certify for Counsel.

Attorney for the auction-purchaser : *Babu C. C. Bose.*

Attorneys for the judgment-creditor : *Messrs. G. C. Chunder & Co.*

Attorney for the judgment-debtor : *Messrs. Kally Nath Mitter and Sarbadhicary.*

C. E. G.

NOTES.

[Interest, however small, is sufficient, unless fraud is established :—(1901) 23 All., 355; (1901) 28 Cal., 235; (1902) 29 Cal., 370; (1902) 29 Cal., 420; on appeal 30 Cal., 468; 37 Cal., 67; 10 C.L.J., 492; 35 Bom., 29.]

[27 Cal. 269]

, The 30th November, 1899.

PRESENT :

MR. JUSTICE SALE.

Ramdoyal Serowgie

versus

Ram Deo and another.*

Practice—Attorney's costs—Summary jurisdiction—Collusive and fraudulent compromise to deprive attorney of his costs.

An attorney applied for an order that the plaintiff and the defendant, or either of them, should pay to him his taxed costs on the ground that they had fraudulently and collusively compromised the suit with the object of depriving him of his costs.

Held, that in cases of this kind, where charges of fraud and collusion are made, it is inconvenient for the Court to dispose of the issues on affidavits alone.

Held, also, that it is not the practice of the Court to interfere summarily between attorneys and their clients as regards claims for costs.

Khetter Kristo Mitter v. Kally Prosonno Ghose, (1898) I. L. R., 25 Cal., 887, dissented from.

THIS was an application, made on summons and adjourned into Court, by Babu N. C. Roy, the attorney for the defendant Luchminarain, asking for an order on the plaintiff and the second defendant, or either of them, for payment of the taxed costs due to him by the second defendant Luchminarain. The application asked for the order to be made by the Court in the exercise of its summary jurisdiction.

Mr. R. Mitter (Mr. S. R. Das with him) for the Applicant.—The facts clearly show that there was no *bonâ fide* settlement, and [270] that the parties colluded together to deprive the attorney of his costs. The Court has power to make an order of this description, if it is shown that the settlement arrived at between the parties was not arrived at solely with the *bonâ fide* intention of ending the litigation, but also in order to defraud the attorney of his costs.

The case of *Khetter Kristo Mitter v. Kally Prosonno Ghose*, (1898) I. L. R., 25 Cal., 887, was referred to.

Mr. Avetoom for the Plaintiff.—The plaintiff does not admit that there has been any collusion or any intention on his part to deprive the attorney of his costs due to him by Luchminarain. This is not a case in which the summary jurisdiction of this Court should be exercised. The plaintiff has denied these charges in his affidavit. The application should be dismissed with costs.

Sale, J.—In this case an application is made by an attorney for an order for payment by the plaintiff and the defendants of taxed costs due to him by the second defendant Luchminarain. The application is for an order to be made by this Court in the exercise of its summary jurisdiction.

The facts shortly are these: The plaintiff filed a suit against the defendants to recover Rs. 9,861 on a bond which was alleged to have been executed by both the defendants in favour of the plaintiff. On the 18th May 1899, the plaintiff obtained an *ex parte* decree for the amount claimed, and on the 14th August he attached the stock-in-trade of the shop of Luchminarain, the second defendant, in Akyab. Thereupon Luchminarain came to Calcutta and instructed Babu N. C. Roy, his attorney, to take steps to set aside the decree on the

* Original Civil Suit No. 116 of 1899.

grounds that no service had been effected on him of the summons; and that he was not a partner of Ramdeo and had not executed the bond in question. Certain proceedings were had through the attorney, and subsequently there were negotiations for a settlement of the claim in suit which were partly conducted by the attorney, and eventually a settlement was arrived at by the parties independently of the attorney, and the attorney now claims that the conduct of the plaintiff and the defendants has caused a breach of his lien for the costs due to him, and he also alleges that the settlement was [271] not in fact *bonâ fide*, but was made by the parties collusively with the object of depriving him of his costs. The claim, so far as it rests on the alleged breach of lien, was not pressed, but the applicant relies on facts which it is contended disclosed fraudulent collusion between the plaintiff and the defendants to deprive the attorney of his costs by means of this pretended settlement, which is now set up.

As to the alleged settlement, the plaintiff, who alone opposed the application, filed an affidavit, in which he denied certain of the facts asserted by the applicant, and alleged that there had been a settlement; he denied collusion or any intention on his part to deprive the applicant of the costs due to him by Luchminarain. It is difficult on the materials before me to come to any satisfactory conclusion as to the alleged settlement, or as to the collusion which has been charged.

The conduct of the parties in the proceedings leading up to the alleged settlement is certainly suspicious, but it is impossible on these materials to say what the exact nature of the alleged settlement was, or that it was brought about by the plaintiff collusively with the defendants with the intention of depriving the attorney of his costs.

I think that, even supposing I had the power to exercise the summary jurisdiction of this Court in favour of the applicant, this is not a case in which it ought to be exercised. I ought to say, however, that in my opinion in cases of this kind, where charges of collusion and fraud are made, it is inconvenient that the Court should be asked to dispose of the issues on affidavits, and I feel bound to add that, with all respect to the learned Judge who decided the case of *Khetter Kristo Mitter v. Kaliy Prosonno Ghose*, (1898) I. L. R., 25 Cal., 887, I see no good reason for departing from what has undoubtedly been the rule of this Court, not to interfere summarily between attorneys and their clients as regards claims for costs by the former.

This rule has been laid down and explained in the case of *Domun v. Emam Ally*, (1881) I. L. R., 7 Cal., 401. See also the case of *Mahommed [272] Zohuruldeen v. Mahommed Noorooddeen*, (1893) I. L. R., 21 Cal., 85. The application is therefore refused, but without costs. The applicant to have liberty to establish his claim, if so advised, by regular suit.

Application refused.

Attorneys for the Plaintiff: Messrs. *Manuel and Agurwallah*.

Attorney for the Defendant Luchminarain: *Babu N. C. Roy*.

C. E. G.

NOTES.

[As regards attorney's lien, this was dissented from in (1904) 30 Bom., 27; see also (1905) 7 Bom. L. R., 547.]

[27 Cal. 273]
APPELLATE CIVIL.

The 8th August, 1899.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE HILL.

Bachu Koer.....Judgment-debtor

versus

Golab Chand.....Decree-holder.*

Jurisdiction—Bengal, N.-W.P., and Assam Civil Courts Act (XII of 1887), section 13, clause 2—Transfer of Property Act (IV of 1882), sections 88, 90—Sale in execution of mortgage decree—Execution of decree.

When Subordinate Judges are appointed by the Local Government with jurisdiction over the whole of a district, the District Judge is not competent, under section 13 (2) of the Bengal, N.-W.P., and Assam Civil Courts Act, to assign to them different areas so as to limit or cause their respective jurisdictions.

The Court of such a Subordinate Judge which passed a mortgage decree is therefore the only Court competent to entertain an application for the execution of the decree and to make an order in furtherance thereof, even when the execution is sought by the sale of property other than the mortgaged property, lying within the district, but outside the area assigned to it by the District Judge.

A MORTGAGE decree was obtained by the plaintiff (decree-holder) against the defendant (judgment-debtor) on the 1st April 1897. In execution of that decree, the mortgaged property was sold on the 5th December 1898. The decree was obtained in the Court of the Second Subordinate Judge of Sarun. The present application for execution of the said decree was made by the decree-holder in the same Court on the 6th March 1899, praying for the attachment and sale of properties of the judgment-debtor, [273] other than the mortgaged property, for the realisation of the balance of the decretal money. Some of these properties were situated within the districts of Sarun and Champaran, and the rest were situated in other districts.

With regard to the former properties, the judgment-debtor objected that the Court of the Second Subordinate Judge had no jurisdiction to execute the decree by the sale of the said properties, inasmuch as they were situated within the *mouzas* which were within the jurisdiction of the Court of the First Subordinate Judge and that of the Additional Subordinate Judge, in accordance with an order of the District Judge, dated the 21st December 1898. The judgment-debtor made also some other objections to the execution proceeding. On the question of jurisdiction, the judgment-debtor relied on *Obhoy Churn Coondoo v. Golam Ali*, (1881) I. L. R., 7 Cal., 410; *Prem Chand Dey v. Mokheja Debi*, (1890) I. L. R., 17 Cal., 699; *Dakhina Churn Chaitopadhyaya v. Bilash Chunder Roy*, (1891) I. L. R., 18 Cal., 526; and *Gurindro Chunder Roy v. Jarawa Kumari*, (1891) I. L. R., 20 Cal., 105.

The Subordinate Judge overruled the objection, holding that these precedents did not apply, as they did not deal with the provisions of section 13 of Act XII of 1887, under which the objection was untenable.

The judgment-debtor appealed to the High Court.

Babu Digamber Chatterjee, for the Appellant.

* Appeal from Order No. 203 of 1899, against the order of Babu Atal Behari Ghose, Subordinate Judge of Sarun, dated the 3rd of June 1899.

Dr. Rash Behary Ghose and Babu Golap Chandra Sarkar, for the Respondent.
The judgment of the High Court (Ghose and Hill, JJ.) was as follows:—

This is an appeal against an order of the Second Subordinate Judge of Sarun granting the application of the decree-holder for attachment and sale of certain properties belonging to the judgment-debtor.

The decree was in a mortgage suit, and it seems to have been made under the combined provisions, so to say, of sections 88 and 90 of the Transfer of Property Act. The mortgaged properties [274] belonging to the judgment-debtor were, in pursuance of the order of the Court which made the decree, sold on the 5th December 1898. Subsequently an order was made by the District Judge under clause (2) of section 13 of the Bengal and N.-W. P. and Assam Civil Courts Act (XII of 1887) under which order, as we may assume, that officer distributed amongst the several Subordinate Judges of the district the civil business arising in that district. It is, however, stated (for we have not the order itself before us) that the District Judge assigned over to the Second Subordinate Judge of the district certain parganas, and to another Subordinate Judge certain other parganas lying within the same district, so as to define their respective jurisdictions; but we cannot conceive how such a division of jurisdiction could have been made, having regard to clause (2) of section 13 of Act XII of 1887. Subsequently, however, an application was made by the decree-holder, which was in March 1899, for the attachment and sale of certain properties which, as it is now stated before us, are situate within the local limits assigned to another Subordinate Judge not being the Second Subordinate Judge who had made the decree itself; and an objection was thereupon raised that the Second Subordinate Judge had no authority in law—in fact, no jurisdiction, to entertain and grant the application in question. The Second Subordinate Judge has, upon a consideration of the law and the various rulings on the subject, overruled the objection of the judgment-debtor and granted the application, and the present appeal is by the judgment-debtor.

We think, as already explained, that all that the District Judge could do, with reference to clause (2) of section 13 of Act XII of 1887, was to assign to each of the Subordinate Judges such civil business as was cognizable by the Subordinate Judge, subject to any general or special orders of the High Court as he may think fit; and so far as the local limits of the jurisdiction of any particular Subordinate Judge is concerned, it is provided for in clause (1) of the same section which states: "The Local Government may, by notification in the Official Gazette, fix and alter the local limits of the jurisdiction of any Civil Court under this Act." There is no question before us that the Second Subordinate Judge was appointed with the jurisdiction over the [275] whole district, and therefore we do not see how his jurisdiction could have been limited, in the way as it is stated it was, by the order of the Judge under clause (2) of section 13 of Act XII of 1887. On the other hand, the decree having been made by the Second Subordinate Judge, he is the only officer who could entertain the application of the decree-holder and make an order in furtherance of the application. The application made by the decree-holder on the present occasion may perhaps be strictly regarded as one under section 90 of the Transfer of Property Act* but, as already stated, the decree was made under the combined provisions of sections 88 and 90 of the Transfer of Property Act, and therefore the application for execution of that decree could only be made to the Second Subordinate Judge.

* [Under the rules framed by the Calcutta High Court under section 104 of the Transfer of Property Act, the procedure to be followed in execution of a decree passed under section 90 of that Act is that prescribed by the Code of Civil Procedure—*Rep.*]

In the view we have expressed we are fortified by the decision of this Court in the case of *Kali Pado Mukerjee v. Dino Nath Mukerjee*, (1897) I. L. R., 25 Cal., 315, as also by the observations of this Court in the case of *Jagernath Sahai v. Dip Rani Koer*, (1895) I. L. R., 22 Cal., 871 (874, 875). The particular passages from the latter case bearing upon this matter are to be found at pp. 874 and 875 of the report.

For these reasons we think that the order of the Subordinate Judge ought not to be interfered with in this appeal, and the appeal will accordingly be dismissed with costs.

M. N. R.

Appeal dismissed.

[276] *The 4th August, 1899.*

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE PRATT.

Khairunnessa Bibi and others.....Defendants

versus

Loke Nath Pal and others.....Plaintiffs.*

Specific performance—Contract relating to property of minor—

Decree for specific performance.

A decree for specific performance can be given against a minor when the Court finds that it is for the benefit of the minor that the contract should be performed.

Krishnasami v. Sundarappayyar, (1894) I. L. R., 18 Mad., 415, approved. *Fatima Bibi v. Debnauth Shah*, (1893) I. L. R., 20 Cal., 509, dissented from.

THIS was a suit to enforce specific performance of a contract for the lease of a tank and certain land. The plaintiffs contracted with two *putnidars*, defendants Nos. 6 and 11, for this lease, which these two defendants agreed to give on behalf of themselves and their co-sharers, some of whom were minors. Subsequently the defendants Nos. 1, 2, 3 and 4, well knowing the arrangement which had been made with the plaintiffs, succeeded in inducing certain of the other defendants to give them a lease of the same property after paying them a certain sum for *salami* and a certain sum as a bribe.

The Subordinate Judge, on finding the aforesaid facts, and that the defendants Nos. 6 and 11 had authority to contract on behalf of themselves and the other co-sharers, gave the plaintiffs a decree for specific performance of the lease, with a declaration that the lease granted to the defendants Nos. 1, 2, 3 and 4 was null and void as against the plaintiffs.

From this decision the defendants Nos. 1, 2, 3 and 4 appealed to the High Court.

Moulvi *Sirajul Isiam*, and Moulvi *Mahomed Mustafa*, for the Appellants.—A decree for specific performance of a contract can—[277] not be given against minors, as they are incapable of contracting under the Contract Act; see *Fatima Bibi v. Debnauth Shah*, (1893) I. L. R., 20 Cal., 509.

* Appeal from Appellate Decree No. 2205 of 1897, against the decree of Babu Atul Chunder Ghose, Subordinate Judge of Birbhoon, dated the 25th of August 1897, reversing the decree of Babu Sitikanta Mullick, Munsif of Dubrajpur, dated the 3rd of July 1896.

Babu Nolini Ranjan Chatterjee, for the Respondents.—The case of *Fatima Bibi v. Debnauth Shah* was dissented from, by the Madras High Court, in *Krishnasami v. Sundarappayyar*, (1894) I. L. R., 18 Mad., 415. Mr. Trevelyan in his book on Minors at page 179 says, that specific performance will be granted against an infant if the contract is for his benefit.

The judgment of the High Court (Rampini and Pratt, JJ.) was as follows:—

This is an appeal from a decision of the Subordinate Judge of Birbhoom, dated the 25th of August 1897, decreeing specific performance of a certain contract.

The facts of the case are that the plaintiffs contracted with two *putnidars*, defendants Nos. 6 and 11, for the lease of a tank and certain land, and that these defendants agreed to give them this lease on behalf of themselves and their co-sharers. Subsequently the defendants Nos. 1 to 4, well knowing of the arrangement which had been made with the plaintiffs, succeeded in inducing certain of the other defendants to give them a lease of the same property after paying them a certain sum for *salami* and a certain sum as a bribe.

Now the Subordinate Judge has given the plaintiffs a decree for specific performance of the lease granted to them, with a declaration that the lease granted to the defendants Nos. 1 to 4 is null and void as against the plaintiffs.

The defendants Nos. 1 to 4 have appealed, and on their behalf it has been urged before us, *first*, that the *putnidars* were not made parties to the appeal in the Court below; *secondly*, that certain of the defendants are minors, and that a decree for specific performance of contract cannot be given against them; and, *thirdly*, that there is no sufficient proof of the authority of the defendants, Nos. 6 and 11, to grant the lease to the plaintiffs on behalf of their co-sharer *putnidars*.

We think, however, that there is no force in any of these contentions.

[278] The defendants Nos. 1 to 4 are the only appellants. They are only concerned with the question as to whether their lease should stand or fall. It is perfectly clear that their lease cannot stand against the contract which was entered into by the *putnidars* and the plaintiffs. The Subordinate Judge has found as a fact that the defendants Nos. 1 to 4, with full knowledge of the agreement with the plaintiffs, took a lease from the *putnidars*; and therefore it is evident that the lease cannot stand.

Then as to the plea that a decree for specific performance of contract cannot be given against a minor, it is sufficient to refer to the case of *Krishnasami v. Sundarappayyar*, (1894) I. L. R., 18 Mad., 415, in which the contrary has been held, and in which the ruling of Mr. Justice NORRIS, sitting alone in the case of *Fatima Bibi v. Debnauth Shah*, (1893) I. L. R., 20 Cal., 509, has been dissented from. We have also been referred to Mr. Justice TREVELYAN'S work on Minors, page 179, which, we think, is sufficient authority for saying that a decree for specific performance of contract can be given against a minor, when it is for his benefit that the contract should be performed, as we think is the case in this instance.

The third point is that the defendants Nos. 6 and 11 had no authority to enter into the contract with the plaintiffs; but there is a finding of fact by the lower Courts to the contrary. It has been found by both Courts that the defendants Nos. 6 and 11 were fully authorised to contract with the plaintiffs, and there is clear evidence to this effect on the record. It is shown that it was the custom of the *putnidars* that, whichever of their co-sharers went to the *mahal*, acted for all of them. There is, therefore, no want of authority on the part of the defendants Nos. 6 and 11, and the *putnidar* defendants, if they had appeared, would have been estopped from raising such a plea.

For these reasons we think that the decision of the Subordinate Judge must be affirmed, and we accordingly affirm it and dismiss this appeal with costs.

M. R. M.

Appeal dismissed.

NOTES.

[In *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*, (1911) 39 Cal., 232, on appeal from (1906) 34 Cal., 163, the Privy Council observed. "Without some authority their Lordships are unable to accept the view of the learned Judges of the Division Bench that there is no difference between the position and powers of a manager and those of a guardian. They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract."

The decisions in (1901) 26 Bom., 326; (1906) 11 C. W. N., 207; (1902) 4 Bom. L. R., 587 (at 603); (1911) 16 C.W.N., 297—which were prior to the Privy Council decision—were in accordance with the decision in 27 Cal., 276.]

[279] *The 2nd August, 1899.*

PRESENT:

MR. JUSTICE RAMPINI AND MR. JUSTICE PRATT.

Sia Ram Das.....Defendant

versus

Mohabir Das (minor) through his guardian and
next friend Sarju Das.....Plaintiff.*

*Receiver—Appointment of Receiver—Civil Procedure Code (Act X of 1882),
section 503—Discretion—Waste.*

The removal of a large amount of property by the defendant, and under circumstances which might fairly give rise to suspicion, during the pendency of the suit in which the question of title to that property would be determined is a sufficiently strong ground for the appointment of a Receiver. *Sidheswari Dabi v. Abhoyeswari Dabi*, (1888) I.L.R., 15 Cal., 818. *Chandida Jha v. Padmanand Singh*, (1895) I. L. R., 22 Cal., 459; and *Sham Chand Giri v. Bhairam Pandey*† referred to.

ON the 8th September 1899 the mohuntship of the Asthal Suja *alias* Ramnuggur became vacant by the death of the mohunt Jugarnath Das. Of the two claimants, one was the plaintiff Mohabir Das, who alleged that he was appointed *chela* of the deceased mohunt on the 20th January 1898, and was installed as mohunt on the 2nd of September by Jugarnath Das about six days before his death. The defendant Sia Ram Das, the other claimant, alleged that he was made *chela* on the 16th May 1897, and that he was appointed mohunt twelve days after the death of Jugarnath Das by a *punchayet* consisting of certain neighbouring mohunts and zamindars. The defendant being in possession of the property, an application was made for the appointment of a Receiver at the instance of the plaintiff. A large number of affidavits were put in by both the parties, and from those adduced by the plaintiff it appeared that the plaintiff was installed as mohunt on the 2nd of September; that he was the nephew of the last mohunt; that all the three preceding mohunts belonged to the same natural family; and that Jugarnath Das, the last mohunt, was appointed *chela*

* Appeal from Original Order No. 130 of 1899, against the order of Babu Hari Krishna Chatterjee, Subordinate Judge of Monghyr, dated the 14th of April 1899.

† Suit No. 179 of 1898. Judgment of the High Court, dated 5th March 1894.

by his uncle when he was a child. From the report of the Commissioner who was appointed by the Subordinate Judge to make an inventory [280] of the property in question, it appeared that the defendant removed or secreted moneys, securities, bonds, promissory notes and a large quantity of gold and silver ornaments and utensils from the time he took possession of the property. Under these circumstances, the Subordinate Judge made an order directing the appointment of a Receiver.

From this order the defendant appealed to the High Court.

Mr. J. T. Woodroffe (with Babu Joy Gopal Ghose) for the Appellant.—It is not enough for the appointment of a Receiver to assert a right to property; there must be a *prima facie* title and a strong case made out before the Court will interfere; see *Sidheswari Dabi v. Abhoyeswari Dabi*, (1888) I. L. R., 15 Cal., 818, and *Chandidat Jha v. Padmanand Singh*, (1895) I. L. R., 22 Cal., 459. The appointment of a Receiver will have the effect of turning the defendant out of possession of the property which he now holds; and it would not only deprive him of the management of the property, but would render it difficult for him to procure funds for his defence.

Mr. Jackson (with Babu Umakali Mukerjee) for the Respondent. The fact that a large amount of property has been wasted under circumstances of suspicion during the pendency of the suit in which the question of title to this property is to be determined, is in itself a sufficient ground for the appointment of a Receiver; see *Sham Chand Giri v. Bhairam Pandey*. It is shown by the Commissioner's report that the defendant has removed or secreted a large amount of property since he took possession, and he threw obstacles in the way of the Commissioner when he went to make an inventory of the property.

The judgment of the High Court (Rampini and Pratt, JJ.) was as follows:—

This is an appeal against an order of the Subordinate Judge of Monghyr, dated the 14th April 1899, directing the appointment of a Receiver for the custody and preservation of certain property the subject of a suit now pending in his Court.

[281] The suit relates to the mohuntship of the *Asthal* of *Suja alias* Ramnugger, which became vacant by the death of the former mohunt, Jugarnath Das, who expired on the 8th of September last. Of the two claimants, one is Mohabir Das, the plaintiff, who alleges that he was appointed *chela* of the deceased mohunt on the 20th January 1898, and was installed as mohunt on the 2nd of September, about six days before the death of the old mohunt.

The defendant is Sia Ram Das; and on his behalf it is alleged that he was made *chela* on the 16th May 1897, and that he was appointed mohunt on the 12th day after the death of Jugarnath Dass by a *punchayet* consisting of certain neighbouring mohunts and zamindars. The defendant is now in possession of the property; and an application for the appointment of a Receiver has been made at the instance of the plaintiff.

In connection with this case several rulings have been cited by the learned Counsel on either side.

On behalf of the defendant our attention has been called to the case of *Sidheswari Dabi v. Abhoyeswari Dabi*, (1888) I. L. R., 15 Cal., 818, in which it was held that the Court is not justified in appointing a Receiver where a right is asserted to property in the possession of the defendant claiming to hold it under a legal title, unless a strong case is made out. This case was decided by MACPHERSON and GORDON, JJ., on the 4th June 1888; and it has been

* Suit No. 179 of 1893. Judgment of the High Court, dated 5th March 1894.

followed in the case of *Chandidat Jha v. Padmanand Singh*, (1895) I. L. R., 22 Cal., 459, in which it has been ruled that the Court will not interfere by appointing a Receiver unless a strong case is made out, and in which it is pointed out that, when an application is made for an injunction, it is sufficient to show that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged, while in the case of a Receiver a *prima facie* title has to be made out.

These cases have been cited on behalf of the appellant, while on behalf of the respondent the decision of MACPHERSON, J., sitting on the Original Side of this Court, in *Sham Chand Giri v. [282] Bhairam Pandey* (suit No. 179 of 1893, dated 5th March 1894) has been relied on. This decision is printed at page 139 of this paper book; and it will be seen that in it the learned Judge seems to be of opinion that it is not necessary that a strong case should be made out to justify the appointment of a Receiver, but that it is sufficient if a fair *prima facie* case is established. Mr. Justice MACPHERSON further says: "The mere circumstance that such a large amount of property was removed, and under circumstances which might fairly give rise to suspicion, during the pendency of a suit in which the question of title to that property would be determined, is in itself a sufficient ground for the appointment of a Receiver." Mr. Justice MACPHERSON, therefore, seems in this decision to have taken a less strong view of what is necessary to justify the appointment of a Receiver than in his previous judgment in the case of *Sidheswari Dabi v. Abhoyeswari Dabi*. However that may be, we have heard Counsel on both sides, and we have had read to us a very large quantity of affidavits put in by the parties; and we think, after consideration of all these affidavits and of the circumstances of the case, that a sufficiently strong case—we may say a *very* strong case—has been made out by the plaintiff to justify the appointment of a Receiver in this case. Although we are far from wishing to prejudge the case in any way, we certainly think a fair *prima facie* case has been shown to exist on the side of the plaintiff. But, as we have said, we do not wish to prejudge the case; and we must here point out that no evidence on oath has been given. There are nothing but affidavits to go upon; and therefore the view we take on these affidavits may entirely be set aside when the witnesses are cross-examined,—as cross-examined they will be,—before the Subordinate Judge at the trial.

Now there is a considerable number of affidavits adduced by the plaintiff—affidavits of most respectable witnesses—to show that he was installed as mohunt upon the 2nd of September last. These are the affidavits of Dr. Rogers, Jotindra Nath Banerjee, Jogendra Nath Banerjee, and others; and if the affidavits of these gentlemen are entitled to implicit belief, there is little doubt that the plaintiff was so appointed on that day. There is also the fact [283] in favour of the plaintiff, namely, that he was the nephew of the last mohunt, and that, all the three preceding mohunts,—Kesho Das, Nursingh Das and Jugarnath Das—belonged to the same natural family. Jugarnath Das was the nephew of Nursingh Das and was appointed *chela* by his uncle when he was a child. In these circumstances, it appears to us certainly not improbable that Jugarnath Das on his death-bed did select the plaintiff to be his successor.

On the other hand, there are affidavits in support of the allegation that the defendant, Sia Ram Das, was made a *chela* by the deceased Jugarnath Das on the 16th of May 1897, although this fact is denied by the plaintiff. But it is admitted that he was installed as mohunt by the *punchayet* on the 12th day after the death of Jugarnath Das. Notwithstanding these two facts, if the former be proved at the trial, it is clear that if the plaintiff succeeds in the course of the suit now pending before the Subordinate Judge in establishing that he

was duly installed as mohunt by Jugarnath Das on the 2nd of September, still his claim must prevail over that of Sia Ram Das, that is to say, provided it be proved that the mohunt has power to nominate his successor, as it is contended in this case that he has.

Mr. *Woodroffe*, who appeared on behalf of the appellant, Sia Ram Das, urges that it would be very wrong to appoint a Receiver, seeing that this would have the effect of turning his client out of possession of the property which he now holds; and that it would be injurious to him, inasmuch as it would not only deprive him of the management of the property, but would render it difficult for him to procure funds for the prosecution of his defence in the case. We observe, however, that Sia Ram has not been long in possession of the property. He has only recently taken possession. He certainly was not in possession of the property appertaining to the mohuntship before the death of Jugarnath Das, which took place in September 1898; and he obtained possession with the assistance of the police. Therefore, it does not appear to us that he can be said to be in peaceful possession of the property. By the term peaceful possession, we mean possession with the acquiescence of the plaintiff.

[284] Then there is very great reason to believe that since he has taken possession of the property he has committed gross waste with regard to it. It appears that this defendant appeared before the Sub-Divisional Officer of Beguserai on the 9th September 1898, and acknowledged receipt of the property of the mohunt, saying that it was "all safe." Nevertheless, when the Commissioner sent by the Subordinate Judge to make an inventory of the property arrived at the Asthal, in the first place, every obstruction that was possible was put in the way of his doing his duty by this very defendant and his employes; and in the second place, according to the Report of the Commissioner, printed at page 172 of the paper book, it appears that a very large quantity of valuable property has disappeared from the time that this appellant took possession of the property. This property consists of moneys, bonds, promissory notes and other securities, gold and silver ornaments and utensils. And the Commissioner distinctly found that the defendant appeared to have removed or secreted moneys, securities, bonds, promissory notes and a large quantity of silver and gold ornaments and utensils.

In these circumstances, it appears to us that this case comes exactly within the ruling of Mr. Justice MACPHERSON in the case on the Original Side, in which he lays down that "the mere circumstance that such a large amount of property was removed, and under circumstances which might fairly give rise to suspicion during the pendency of the suit in which the question of title to that property would be determined, is in itself a sufficient ground for the appointment of a Receiver."

As for the contention of Mr. *Woodroffe* that the defendant will now be deprived of funds to carry on his defence in this case, we have only to say that the plaintiff is exactly in the same position. But there is too much reason to believe that, owing to the acts of waste which the defendant appears to have committed, he will not be entirely without funds to carry on his case.

Taking the whole of the circumstances of the case into our consideration, we think that this is a case in which a Receiver should be appointed. The property at stake in this case is very large. The immoveable property is estimated to be worth 3 or 4 [285] lakhs of rupees; and the moveable property is said to be worth more than a lakh. The income from the immoveable property is, moreover, said to amount to thirty or forty thousand rupees per annum.

The claimants of the property are mendicants, and apparently possessed of no worldly property whatsoever, and we think that until the rights of the claimants of this property are decided, it is proper that a Receiver should be appointed.

We therefore affirm the order of the Subordinate Judge and dismiss this appeal with costs.

M. R. M.

Appeal dismissed.

NOTES.

[See also (1905) 32 Cal., 741.]

[27 Cal. 285]

The 2nd August, 1899.

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE PRATT.

Kartick Nath Pandey and another.....Judgment-debtors

versus

Juggernath Ram Marwari and others.....Decree-holders.*

Limitation—Civil Procedure Code (Act XIV of 1882), section 230—Decree for sale of mortgaged property, making the defendant personally liable in case of insufficiency—Mortgage decree—Limitation Act (XV of 1877), schedule II,

Art. 179, clause 4—Step in aid of execution—Application for time—Application to review the order striking off the execution case and to restore it to file.

A decree which directs the realisation of the decretal amount by sale, in the first instance, of the mortgaged properties, and afterwards from the persons and other properties of the defendants, is a mortgage decree and not "a decree for the payment of money" within the meaning of section 230 of the Civil Procedure Code.

Application for time is not "a step in aid of execution;" but an application for review of an order striking off an execution case and for its restoration to the file is undoubtedly a step in aid of execution within the meaning of the Limitation Act (XV of 1877), schedule II, article 179. *Ram Charan Bhagat v. Sheobarat Rai*, (1894) I.L.R., 16 All., 418, and *Fazil Howladar v. Krishna Bundhoo Roy*, (1897) I. L. R., 25 Cal., 580, referred to and followed.

Kommachi Kather v. Pakker, (1896) I. L. R., 20 Mad., 107, dissented from.

[286] *Fakeer Buksh v. Chutterdharee Chowdhry*, (1870) 14 W. R., 209 : 12 B.L.R., 513, note, *Purmessuree Dossee v. Nobin Chunder Tarun*, (1875) 24 W. R., 305, distinguished.

THE decree in question was obtained on 26th February 1880 on a mortgage bond. The decree provided that the amount should be paid by sale of the mortgage properties, and if there were a balance left, the same should be realised from the person and other properties of the judgment-debtors. On the 5th of November 1897 the decree-holder made his last application for execution.

* Appeal from Original Order No. 204 of 1898, against the Order of Babu Nuffer Chunder Bhutto, Subordinate Judge of Bhagulpore, dated the 2nd of June 1898.

The application for execution before this was made on the 26th February 1894. On the 5th of November 1894 the decree-holders applied for time for procuring certain extracts, and on the 6th of November 1894 the Court ordered them to produce the extracts in a day. On the 7th of November 1894 the decree-holder applied for further time, which was refused, and the execution case was struck off. On the 22nd of November 1894 the decree-holders made an application under section 623 of the Civil Procedure Code for review of the order of the 7th November 1894, and for restoring that execution case to the file; but on the 27th of November 1894 this application was rejected. The main objection of the judgment-debtors in the lower Court was that the execution was barred under section 230 of the Civil Procedure Code, and also by the Limitation Act.

The Subordinate Judge overruled the plea, holding that the decree being a mortgage decree, section 230 of the Civil Procedure Code did not apply, and under the Limitation Act, schedule II, article 179, the present application of the 5th of November 1897 was saved by the applications of the 5th, 7th and 22nd of November 1894, which were "steps in aid of execution," and he allowed the application to proceed.

From this decision the judgment-debtor appealed to the High Court.

Dr. *Rash Behary Ghose* (with *Babu Joy Gopal Ghose*) for the Appellants: This is a money decree, and the present application, which is beyond the period of 12 years from the date of the original decree, is barred by section 230 of the Civil Procedure Code; see [287] *Kommachi Kather v. Pakker*, (1896) I.L.R., 20 Mad., 107; *Fakeer Buksh v. Chutterdharee Chowdhry*, (1870) 14 W.R., 209; and *Parnessuree Dossee v. Nobin Chunder Tarun*, (1875) 24 W. R., 305. Further, it is barred by the Limitation Act, as clearly the Subordinate Judge was wrong in holding that the applications of the 5th, 7th and 22nd November 1894 were "steps in aid of execution."

Babu Saroda Churn Mitter, Dr. *Ashutosh Mukherjee*, and *Babu Ashutosh Mukherjee*, for the Respondents were not called upon.

The judgment of the High Court (*Rampini and Pratt, JJ.*) was as follows:—

This is an appeal against the judgment of the Subordinate Judge of Bhagulpore, dated the 2nd of June 1898.

The order of the Subordinate Judge was passed on an application for execution of a decree. The decree in question was dated the 26th February 1880; and it was a consent decree passed in a suit brought upon a mortgage. The decree directs that the decretal money be recovered by sale, in the first instance, of the mortgaged properties which have not been exempted, and afterwards from the persons and other properties of the defendants.

The judgment-debtors in this case have contended that the decree is barred by limitation.

The Subordinate Judge has overruled this plea, and has ordered that execution should proceed.

[288] Before us two pleas have been urged, namely, *first*, that the present application is barred under the three years' rule laid down in article 179 of the Limitation Act; and, *secondly*, that it is barred by the 12 years' rule in section 230 of the Code of Civil Procedure.

The present application was made on the 5th of November 1897, and the previous application on the 26th of February 1894. The Subordinate Judge has, however, held that the present application is saved by the applications made on the 5th, 7th and 27th of November 1894, which, in his opinion, were applications made to take steps in aid of execution.

The pleader for the appellant contends, in the first place, that the Subordinate Judge is wrong in regarding these applications as applications to take steps in aid of execution. We think he is wrong with regard to the applications of the 5th and 7th of November 1894, because these applications were applications for time, which did not further the execution of the decree, but rather retarded it. The application of the 27th of November, however, was an application for review of an order passed upon the 7th, striking off the execution case, and it prays that it be restored to the file. In these circumstances, in our opinion, it is undoubtedly an application to take a step in aid of execution; and therefore the present application seems to us to be saved by the application of the 27th of November.

As to the plea urged by the pleader for the appellant in respect of s. 230 of the Code, we would say that although this, the present application, is no doubt beyond the period of 12 years from the date of original decree, yet that decree appears to us not to be a decree for payment of money or for delivery of property. Therefore execution of this decree is not barred by the rule in section 230. In support of this view we may cite the cases of *Ram Charan Bhagat v. Sheobarat Rai*, (1894) I. L. R., 16 All., 418, and *Fazil Howladar v. Krishna Bundhoo Roy*, (1897) I. L. R., 25 Cal., 580. There is no doubt a ruling of the Madras High Court to the contrary effect; see [289] the case of *Kommachi Kather v. Pakker*, (1896) I. L. R., 20 Mad., 107. But we are, of course, bound to follow the ruling of this Court.

The learned pleader for the appellant has called our attention to the case of *Fakeer Buksh v. Chutterdharee Chowdhry*, (1870) 14 W.R., 209 : 12 B.L.R., 513, note, which has been followed in a later case of *Purmessuree Dossee v. Nobin Chunder Tarun*, (1875) 24 W. R., 305. We, however, think that these rulings do not apply to the present case. It would seem that in the case *Fakeer Buksh v. Chutterdharee Chowdhry*, (1870) 14 W. R., 209 : 12 B. L. R., 513, note, the plaintiff waived his right as mortgagee, sued for the money due on the bond, and got a decree for the money. The present applicant did nothing of the kind. He got on the 26th February 1880 a mortgage decree, and nothing else but a mortgage decree, and he did not get a decree for payment of the balance due on the amount, after realizing what he could from the property until the 5th July 1888.

The pleader for the appellant contends that there was no decree passed then. That may be so; but there appears to have been an order to the effect that the judgment-debtors were bound to pay the balance of the decree, Rs. 60,000. That order seems to have the effect of a decree. But even if that be not so, then it is clear that until that order was passed, the present decree, which it is now sought to execute, was nothing but a mortgage decree. It was not converted into a money decree until that date.

For all these reasons we think that the decree of which execution is sought is not barred by time; and we dismiss this appeal with costs.

M. R. M.

Appeal dismissed.

NOTES.

[I. See now the C. P. C. 1908, sec. 73. This was dissented from in (1904) 28 Mad., 224; but see (1903) 25 All., 541; (1904) 31 Cal., 792; (1911) 18 I. C., 455 (Cal.); (1913) 17 C. W. N., 1039.

II. As regards limitation, see also 35 Cal., 1060; 10 C. W. N., 209; (1913) 26 M. L. J., 433.]

[290] The 7th September, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,
AND MR. JUSTICE BANERJEE.

Preonath Mitter and others.....Defendants

versus

Kiran Chandra Roy and others.....Plaintiffs.*

*Sale for arrears of revenue--Purchaser at a revenue sale—Act XI of 1859, sections 28, 35 and 37—"Entire estate," Meaning of—
Effect of Estate being recorded under a distinct number
on the rent-roll, with a separate revenue assessed
upon it—Protected interest.*

When an estate is recorded under a distinct number on the *touzi* or rent-roll of the Collector with a separate revenue assessed upon it, and the sale certificate granted to the auction-purchaser under section 28 of Act XI of 1859 shows that the estate sold was an entire estate, the mere fact of it comprising undivided shares in certain villages does not prevent its being an entire estate.

Kamal Kumari Chowdhurani v. Kisan Chunder Roy. (1898) 2 C. W. N., 229, referred to.

THIS appeal arose out of an action brought by the plaintiffs, certain auction-purchasers, under Act XI of 1859, for a declaration of their right to *khas* possession of certain lands. The allegation of the plaintiffs was that the defendants had no right to the disputed *howla*, inasmuch as they being purchasers of an "entire estate," they were entitled to get the estate free from all encumbrances.

The defence, *inter alia*, was that the lands in question were included in a certain *howla* which was created before the Permanent Settlement, and consequently their *howla* was a "protected interest" within the meaning of section 37 of Act XI of 1859. The defendants also contended that inasmuch as the estate sold consisted partly, at least, of undivided shares in certain *mouzas* or villages whereof the remaining shares appertained to other estates, the plaintiffs could not be regarded as purchasers of an "entire estate."

The Subordinate Judge overruled the objections of the defendants and decreed the plaintiffs' suit.

Against this decision the defendants appealed to the High Court.

[291] Babu Saroda Churn Mitter, for the Appellants.

Babu Srinath Das, and Babu Ram Churn Mitter, for the Respondents.

The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows:—

Maclean, C. J.—This is a suit by certain purchasers under Act XI of 1859, asking in effect for a declaration of their right to *khas* possession of certain lands marked and described on the map, made by the Civil Court Ameen in this suit, as Abbis Mudafat *howla*, for a declaration that the defendants have no rights in such lands, and that, even if they have, they are not valid as against the plaintiffs under the above Act, and for consequential relief. The present appellants are defendants 7 to 9 and 11 to 15, and their defence put shortly is that the lands in question are included in a certain *howla* which

* Appeal from Original Decree No. 255 of 1896, against the decree of Babu Debendra Lal Shome, Subordinate Judge of Buckergunge, dated the 3rd of June, 1896.

was created before the Permanent Settlement, and consequently that their *howla* is a "protected interest" within the meaning of section 37 of Act XI of 1859. This virtually is the real issue between the parties. The Court below has decided against the present appellants, and hence the present appeal.

There is no question that the plaintiffs purchased the zemindari No. 3847 at a revenue sale on the 26th June 1888, which was confirmed on the 3rd October in that year, and the only question is, whether they are entitled to *khas* possession of the land in dispute, or whether the present appellants have, on the ground I have stated, a "protected interest" in that land.

The various issues and contentions of the two sets of litigants are stated in detail in the judgment appealed against, but few of the arguments apparently addressed to the lower Court have been addressed to us, and I scarcely think any useful object would be attained by my recapitulating in detail those issues and those contentions, but I propose to content myself with referring to the particular points which have been urged before us.

Prima facie the plaintiffs, as purchasers at a revenue sale, are entitled to avoid the under-tenure set up by the appellants, unless the latter can bring themselves within some one of the exceptions specified in section 37, and to my mind the [292] onus, any way in the first instance, is cast upon them of bringing themselves within such exceptions [see *Rash Behari Bosu v. Hara Moni Debya*, (1888) I. L. R., 15 Cal., 555], and the substantial question for our decision is, have they done so?

The suit was instituted in April 1894, and there is no doubt but that the present appellants and their predecessors in title had been in possession of the disputed land for some thirty or forty years before suit, and we are invited to presume from this possession that, even if the documents upon which the appellants rely are not genuine, the *howla* was existent from before the date of the Permanent Settlement.

The appellants, however, did not launch their case in the Court below upon any such presumption, but based it upon a variety of documents, including the actual pottah creating the *howla*, and which purports to be dated the 2nd June 1773, certain *dakhilas* alleged to have been given by the then zemindar to the *howla* tenure-holder between the years 1776 and 1792, and certain deeds alleged to have been executed in 1833 and 1838. If the first of the above documents be genuine, the appellants ought to succeed, but unfortunately the Court below has found against its genuineness, holding that there are indications on the face of it, which clearly show its recent preparation. The learned Judge in the Court below has probably much more experience in these matters than myself. I lay no claim to being an expert in them, but, apart from his reasons, the document in appearance strikes me as almost too venerable, whilst the almost symmetrical tearing of the edges is calculated to excite suspicion. Anyway, I am not prepared to say that the Judge below was wrong in holding that this document is not genuine, whilst to my mind he gives cogent reasons for discrediting the three deeds of 1833, viz., Exhibits A3, B7 and D1, and his adverse and somewhat pungent criticisms on the three deeds of 1838, viz., Exhibits A4, B8 and D2 appear to me to be well founded and fatal to the genuineness of those documents. If, then, as the Judge in the Court below has found—and I think rightly—these documents are fabricated and not genuine, no [293] reliance can be safely placed on the *dakhilas* between 1776 and 1792 as genuine documents. No doubt Exhibits F1 and F2, the returns of Mr. Scott in 1857, mention this *howla*; but I do not think too much stress can safely be laid upon these returns, for the

reason that the zemindari had been then attached, the zemindar was under a cloud, he was not there to test any returns which might be made, and it was just the time when a designing person or persons, with a view to subsequently setting up a *howla* tenure, might get the same entered on the return. But, be this as it may, it only carries us back to 1857, which is a long way from the date of the Permanent Settlement. And it is worthy of comment that the registered deeds of 1865 contain no reference to the previous unregistered documents which I have mentioned above, whilst it is at least open to question, upon the evidence, whether these documents can be regarded as having been produced from the proper custody.

In my opinion, then, the appellants have failed to prove the genuineness of the pottah of 1773, or the various deeds of 1833 or of 1838, and have equally failed to show an under-tenure existent before the date of the Permanent Settlement, and so protected.

Being of this opinion, it is not necessary to decide whether or not the quinquennial papers referred to in the case are or are not admissible in evidence under section 35 of the Evidence Act. I consider it very doubtful; but, even if admissible, they do not afford very cogent evidence against the appellants, for they only show that no such *howla* as is now set up is mentioned in those papers.

In regard to the point that the plaintiffs are not purchasers of an "entire" estate within the meaning of section 37, the learned Vakil for the appellant relies upon the statements in paragraphs 2 and 4 of the plaint, and he contends that, as the estate sold consists partly, at least, of undivided shares in certain *mouzahs* or villages whereof the remaining shares appertain to other estates, the plaintiffs cannot be regarded as purchasers of an entire estate. In our opinion this contention is not sound. The mere fact of the estate sold comprising undivided shares in certain villages does not prevent its being an entire estate, when it is recorded [294] under a distinct number on the *touzi* or rent-roll of the Collector with a separate revenue assessed upon it, and when the sale certificate granted to the auction-purchaser under section 28 of Act XI of 1859 (Ex. 7) shows that the estate sold was an entire estate. The view we take is in accordance with that taken by this Court in *Kamal Kumari Chowdhurani v. Kisan Chandra Roy*, (1898) 2 C. W. N., 229.

Then it is said that, having regard to the possession of the appellants from the year 1857, the burden of proof, originally upon them, to make out their protected interest is shifted, and that, in the absence of any evidence adduced by the plaintiffs to the contrary, the Court ought to presume that the *howla* existed before the Permanent Settlement, and reliance is placed on the Privy Council case of *Forbes v. Meer Mahomed Hossein*, (1873) 20 W. R., 44 (45), and the recent case of *Nityanund Roy v. Banshi Chandra Bhuiyan*, (1899) 3 C. W. N., 341. I do not think the possession here is long enough to raise any such presumption or to shift the onus of proof, least of all when the appellants have not launched their case upon any such presumption but upon a series of documents which are found not genuine. In the case of *Nityanund Roy v. Banshi Chandra Bhuiyan*, (1899) 3 C. W. N., 341, it was found that the *taluq* had been in existence and in possession of the defendants from the year 1798, that is, only five years after the date of the Permanent Settlement. Here the possession only goes back thirty years or so before the plaintiffs' purchase, and may reasonably be attributed to some source of title other than the creation of a tenure before the Permanent Settlement.

Agreeing then in the conclusion of the Court below, we think the appeal fails, and must be dismissed with costs.

Banerjee, J.—I concur.

S. C. G.

Appeal dismissed.

[295] CRIMINAL REFERENCE.

The 20th June, 1899.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Queen-Empress

versus

Jadub Das.*

Evidence—Evidence in Criminal Case—Criminal Procedure Code (Act V of 1898), sections 161, 164, 288 and 307—Impropriety of taking down statements of persons immediately before their arrest—Impropriety of recording statements of witnesses with a view to fix them to those statements—Confession retracted—Evidence of witnesses retracted—Corroboration—Deposition before committing Magistrate read under section 288, Criminal Procedure Code—Trial by jury—Duty of Judge—Reference to High Court.

Where there is evidence in the hands of a police officer upon which he is bound to arrest a person, it is improper for him to obtain a statement from that person professedly under section 161 of the Criminal Procedure Code and reduce it to writing ; and by virtue of section 25 of the Evidence Act such statement is inadmissible in evidence.

It is also improper for a police officer to send a person practically under custody, who is in the position of a witness, to have his statement recorded by a Magistrate under section 164 of the Criminal Procedure Code, with the view of fixing him to that statement at the time when judicial proceedings are subsequently taken. The voluntary character of such a statement cannot but be doubted, and when retracted in the Court of Sessions, the Judge should not bring the statement on to the record under section 288 of the Criminal Procedure Code without making proper inquiry.

It is not safe to convict an accused person on his retracted confession standing by itself uncorroborated, or on the statements of witnesses brought in under section 288 of the Criminal Procedure Code without independent corroborating testimony ; nor can these two be joined together and held as mutually corroborating each other so as to justify a conviction based on them.

* Criminal Reference No. 11 of 1899, made by J. Palit, Esq., Sessions Judge of Jessore, dated the 13th of May 1899.

Queen v. Amanulla, (1874) 12 B. L. R., Ap., 15; 21 W. R. Cr., 49, *Queen-Empress v. Rangi*, (1886) I. L. R., 10 Mad., 295 and *Queen-Empress v. Bharmappa*, (1888) I. L. R., 12 Mad., 123, referred to and approved of.

In making a reference under section 307 of the Code of Criminal Procedure the Sessions Judge is limited to the evidence at the trial which was before the jury.

[296] REFERENCE under section 307 of the Criminal Procedure Code by the Sessions Judge of Jessore. The facts of the case appear from the following portions of the letter of reference :—

“ Three persons—Jadub Das, Rai Charan Das and Mangal Das—were tried for the murder of one Jogeswar Das. The trial was by jury. The jury returned a verdict of “ not guilty ” in respect of all the three accused. In respect of Rai Charan Das and Mangal Das I accepted the verdict of the jury, but as regards Jadub Das I think it necessary for the ends of justice to refer the case under section 307 of the Criminal Procedure Code.

“ The case for the prosecution may be briefly stated as follows : On the 1st of January last, Jogeswar Das, a boy, said by his father to be about fourteen years of age, and by the Assistant Surgeon who performed the *post mortem* examination to be about 17 years of age, went out in the evening and did not return home. His father searched for him the next day, but in vain. On the morning of the 3rd January his dead body was found in a field, and the boy's father went and lodged information at the police station. The police came and arrested Jadub Das on suspicion and sent him up. Then, in the course of the investigation, evidence was obtained from Jadub's mother, grandmother and wife, which led to the arrest of Rai Charan and Mangal. In the committing Magistrate's Court Jadub made a statement in the nature of a confession, and giving the same version of the occurrence as that given by his mother.

“ All the three women witnesses and the prisoner Jadub have retracted the statements made by them in the committing Magistrate's Court. The depositions of these three witnesses and the examination of Jadub in the committing Magistrate's Court have been put in. Without these there is no evidence at all against any of the prisoners.

“ It has been contended that the mere fact that the whole of the evidence against the accused consists of evidence given in the committing Magistrate's Court and of a retracted confession is sufficient to entitle the accused to an acquittal.

“ I am aware that there are some decisions which apparently support the above view. In *Queen v. Amanulla*, (1874) 12 B. L. R., App. 15; 21 W. R., Cr. 49, PHEAR, J. expressed a strong view that the law does not authorize the founding of a conviction upon evidence given entirely in another Court. But it appears to me that the true interpretation of the remarks of PHEAR and MORRIS, JJ. in that case is that when there is nothing before the Court to enable it to arrive at the truth except contradictory statements by the same witnesses, then it is not proper to base a conviction upon any one of two such sets of contradictory statements. If from the evidence of other witnesses, or from the circumstances of the case, the Court is enabled to conclude that the evidence given in the committing Magistrate's Court can be acted upon, then I apprehend that the mere fact that **[297]** all the witnesses have gone back on their first statements will not stand in the way of a conviction. In the case of *In the matter of Dham Mundul*, (1880) 6 C. L. R., 53, a conviction based entirely on evidence given in the committing Magistrate's Court was upheld.

“ I therefore proceed to consider whether the evidence in this case is of such a nature as to justify a conviction.”

After discussing the evidence as given before the Committing Magistrate, the Sessions Judge concluded his letter of reference as follows :—

“ The jury have no doubt returned a unanimous verdict of acquittal. In a case of this kind, however, the verdict of a jury does not stand on the same footing as in a case where they are called upon to decide on evidence given before them. In this case the Court has to act more as an Appellate Court, the evidence having been practically entirely given in another Court, and the decision in a case of this kind must rest on an elaborate process of reasoning.

Having regard to the nature of the case, I am not surprised that the jury should have returned the verdict they did. After giving the case my best consideration, I feel convinced that Jadub is guilty of the murder of the unfortunate boy. The murder was an atrocious one, and the evidence that the police produced was the best that they, after an honest and careful investigation, could produce. The witnesses being so closely related to the prisoner, it was only to be expected that they should retract their evidence as soon as they realized that the evidence would mean Jadub's conviction. But in spite of all that, it seems to me that Jadub's guilt has been amply brought home to him.

"Therefore I think it necessary, for the ends of justice, to refer the case under section 307 of the Civil Procedure Code for the orders of the Hon'ble High Court."

The *Officiating Deputy Legal Remembrancer* (Mr. *Abdur Rahim*) for the Crown.

Babu *Jyoti Prosad Sarbadhicary*, and Babu *Sarat Chunder Roy Chowdhry*, for the Accused.

The **judgment** of the High Court (**Prinsep and Hill, JJ.**) was as follows:—

Three persons—Jadub Das, Mangal Das, and Rai Charan Das—were tried in the Sessions Court of Jessore on a charge of murder by causing the death of one Jogeswar Das by strangling him, and in the Sessions Court a further charge of abetment under section 114 of the Indian Penal Code was added by the Sessions Judge against Jadub Das. The jury returned an unanimous [298] verdict of acquittal and the Sessions Judge has referred the case to us under section 307 of the Code of Criminal Procedure in respect only of Jadub Das. He has accepted the verdict of acquittal as regards the other two accused.

Dwarik Das is the father of the deceased Jogeswar, and he states that his son left his house at about two dandas of the evening of the 1st January, and has never since been seen alive. He made many inquiries regarding him during that night and the following day, but could learn nothing until, on the morning of the 3rd January, he was told by one Biswanath that his son's body was lying in a field. He went there and found his son dead; Jadub Das, the prisoner, his mother and grandmother, who are both witnesses, being present "lamenting." He also says that "Patiraj Chowkidar went there at that time," but this man has not been examined as a witness. He then went and gave information to the police station, distant about six miles, charging Jadub Das with the crime, and mentioning Biswanath and Mangal Das as being concerned in it. It may here be observed that nothing was then said of the presence of Jadub Das and the female witnesses when he first found the body. The Police Sub-Inspector went on the following day, that is on the afternoon of the 4th, and then commenced his investigation.

Now the first thing naturally would be to proceed against Jadub Das, who was the person accused by Dwarik on the ground that he bore ill-will towards the deceased. The Sub-Inspector states that Jadub was not at home, and that he was brought by a constable at about 4-30 in the afternoon. The constable, who is said to have arrested him, has not, however, been examined, and therefore there is nothing to show that Jadub Das was in any way evading arrest. Having got Jadub Das before him, it would be expected that the Sub-Inspector would arrest him; but he says that he did not do so. He would have us believe that he considered that he had no sufficient ground for arresting him. That is indeed the reason mentioned, and accepted by the learned Sessions Judge in a part of his reference to us. On the contrary, the Sub-Inspector proceeded to record a statement in writing of Jadub Das professedly under section 161 of the Code of Criminal Procedure, and then immediately afterwards he [299] arrested him and sent him in to the Magistrate without any delay. In that statement it may be mentioned that Jadub Das denied all knowledge of the

murder, and therefore there was nothing before the Sub-Inspector, in addition to the accusation of Dwarik Das, which was already before him, to induce him to arrest Jadub Das. We think it was a very improper step on the part of the Sub-Inspector to take any statement in writing from Jadub Das. He must have known that that statement was being taken preliminary to his arrest, and that it could be so taken only for the purpose of obtaining evidence. We observe that a similar course was also taken in regard to another man—Rai Charan Das. This will be presently referred to. Jadub Das was accordingly sent in to the Magistrate on the evening of the 4th. Now, with suspicion on some foundation against Jadub Das, it would naturally follow that the police should make a further and close inquiry from the inmates of his house. The Sub-Inspector, however, would have us believe that he did not think it necessary to make any inquiry beyond a mere cursory inquiry, and that he directed his inquiries elsewhere. He states, however, that he examined the mother of Jadub Das on the evening of the 6th, and that the next morning she repeated the same statement in the presence of about fifty people, the statement then made being one incriminating her son Jadub Das and the two other prisoners, Mangal and Rai Charan. Having this statement before him, the Sub-Inspector did not attempt to expedite the completion of the investigation, or to arrest Mangal and Rai Charan. On the 10th January he sent in the mother of Jadub Das to be examined by the Magistrate under section 164 of the Code of Criminal Procedure, and the reason he gives for requesting this to be done was that she was the only eye-witness available, and it was very likely that she would be gained over by the accused if she was not examined at once. The Sub-Divisional Magistrate accordingly recorded her statement as that of a witness, and in so doing, he added a note that that statement was taken in the presence of Jadub Das and three others who had an opportunity of cross-examining the witnesses, but had not done so. In that statement, no doubt, this woman describes that the murder was committed by the prisoners. We think it was never intended [300] that section 164 should be applied to such a purpose. It was not intended to enable the police to obtain an incriminating statement by some person, and as it were to put a seal on that statement by sending in that person to a Magistrate, practically under custody, to be examined before the judicial inquiry or trial, and therefore compromised in his evidence when judicial proceedings are regularly taken. We may also observe that the law does not require that in the case of a witness so examined there should be a certificate after proper inquiry that the statement has been voluntarily made, and the law also expressly protects a witness from unnecessary restraint or inconvenience at the hands of the police. Here this woman was sent by the police, and therefore presumedly under some restraint, and there was consequently much risk that her statement would be given under some pressure and not voluntarily. In this case we can find no reason why the Sub-Inspector should not have sent up the entire case at that time. If he had done so, this woman could have attended as any other witness. There was, moreover, no sufficient reason why he should have hurriedly sent up this woman alone to be examined before the completion of the investigation.

We have already stated that a statement of a witness so obtained always raises a suspicion that it has not been voluntarily made. Here we have the fact that, although it was repeated a few days later before the Magistrate, it was retracted at the Sessions trial, and an explanation, which was not *prima facie* unfounded or impossible, given to show that the statement had been improperly obtained. With this before him, the Sessions Judge was, in our opinion, bound to make some inquiry. Instead of doing so he at once proceeded under section 288

of the Code of Criminal Procedure to bring on the record as evidence at the Sessions trial the two statements made by this witness, and it may be added the Sessions Judge never made any inquiry at all into this matter, although the same story was repeated by Jadub Das when he accounted for the manner by which his confession had been obtained in the Magistrate's Court.

The inquiry before the Magistrate commenced on the 14th, and first of all Dwarik Das was examined, then the Sub-Inspectors [301] and then the mother of the accused, Jadub Das, who had already made a statement on the 10th. Now if the statement that she made on the 10th was a part of the inquiry before the Magistrate and a commencement of it, it is impossible to conceive for what useful purpose the same statement should have been again recorded. The fact that the Magistrate in recording the first statement thought proper to certify that it was made in the presence of Jadub Das and the other accused, and that they had an opportunity to cross-examine, but did not do so, would seem to show that the Magistrate considered that he was making that examination as part of a judicial inquiry. She then repeated almost in the same words what she had already said on the 10th. There was also the evidence of the grandmother of Jadub, and of his wife which, in some respects, corroborated the evidence given by the mother. At the close of the evidence for the prosecution in the Magistrate's Court when the accused were examined, Jadub Das proceeded to make a statement in the nature of a confession, and generally in the same terms as the statement already given by his mother as a witness. At the Sessions trial, not only did these three women deny their previous statements, but Jadub Das also denied the confession that he had made. The Sessions Judge nevertheless proceeded to place on the record, under section 288 of the Code of Criminal Procedure, the evidence given by these three women before the Committing Magistrate, as well as the statement of the mother previously recorded under section 164 on the 10th.

In addition to these statements, there is the evidence of a blind man, of which it is necessary only to say that in the Sessions Court he has embellished his evidence given before the Magistrate very considerably, so as to make it press more severely on the accused. No doubt the Sessions Judge has placed on the record the previous statement made by this witness before the Magistrate; but even if we were to accept that statement as true in preference to his later deposition, we should still not regard it as of any value whatsoever in this case. The remaining evidence consists of the evidence of the Sub-Inspector and the constable, and also of the medical witnesses. The evidence of the Sub-Inspector is, we think, not at all material in this case, except in so far as it shows that he has not fairly conducted the investigation.

[302] It has been already mentioned that the statement obtained by the police from the mother of Jadub Das is said to have incriminated Rai Charan, but that instead of arresting Rai Charan, the Inspector examined him as a witness, reducing his statement to writing, and that he then arrested Rai Charan. We have already expressed our strong disapproval of this proceeding. To all intents and purposes it was the obtaining by the police of a statement from an accused person and reducing it to writing, and this was done at a time when the police officer well knew that there was evidence before him on which he was bound to arrest Rai Charan. The impropriety of such proceedings is aggravated by the course taken by the Sessions Judge. He examined the Sub-Inspector in regard to that statement, and he thus admitted it as evidence on the trial. This statement cannot be regarded otherwise than as a confession made by Rai Charan to the Sub-Inspector. If it be so regarded, it was clearly inadmissible under section 25 of the Evidence Act. If, on the

other hand, it was to be used as evidence against the other prisoners, it was manifestly inadmissible. It was therefore very improper on the part of the Sessions Judge himself to introduce this statement so as to place it before the jury, and by so doing he must have seriously prejudiced, not only Rai Charan, but the other prisoners who are mentioned in that statement as taking a prominent part in the murder.

The Sessions Judge has, moreover, in this manner, acted in disregard of the statutory rule laid down in section 162 of the Code of Criminal Procedure, which declares that "no statement made to a police officer in the course of an investigation shall, if taken in writing, be used as evidence." No doubt Rai Charan, it is said, was not under arrest when he made that statement; but there was ample information with the police on which he might and should have been arrested.

It is impossible to avoid believing that Rai Charan was practically under arrest at that time, and that there has been an endeavour made by the police, which has been successful, to get this statement admitted as evidence when it was clearly inadmissible.

Lastly, we have the medical evidence. The evidence of the [303] medical officer who conducted the *post-mortem* is not very explicit as regards the actual cause of death, and we think it is to be regretted that, under such circumstances, the Sessions Judge should not have examined the medical witness himself at the Sessions trial. But taking the evidence of this officer as recorded by the Magistrate, the Sessions Judge proceeded to examine the Civil Surgeon as an expert, and he did not examine this witness on the points which were in evidence on the statement of the officer who conducted the *post-mortem* examination, but he took his statement on matters entered in the *post-mortem* report. Now that report is not admissible as evidence except to contradict the officer who made it. It may, however, be used by that officer when under examination for the purpose of refreshing his memory. We have no particular fault to find with the summing up by the Sessions Judge. The jury unanimously returned a verdict of acquittal, and the reference, as has already been stated, is only in regard to Jadub Das. Now, in the first place, we observe that in making this reference the Sessions Judge says: "Having regard to the nature of the case, I am not surprised that the jury should have returned the verdict they did;" and he adds apparently as a reason for his refusing to accept that verdict that the "decision in a case of this kind must rest on an elaborate process of reasoning." But there was no apparent excuse for the Sessions Judge not laying before the jury the same elaborate process of reasoning as he thought proper to lay before us in making this reference to us, supposing, however—and we lay special stress on this—that the manner in which he has treated the case on this reference is legitimate and proper. We give the Judge full credit for being impressed with the guilt of the accused and doing his best to place the case before us in a proper manner, but having done this, we must express our surprise at the terms in which he has placed his reference before us. It is not a document which should emanate from any judicial officer. It is a piece of *special pleading* with the chief object of exonerating the police from any suspicion in the proceedings.

The Sessions Judge does not rely on the evidence as presented to the Jury, but he has throughout relied on the police proceedings, which could not have been placed before the jury. If he desired to show that the proceedings of the police were regular [304] and above suspicion, he should obviously have obtained such evidence by examining police officers as witnesses so as to explain such proceedings. The objections which must be taken to these

proceedings were patent from the first. The Sessions Judge should therefore have examined the Inspector at once on all these points, and he should also have required evidence regarding the custody of Jadub Das in the jail with special reference to the meeting which is said to have taken place between the female witnesses and the prisoner Jadub Das, and the inducement then said to have been held out. The Sessions Judge has really asked us to consider and determine their case, not only as he himself admits on an elaborate process of reasoning which he never laid before the jury, but on matters which were not admissible in evidence, and were not therefore before the jury, and he has then asked us to hold that the verdict of the jury is erroneous on grounds which were never laid before them for their consideration. Obviously, in a reference under section 307, it is our duty to consider whether the verdict of the jury is erroneous or perverse on the case presented to them at the trial. Moreover the course adopted by the Sessions Judge would be most unfair to those under trial, for they would not have had an opportunity of meeting and rebutting what is now to be used against them. The Sessions Judge throughout seems to have considered that the Inspector was not only attacked, but as if he were under trial. It was rather the duty of the Sessions Judge to consider how far the evidence could be fairly used against those who were really under trial. He has not approached a consideration of the evidence by satisfying himself how far the reasons given for discrediting the evidence in consequence of alleged irregularities or misconduct of the police have any substantial foundation, but he has rather applied himself to exonerate the police. As an instance of this, we would mention that, when the mother of Jadub Das denied the statements that she had made to the Magistrate, and stated how they had been improperly obtained by the police, the Sessions Judge, without any inquiry as to the truth of this allegation, forthwith brought on the record, under section 288 of the Code of Criminal Procedure, those statements to be treated as evidence at the trial as if this accusation had no foundation; and it may be added that it is on this statement that the conviction of Jadub Das, which the Sessions Judge [305] recommends, must principally depend. The Sessions Judge has referred to, and relied on, police diaries. Now the police diaries never could be placed before the jury. They are only useful as is pointed out by the Code of Criminal Procedure, section 172, not as evidence, but to aid a Court on the trial, so as to enable it to make a thorough inquiry on all material points by eliciting in the examination of the witnesses—and especially of police witnesses—the real facts of the case. We are surprised to find that the Sessions Judge has not seen any impropriety on the part of the Sub-Inspector in examining Jadub Das and Rai Charan, in recording their statements immediately before their arrest at a time when the Sub-Inspector must have known that he was about to arrest them. We cannot, therefore, agree with the Sessions Judge that in this respect the Sub-Inspector's conduct of the investigation appears to have been perfectly proper and straightforward without affording any ground for even a suggestion to the contrary.

Then, again, when we come to the proceedings in respect to the mother of Jadub Das, we find that the Sessions Judge thinks that they were not at all open to comment. It seems to us, however, that there are serious reasons for disapproving of them. Here we have a statement said to have been made on the 6th, and it is followed by a delay in completing the investigation, which is not explained, and which is also *prima facie* unaccountable. This was followed up by the Sub-Inspector sending in this woman to have her examined on the 10th by the Magistrate under section 164 of the Code of Criminal Procedure. The Sessions Judge apparently overlooked this delay, and we can find no

explanation why this woman, who is said to have first made this statement to the police on the 6th and to have repeated it to the villagers on the 7th, should have been kept until the 10th, if it was necessary to have her statement taken by the Magistrate. The case was really completed when the statement had been obtained from the mother of Jadub Das and the two other women of the house, and there was really no reason at all why there should have been any delay in concluding the investigation and sending in the final report with all the evidence obtainable. We are consequently quite unable to take the view expressed [306] by the Sessions Judge of the conduct of the police in this investigation.

It remains, however, to consider the order which, on the evidence before us, we should make on this reference and on the evidence at the Sessions trial.

The sole fact upon which we can rely is that Jogeswar's body was found in a state from which the medical evidence shows it may be concluded that death was caused by violent means about 36 hours before the discovery of the body. The other evidence that there is on the record is the evidence of the three women recorded by the Committing Magistrate and denied by them in the Court of Sessions, but placed on the record by the Sessions Judge and laid before the jury under section 288 of the Code of Criminal Procedure. Now the manner in which such evidence should be treated has long ago been settled by the decisions of this Court, and it has been laid down that, unless there is something to show the truth of the former statement, it should not be preferred to the statement made subsequently in the Sessions Court, that is to say, that there should be something to corroborate such a statement on some material point. The case of *Queen v. Amanulla*, (1874) 12 B.L.R., App., 15 : 21 W. R., Cr., 49, is the leading case on this subject. What reason, it may be asked, is there to suppose that the statements made before the Magistrate by these witnesses were true? The only corroboration that there is is afforded by the statement made by Jadub Das at the conclusion of the record of the evidence for the prosecution by the Magistrate, and that statement is in the nature of a confessional statement. But that statement was also repudiated in the Sessions Court, and it has been frequently held by this Court that it is not safe to rely upon a statement so made, unless it is corroborated by some evidence so as to show that it is true. Now, what evidence is there that it is true? There are the statements of these witnesses, but the statements of these witnesses should not be accepted without some corroboration. Here then we have two sets of evidence, neither of which can alone be accepted without corroboration, and which cannot therefore each in turn be taken to corroborate the other. Reference may be made to the judgment [307] of KERNAN, J., in *Queen-Empress v. Rangi*, (1886) I. L. R., 10 Mad., 295, and *Queen-Empress v. Bharmuppa*, (1888) I. L. R., 12 Mad., 123. The last case especially expresses the opinion that we entertain, that evidence brought in under section 288 cannot be accepted as proper corroboration of a confession made to a Magistrate and retracted at the Sessions trial. There is, moreover, an additional reason for refusing to act on such evidence, for there is very good ground for supposing that the confession of Jadub Das made before the Magistrate on the 14th January was not fairly obtained, and that it therefore was not a voluntary statement. In the Sessions Court the mother states that she and other female relatives of Jadub Das were, during the proceedings before the Magistrate, brought into his presence. Jadub Das makes a similar statement. There has been no attempt made to contradict this. With what object this was done it is not difficult to understand. It must have been for the express purpose of inducing Jadub Das to confess, and

that is what both Jadub Das and his mother state happened, with the result that the mother repeated her previous statement, and Jadub Das made a similar statement as the best course suggested to them of obtaining a result most favourable to him. No doubt there is no evidence to show this; but the evidence of the woman is uncontradicted. However that may be, as has been already pointed out, we think it would not be safe to convict the accused Jadub Das on the evidence of the confession standing by itself, or on the evidence of three witnesses standing alone, and we do not think that these two sets of evidence can be joined together and held as mutually corroborating each other, so as to justify our acting on such evidence.

It may be that there are some reasons for suspecting that Jadub Das has committed this murder, but we can certainly not convict him on the evidence before us, for we cannot rely with any confidence on any part of it.

In conclusion, it is only necessary to bring to the notice of the Sessions Judge that he has entirely misconceived his duty in this reference under section 307 of the Code of Criminal Procedure. He seems to think that he was placed in a different position from the jury, or from that which he himself occupied during the trial. [308] He says that in a case of this kind "the verdict of the jury does not stand on the same footing as in a case where they are called upon to decide on evidence given before them. In this case the Court has to act more as an Appellate Court, the evidence having been practically entirely given in another Court." We cannot at all concur in this observation. The Judge should recollect that in a trial held by him, he is exactly in the same position as the jury in dealing with the evidence properly given before him, and that he is bound to confine his attention solely to that evidence. That is the rule which should invariably guide him in making a reference to this Court under section 307 of the Code of Criminal Procedure. The result that we come to, therefore, is that, in our opinion, Jadub Das should be acquitted, and we accordingly direct his release.

S. C. B.

NOTES.

[As regards recording of confessions, this was followed in (1902) 7 C. W. N., 345. As regards the value of retracted confessions, see also (1914) 25 I. C., 634 (Punjab).]

[27 Cal. 308]
APPELLATE CIVIL.

The 22nd August, 1899.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,
 AND MR. JUSTICE BANERJEE.

Bejoy Chand Mahatab, Minor, by his next friend Raja Bun Behari
 Kapur.....Defendant No. 1

versus

Amrita Lal Mukerjee, (Plaintiff) and others.....Defendants Nos. 2 & 3.*

*Sale for arrears of rent—Regulation (VIII of 1819), section 8, clauses (2)
 and (14)—Formalities prescribed in that section for due publication
 of the notice of sale—Rights of auction-purchaser on sale being set aside—
 Interest on purchase money.*

In cases where the due publication of the sale notice is in controversy, it is incumbent upon the landlord to show that the formalities prescribed by section 8 of Regulation VIII of 1819 have been complied with.

Maharajah of Burdwan v. Tarasundari Debi, (1882) I. L. R., 9 Cal., 619. L. R., 10 I.A., 19, and *Maharani of Burdwan v. Krishna Kamini Dasi*, (1886) I. L. R., 14 Cal. 365 : I. R., 14 I. A., 20, referred to.

[309] *Sona Beebee v. Lallchand Chowdhry*, (1868) 9 W. R., 242, explained.

Under section 14 of Regulation VIII of 1819, when a *putni* sale is set aside, the auction purchaser is entitled to get back the purchase money with interest.

THESE appeals arose out of an action brought by the plaintiff for the setting aside of a *putni* sale on the ground of the notice under section 8 of regulation VIII of 1819 not being duly published. The allegation of the plaintiff was that he had an eight-anna share in a *putni* tenure, and defendant No. 3 was entitled to the other eight-annas; that they defaulted in payment of the *putni rent* whereupon the landlord, defendant No. 1, having taken proceedings under Regulation VIII of 1819, sold the tenure, which was purchased by defendant No. 2; that the notice mentioned in section 8 of the Regulation was not duly published, and the sale was therefore bad in law.

The Subordinate Judge upon the evidence found that the formalities prescribed in section 8 of the Regulation were not observed, and set aside the sale, making the defendants Nos. 1 and 2 jointly liable for costs, and directed refund of the purchase-money without interest.

Against this decision the defendants appeal to the High Court.

Babu *Ram Churn Mitter* for the Appellant in appeal No. 332, and for the Respondent in Nos. 329 and 348.

Babu *Golap Chunder Sarkar* for the Appellant in appeal No. 329, and for the Respondent in No. 332.

Babu *Nilmadhub Bose* and Babu *Shib Chunder Palit* for the Appellant in No. 348.

Babu *Shib Chunder Palit* for the Respondent in No. 332.

Babu *Shiva Prasanna Bhattacharjee* for the Respondent in No. 348.

* Appeal from Original Decrees, Nos. 332, 329 and 348 of 1897, against the decree of Babu Kali Prosunno Mukerjee, Subordinate Judge of Hooghly, dated the 23rd of July 1897.

The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.):—

Maclean, C.J.— This is an appeal from the decision of the third Subordinate Judge of Hooghly. The case is of this nature. [310] The plaintiff was an eight-anna share in a certain *putni* tenure, and the defendant No. 3, who is a minor, is entitled to the other eight annas share. They defaulted in the payment of the *putni* rent, and the zemindar took proceedings under Regulation VIII of 1819 to have the *putni* tenure sold. The tenure was put up for sale, and was sold on the 23rd November 1896, and the defendant No. 2 was the purchaser under that sale. The defendant No. 1 is the zemindar, the Maharajah of Burdwan, a minor, whose estate is under the Court of Wards. The sole question we have to decide is whether the sale was duly published in accordance with the requirements of paragraph 2 of section 8 of the above Regulation, the suit being one, as I said before, to have the sale of the *putni* set aside on the ground that the requirements of that Regulation were not duly complied with.

The Judge in the Court below, on this issue, came to this conclusion: "I have carefully considered that evidence and am inclined to think that the notice was not duly published." That is not a very strong or confident expression of opinion; but later on he says: "The evidence is not such as to warrant a finding that there was due publication of the sale notice at the *putnidar's* cutcherry." He found, therefore, against the validity of the sale, and in the plaintiff's favour.

The evidence in support of the zemindar's case has been read to us. There is the evidence of the gomashtha of defendant No. 3, of the peon who served, and, as he said, stuck up the notice and duly published it, and of a chowkidar of the village, and that evidence is corroborated by a post-card, which the peon sent on the same day from the village, where he had, as he says, published the notice, to the cutcherry of the zemindar at Burdwan.

I ought to mention that, although there were the two co-sharers of this *putni* tenure, there was but one cutcherry for the two, *viz.*, the cutcherry where the notice is alleged to have been stuck up. These witnesses depose to the notice having been properly stuck up and published. On the other side, *viz.*, for the plaintiff, we have the evidence of the gomashtha of the plaintiff who was residing at the time in the cutcherry; he says that he never saw or heard of any such notice, [311] and that no such notice was ever stuck up or duly published in the cutcherry. His evidence is supported by that of two or three leading men in the village, who depose to the same effect. There is, therefore, a substantial controversy on the evidence, and I am not disposed to say, nor do I think I should be justified in saying, that upon the evidence the conclusion arrived at by the learned Judge in the Court below was wrong.

The formalities prescribed in the second clause of section 8 of the above Regulation were certainly not complied with. That clause says: "The zemindar shall be exclusively answerable for the observance of the forms above prescribed, and the notice required to be sent into the mofussil shall be served by a single peon who shall bring back the receipt of the defaulter, or of his manager for the same; or in the event of inability to procure this, the signature of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot." The peon obtained the receipt of the gomashtha of defendant No. 3, but he was not the sole defaulter: he did not get the receipt of the two defaulters or of their managers or the signature of three substantial persons residing in the neighbourhood,

nor did the peon go to the cutcherry of the nearest Munsif or to the nearest thannah or make the oath or obtain the certificate referred to in the clause. It is clear then that these requisite formalities of the Regulation were not complied with.

It is urged, however, by the learned Vakil for the appellant, upon the authority of the case of *Sona Beebee v. Lallchand Chowdhry*, (1888) 9 W. R., 242, that those requirements are directory merely, and that, if it be proved that the notice has been duly published, it is not necessary that those requirements should be strictly complied with. Sir BARNES PEACOCK, no doubt, says: "The material part of clause 2, section 8, Regulation VIII of 1819, so far as this case is concerned, is that the notice required to be sent into the mofussil shall be served. The zemindar is exclusively answerable for the observance of the forms prescribed by that clause. The subsequent part of the section, which prescribes that the serving peon shall [312] bring back the receipt of the defaulter, or of his manager, or in the event of his inability to procure it, that he shall obtain that which, by the Regulation, is substituted for it, is merely directory, and, if not done, does not vitiate the sale, provided the notice is duly served.

That case has been commented upon by their Lordships of the Judicial Committee of the Privy Council in the case of the *Maharajah of Burdwan v. Tara Sundari Debi*, (1882) I. L. R., 9 Cal., 619 (622) : L. R., 10 I. A., 19 (22). At page 622 there is this passage :—

"That is a very important Regulation" (meaning the above Regulation) "and no doubt it was enacted for a certain and defined policy, and ought, as a rule, to be strictly observed. Their Lordships desire to point out that the due publication of the notices prescribed by the Regulation forms an essential portion of the foundation on which the summary power of sale is exercised, and makes the zemindar, who institutes the proceeding, exclusively responsible for its regularity. Their Lordships do not, however, intend at all to controvert a decision, to which their attention was called, of Sir BARNES PEACOCK when he filled the office of Chief Justice of the High Court of Bengal, to the effect that if the notice itself has been duly published, if it is not matter of controversy, if the fact was ascertained that it was published, then one would not regard any objection either to the form of the receipt or the absence of the receipt itself."

In a later case, the case of the *Maharani of Burdwan v. Krishna Kamini Dasi*, (1886) I. L. R., 14 Cal., 365 : L. R., 14 I. A., 20, the case I have just referred to is thus commented upon by their Lordships at page 373 : "In the case of the *Maharajah of Burdwan v. Tara Sundari Debi*, (1882) I.L.R., 9 Cal., 619 (622); L.R., 10 I. A., 19 (22) this Committee found that the question whether the requisite formality had been observed depended on conflicting evidence, but that the statutory mode of proof had clearly not been followed, and they held that the decision must go against the zemindar, whose business it was to follow the prescribed method. They did not differ from Sir BARNES PEACOCK, nor did they hold that the statutory proof was the only proof that could be given. Neither [313] did Sir BARNES PEACOCK decide nor intimate any opinion that one of the important formalities required as preliminary to a sale could be dispensed with."

From these decisions I conclude that, if the fact of the due publication of the sale notice be not in controversy, be not the subject of conflicting evidence, then it is not incumbent upon the zemindar to show that the formalities prescribed by the statute have been complied with, but that, if there be a conflict of evidence on the point, and the zemindar cannot show that the statutory method of proof prescribed has been followed, the decision must go against him

as it is his business to follow the prescribed method. In the present case there is a most distinct conflict of evidence as to whether the notices were or were not duly published, and the zemindar cannot show that the statutory method of proof prescribed has been followed. His case, therefore, fails.

On these grounds, I consider that the decision of the Court below was right, and that this appeal No. 332 must be dismissed with costs.

As regards the appeal No. 329, which is an appeal upon the question of costs by the minor defendant No. 3, who had been ordered jointly with the other defendants by the Court below to pay the plaintiff's costs, in my opinion such appeal ought to succeed. This appellant was not asked by the plaintiff to join as a co-plaintiff, and, looking at the nature of his defence, which is practically tantamount to a submission of his rights in the matter to the Court, he ought not to have been held liable to pay the plaintiff's costs. That portion of the decree of the lower Court which makes him liable for the plaintiff's costs must, therefore, be reversed. He will neither pay nor will he receive any costs in the Court below, but he must have his costs of this appeal both as against the plaintiff and the defendant No. 1, who has resisted his appeal.

As regards the appeal No. 348, which is the appeal of the auction-purchaser, he raises two points; *first*, that the decree of the Court below is wrong in not allowing him interest on his purchase money; and, *secondly*, that it is equally wrong in holding him [314] jointly liable for the costs of the plaintiff in the suit. As regards the latter point, the learned Judge in the Court below was right. The auction-purchaser, instead of submitting, as he might have done, his rights to the Court to deal with as it thought fit, made common cause with the zemindar against the plaintiff, set up in his defence that the notices had been duly published, and urged that the sale was a binding and valid sale. He resisted the plaintiff and resisted him unsuccessfully, and has consequently rendered himself jointly with the defendant No. 1 liable for the plaintiff's costs of the suit.

As regards the question of interest this appeal must succeed. Section 14 of Regulation VIII of 1819 says: "The purchaser shall be made a party in such suits, and upon decree passing for reversal of the sale" (which is what happened here), "the Court shall be careful to indemnify him against all loss at the charge of the zemindar or person at whose suit the sale may have been made." He is entitled to be "indemnified," and he is not indemnified if he simply gets back his purchase money without any interest. He is clearly entitled to interest on his purchase money at 6 per cent. per annum. The decree of the Court below must, therefore, to that extent, be reversed. As he has partially succeeded, and partially failed, on this appeal, there will be no costs on either side.

Banerjee, J.—I am of the same opinion. I only wish to add a few words with reference to appeal No. 332 of 1897, that is, the appeal of the zemindar. The main question raised in that appeal is, whether the sale notifications were duly published; and the point in dispute with reference to the sale notifications was, whether the notice required by clause 2 of section 8 of Regulation VIII of 1819 to be served in the defaulting putnidar's cutcherry was, in this case, duly published.

Upon this question, having regard to the evidence adduced in the case, I am of opinion that the answer must be in favour of the plaintiff. The law makes the zemindar "exclusively answerable for the observance of the forms" prescribed in the second clause of section 8 of the *putni* Regulation. The evidence adduced on the side of the zemindar, defendant, is not, to my mind,

quite satisfactory, seeing that the zemindar's serving officer, [315] who said that he had been to the cutcherry of the defaulter on more occasions than one, could not remember on which side of the road, running through the village, the cutcherry was; and seeing also that his statement as to the publication of the sale notice in the cutcherry is contradicted by three witnesses examined for the plaintiff, one of whom says he was in the cutcherry at and about the time of the alleged publication, and the other two say that they are the *mandals* of the village, who used, on previous occasions, to be sent for at the time of publication of sale notices.

In this view of the evidence it is not absolutely necessary for us to say anything upon the question of law raised in the case; but as that question was discussed at some length, and as the Court below has pronounced an opinion upon the point, it may be desirable that I should say a few words upon it.

The question of law raised is this, namely, whether, if it is found that the sale notice was published in the defaulter's cutcherry, it is still necessary for the zemindar to make out that the mode in which such publication is required by clause 2 of section 8 to be proved, had been observed.

Where there is no controversy as to the due publication of the notice, and the only dispute is as to whether the statutory mode of proof of such publication was resorted to, the answer to this question must be in the negative according to the decision of the Privy Council in the cases of *Maharajah of Burdwan v. Tara Sundari Debi*, (1882) I. L. R., 9 Cal., 619; L. R. 10 I. A., 19, and *Maharajah of Burdwan v. Krishna Kamini Das*, (1886) I. L. R., 14 Cal., 365; L. R., 14 I. A. 20. But where, as in this case, there is a controversy, and a substantial controversy, as to whether the sale notice in the mofussil, that is, in the defaulter's cutcherry, has been duly published, or not, the question whether the mode of proof of the publication of the sale notice prescribed by law has, or has not, been resorted to, cannot be said to be an immaterial question. This will appear clear from the following passage in the judgment of the Privy Council in the second of the two cases just cited. In that case their Lordships observe: "In the case of *Maharajah of Burdwan v. Tara Sundari Debi* (1882) I. L. R., 9 Cal., 619; L. R. 10 I. A., 19 this Committee found that the [316] question whether the requisite formality had been observed depended on conflicting evidence, but that the statutory mode of proof had clearly not been followed, and they held that the decision must go against the zemindar, whose business it was to follow the prescribed method. They did not differ from Sir BARNES PEACOCK, nor did they hold that the statutory proof was the only proof that could be given. Neither did Sir BARNES PEACOCK decide or intimate any opinion that one of the important formalities required as preliminary to a sale could be dispensed with."

No doubt there is a distinction between the thing to be proved and the mode of proving it; but if there is any controversy as to the thing to be proved, the question whether the statutory mode of proving it has or has not been resorted to cannot be regarded as immaterial to the inquiry.

The thing to be proved is, as I understand it, the publication of the sale notice in the cutcherry of the defaulting *patnidar*. The mode of publication is, according to the section, publication by sticking up the notice in some conspicuous part of the cutcherry; but the mere sticking up the notice would not, as the learned Senior Government Pleader appeared to contend, be a sufficient publication by itself. For if that were so, a mere sticking up of the notice without any intention of allowing it to remain stuck up, and with the object of taking it off the next moment, would be sufficient service of notice. That

could never have been intended. It is clear, from the several parts of the clause, that what is intended is a real and *bona fide* publication of the sale notice.

Then again, although occurring in the part relating to the mode of proof of the publication, we have these important words in the section: "The zemindar shall be exclusively answerable for the observance of the forms above prescribed, and the notice required to be sent into the mofussil shall be served by a single peon, who shall bring back the receipt of the defaulter, or of his manager, for the same; or, in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot."

[317] That indicates, indirectly no doubt, that the notice is to be published, and then the serving officer is to make some *bona fide* endeavour to obtain the receipt of the defaulter or his manager; and it is only in the event of his inability to procure such receipt that the other modes of proof are to be resorted to. In saying this, I must not be understood to mean that the receipt of the defaulter or of his agent is necessary, or that personal service of the notice on the defaulter is required. The law does not make personal service of notice on the defaulter necessary or sufficient. But it must be borne in mind that where there is a dispute as to the due publication of the sale notice, the question whether the serving officer made any *bona fide* endeavour to obtain the defaulter's or his agent's receipt in the first instance, as required by law, must have an important bearing upon the inquiry, especially where the point for determination is whether the alleged publication was real or colourable only. Of course, what would be a sufficient endeavour to obtain such a receipt must depend upon the circumstances of each case. In the present case there was not only no endeavour to obtain the receipt of one of the two defaulters, that is the plaintiff, or his agent, but, as I have said above, the evidence as to the sticking up of the notice in the defaulter's cutcherry is quite unsatisfactory.

S. C. G.

Appeal dismissed.

[27 Cal. 317]

APPELLATE CRIMINAL.

The 22nd January, 1900.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

The Government of Bengal.....Appellants
versus

Senayat Ali and another.....Respondents.*

*Bengal Municipal Act (Bengal Act III of 1884), sections 155, 156—Ferry,
Meaning of—Boat plying for hire without license within prescribed
limits of ferry—Right of ferryman to demand tolls.*

The expression "a ferry" in the Bengal Municipal Act means the exclusive right to carry passengers across the stream from one bank to the other on payment of certain

* Appeal No. 4 of 1899, against the order passed by J. H. Lea, Esq., District Magistrate of Chittagong, dated the 10th August 1899.

prescribed tolls. The object of section 155 of that Act appears to be to prevent the crossing of passengers from one bank of the river to the opposite bank by a boat plying for hire without a license within the prescribed limits. *Semble*, therefore, that the mere crossing of the bar of a [318] *khal* leading into the limits of a Municipal ferry would not constitute a breach of the Act.

A ferryman has no authority to demand tolls from persons who are merely passengers in an unlicensed boat. The remedy against the person who keeps a ferry-boat without a license plying within the prescribed limits is provided by section 156 of that Act.

In this case it appeared that a certain *khal* called the Sikalbaha *khal* flowed into the Kurufali river, and that on that river there was a municipal ferry plying in the neighbourhood of that *khal*. The complainant alleged that he and certain other persons had embarked at Goloke Peshkar's *hat* some six or seven miles from the municipal ferry; that they came down the Sikalbaha *khal* in a *sampan*; that somewhere between Kalapal and the mouth of the *khal* tolls were demanded from them by the accused persons, and they were forcibly detained by the accused for three hours, and not allowed to proceed until the arrival of the *ijaradar* Jimat Ali. The accused, who were employed by Jimat Ali, the *ijaradar* of the municipal ferry, to collect tolls, alleged that the boat came from Kalapal; that no force was used to detain the complainants, but that the boat was detained by rough weather for an hour. The accused were convicted by the Assistant Magistrate of Chittagong under section 341 of the Indian Penal Code.

On appeal, the District Magistrate set aside the conviction and sentence, holding that he was bound to follow a judgment in a precisely similar case delivered by the Sessions Judge in which the Sessions Judge held that the crossing of the bar at the mouth of the *khal* so as to enter the Kurufali river and to land passengers on the opposite bank constituted a breach of the Municipal Act.

An appeal was then preferred by the Local Government against the order of acquittal.

The Deputy Legal Remembrancer (Mr. Gordon Leith) for the Crown.

The judgment of the High Court (Prinsep and Stanley, JJ.) was as follows:—

The matters raised for our determination in this appeal relate to the construction of the sections regarding municipal ferries contained in the Bengal Municipal Act. Certain persons were travelling by *sampan* in a *khal* which flows into the Kurufali river. On that river there is a municipal ferry [319] plying in the neighbourhood of that *khal*. Complaint was made to the Magistrate by some passengers in a boat going through that *khal*, and after entering the Kurufali river, landing them on the opposite side, that they had been stopped by the servants of the ferryman, and had been made to pay tolls under the Municipal Act as if they had crossed that river in a municipal ferry boat.

There was some argument before the Assistant Magistrate, who held the trial, whether the terms of section 155 of the Municipal Act in regard to the limits of the ferry would apply to passengers going from a distance of more than two miles through the *khal* into the river so as to convey them to the opposite bank. For the defence, it was contended that the passengers had entered that boat within two miles from the mouth of the *khal*, and were therefore within the terms of section 155. The Assistant Magistrate, however, held, on the evidence, that the passengers had entered the boat beyond the limit of two miles; that, therefore, they would not come within the terms of the Municipal Act; and that consequently the demanding and obtaining payment

of tolls from them by the servants of the municipal ferryman and their detention until such payments were made, constituted the offence of wrongful restraint, of which he accordingly convicted the servants and sentenced them to a fine.

On appeal, the District Magistrate held that he was bound to follow a judgment in a precisely similar case delivered by the Sessions Judge, in which that officer had held that the crossing of the bar at the mouth of the *khal*, so as to enter the Kurufali river, and to land passengers on the opposite bank, constituted a breach of the Municipal Act. He accordingly set aside the conviction and sentence.

An appeal has been made by the Local Government against the order of acquittal.

Now in regard to the merits of the case, we may at once say that the ferrymen under no circumstances had authority to demand tolls from these persons who were merely passengers in an unlicensed boat. The remedy is provided by section 156 of the Municipal Act against the person who keeps a ferry boat without [320] license plying within the prescribed limits. The conviction and sentence were therefore proper, and must be restored.

But, as a part of this case, we have been asked to consider whether the Magistrate is right in adopting, as a matter of law, the precedent of a judgment of the Sessions Judge in a former case; that is to say, whether the mere crossing the bar of the *khal* leading into the limits of the municipal ferry would constitute a breach of the Act. We are of opinion that the view expressed by the learned Sessions Judge is erroneous. The crossing of the bar of a stream so as to enter another stream would constitute no breach of sections 155 and 156. A "ferry," as we understand the meaning of that expression in the Bengal Municipal Act, means the exclusive right to carry passengers across the stream from one bank to the other on payment of certain prescribed tolls, and the object of section 155 appears to us to be to prevent the crossing of passengers from one bank of the river to the opposite bank by a boat plying for hire without a license within the prescribed limits. On both grounds therefore the order of the District Magistrate on appeal setting aside the conviction and sentence is bad.

The order of the Assistant Magistrate is restored.

D. S.

NOTES.

[As regards *res judicata*, see also (1905) 28 Mad., 517.]

[27 Cal. 320]
CRIMINAL REVISION.

The 26th January, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Queen-Empress

versus

Basant Lall and others.....Accused.*

Arrest—Arrest by Police on an order in writing—Whether Police obliged to show authority under which they act to person arrested—Resistance to such arrest—Escape from custody—Code of Criminal Procedure (Act V of 1898), sections 56 and 80—Penal Code (Act XLV of 1860), section 224.

There is nothing extending section 80 of the Code of Criminal Procedure to an arrest made by the Police on an order in writing under section 56 of that Code, so as to require that any information as to the authority under which the Police are acting must be given to the person arrested in order to make it an arrest warranted by law.

[321] It may be desirable or even obligatory that if called upon the Police-officer making such an arrest should show the person arrested the authority under which he is acting; but to hold that he is bound to do so before he can properly arrest and detain in custody such a person, so as to make the arrest and the detention lawful, would be to extend the law beyond what the Legislature has thought proper to declare it.

ONE Basant Lall was charged with offences under sections 147 and 379 of the Penal Code. On the 26th of September 1898 the Inspector, who had investigated the case, handed to a Sub-inspector a *purwana* directing him to examine certain witnesses and arrest certain accused persons including Basant Lall. Early in the morning of the 27th of September the Sub-inspector, with a Head-constable and a constable went to Khusrupur to make the arrest. They found Basant Lall at his *gola*. The Sub-inspector ordered the Head-constable to arrest him, which he did, by catching hold of Basant Lall. At the same time the Sub-inspector told Basant Lall what he was charged with. Basant Lall stood up and tried to get free and shouted out to his men to come up and beat the Police. A number of men surrounded the Police and released Basant Lall from the grasp of the Head-constable and enabled him to escape into his *zenana*. A prosecution was instituted against Basant Lall under section 224 of the Penal Code, and against certain of the others under sections 147 and 225 of the Penal Code. Basant Lall was convicted under section 224 and sentenced to three months' simple imprisonment; the other accused were also convicted and sentenced to various terms of imprisonment. Basant Lall preferred an appeal and the other accused made an application for revision in the Court of the Sessions Judge of Patna. The appeal and the application for revision were transferred for disposal to the Court of the Sessions Judge of Shahabad. On his appeal Basant Lall was acquitted on the ground that his arrest or attempted arrest was not legal; the Sessions Judge being of opinion that the procedure laid down in section 80 of the Code of Criminal Procedure should have been followed, and Basant Lall should have had notified to him the authority and cause of his arrest, and the Sessions Judge referred the convictions and sentences of the other accused to the High Court with a recommendation

* Criminal Revision No. 260 of 1899, made against the order passed by F. H. Hardinge, Esq., Sessions Judge of Shahabad, dated the 9th of December 1899.

that they should also be set aside on the same ground. In the letter of reference he referred to the [322] cases of *Satish Chundra Rai v. Jodu Nandan Singh*, (1899) I. L. R., 26 Cal., 748, and *In the matter of Durga Tewari*, (1899) Unreported, decided by the High Court on 29th November 1899.

On consideration of this reference it appeared to the Judges of the Criminal Bench of the High Court that *prima facie* the law laid down by the Sessions Judge on which he set aside the conviction and sentence on Basant Lall was erroneous. They, therefore, deferred passing any orders with reference to the other accused, and directed that a rule should issue on Basant Lall to show cause why the order of acquittal passed on his appeal should not be set aside.

Sir *Griffith Evans* (with him Mr. *P. L. Roy*, Mr. *Abdur Kohim*, Mr. *C. R. Dass* and Babu *Atulya Charan Bose*) for the Accused.

Prinsep, J. (STANLEY, J., *concurring*).—

Several persons were tried together by the Magistrate of Shahabad for various offences connected with section 224 of the Indian Penal Code. The sentences passed on these persons were not appealable with the exception of the sentence passed on Basant Lall. On his appeal the Sessions Judge has acquitted him, setting aside the conviction and sentence, and he has referred the convictions and sentences of the others to this Court with a recommendation that they also be set aside on the same ground as that upon which he acquitted Basant Lall on his appeal. On consideration of this reference, it appeared to the Judges of the Criminal Bench, of which I was one, that *prima facie* the law laid down by the Sessions Judge on which he set aside the conviction and sentence on Basant Lall was erroneous. We, therefore, deferred passing any orders with reference to the others directing that a rule should issue on Basant Lall to show cause why the order of acquittal passed on his appeal by the Sessions Judge should not be set aside, having previously recited the reason for so doing. The last portion of the rule was not accurately expressed, for it proceeded to state "and why the [323] conviction and sentence passed by the Magistrate should not be restored." The reason for this order, I may say, was that we contemplated at that time that we should deal with the whole case, bringing up the appeal of Basant Lall for hearing from the Court of the Sessions Judge.

However, now that this matter is before us, we think it right to consider the case from another point of view, and that is that if we hold that the Sessions Judge has acquitted Basant Lall on a misapprehension of the law relating to this matter, we should more properly direct him to hear the appeal on the merits having set aside his order acquitting the appellant. The Sessions Judge has acquitted Basant Lall on the ground that Basant Lall was not lawfully arrested, and he has come to this conclusion, because he considers that the procedure laid down in section 80 of the Code of Criminal Procedure should have been followed, that is to say, that on his arrest Basant Lall should have had notified to him the authority for and the cause of his arrest. Section 80, however, applies only to the execution of a warrant of arrest. The arrest in this case was made by an order in writing under section 56 in regard to an arrest which certain Police officers can make without a warrant. The two sections relate to matters entirely different and appear in different chapters of the Code, and there is nothing extending section 80 to an arrest made by the police on an order in writing, so as to require that any information must be given to the person arrested in order to make it an arrest warranted by law. The order in writing is an authority to a subordinate Police officer to make an arrest which the superior Police officer, if present, could himself make on his own responsibility. It may be desirable or even obligatory that

if called upon the Police officer making such an arrest should show the person arrested the authority under which he is acting, but to hold that he is bound to do so before he can properly arrest and detain in custody such a person, so as to make the arrest and the detention lawful would be to extend the law beyond what the Legislature has thought proper to declare it. This would be to exceed our jurisdiction which is to declare what the law is and not to make the law.

This, as we understand his reference to us in revision and his judgment on the appeal on which the Sessions Judge relies in [324] making the reference, is the ground upon which he has acquitted Basant Lall. We think it unnecessary in this case to enter into any consideration of the merits of that appeal. Those are matters which should be left to the Sessions Judge to be dealt with in due course on the hearing of the appeal. He has not dealt with the merits. He has acquitted the accused Basant Lall simply on an erroneous view of the law. The proper order, therefore, to pass in this matter is to set aside the order acquitting Basant Lall because it proceeds on an erroneous view of the law and to direct a rehearing of the appeal, and we think this is the only order which we can properly pass on a rule issued to consider and deal with this matter. We are also of opinion that it is unnecessary, as the case is now before us, to consider further in revision the conviction and sentences passed on the other accused.

D. S.

[27 Cal. 324]

CRIMINAL REFERENCE.

The 8th January, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HILL.

Queen-Empress

versus

Khetter Mohun Chowdhry and others.*

Stamp Act (I of 1879), sections 58, 61 and 64—"Signing otherwise than as a witness, &c.," Meaning of—Liability of agent authorized to sign on behalf of principal—Granting of unstamped receipt—Refusal to grant stamped receipt by firm—Liability of members of such firm—"Person," Meaning of—Proof of demand of receipt.

The expression "signing otherwise than as a witness, &c.," as used in section 61 of the Stamp Act, means the writing of a person's name by himself or by his authority, with the intent of authenticating a document as being that of the person whose name is so written. An ordinary agent authorized to sign on behalf of his principal would fall within this description, and consequently within the purview of the section.

* Criminal Reference No. 1 of 1899, made by T. A. Pearson, Esq., Chief Presidency Magistrate of Calcutta, dated the 30th of May 1899.

Where, therefore, a person signed a firm's name to certain letters under the authority of the firm, the circumstance that the body of the letters were written at the dictation of the manager of the firm was held not to be sufficient to distinguish his case from that of any other agent.

The term "person" in sections 61 and 64 of the Stamp Act, includes the members of a trading partnership. So where certain persons, members of [325] a firm carrying on business in Calcutta as general dealers (which firm had acknowledged the receipt of certain sums of money from one L and had refused to grant him a stamped receipt), were charged under section 61 of the Stamp Act with having granted an unstamped receipt, and under section 64 of that Act with having refused to grant a duly stamped receipt, it was held that their liability depended on whether they were in contemplation of law the persons who signed the letters of acknowledgment or refusal to give the receipt, and not on whether they were present at the writing of the letters, or knew of the writing of them; provided that it was established by evidence that a requisition for a receipt had been made under section 58 of that Act.

IN this case it appeared that the members of the firm of Nobin Chunder Coondoo & Co. carried on business in Calcutta as general dealers. In that character they sold goods from time to time to one Mr. Lee of Purneah. In payment for these goods Lee sent to the firm on the 6th July 1898 a cheque for Rs. 400, on the 19th October 1898 a cheque for Rs. 200, and on the 28th January 1899 a cheque for Rs. 200. All these cheques were duly received and cashed by the firm, and the receipt of them was acknowledged by the firm by letters dated respectively the 11th July 1898, the 24th November 1898, and the 3rd February 1899. None of these letters bore a receipt stamp. On the 8th February 1899 a letter was written to Lee by the firm, in answer apparently to a demand on his part for a stamped receipt in respect of the above payments, declining to grant him a stamped receipt. The first accused and the members of the firm of Nobin Chunder Coondoo, accused Nos. 2 to 6, were charged with having on the 24th November 1898 granted an unstamped receipt in respect of a sum of Rs. 200, and also with having refused to grant a duly stamped receipt. The third accused was charged in his individual capacity with having abetted the commission of these offences. The scope of the prosecution was, however, amplified by the Magistrate, so as to embrace the two other letters of the 11th July 1898 and the 3rd February 1899.

The case was referred by the Chief Presidency Magistrate, under section 432 of the Criminal Procedure Code, for the opinion of the High Court.

The letter of reference was as follows :—

"This is a prosecution under sections 61 and 64 of the Stamp Act. The accused Nos. 2, 3, 4, 5 and 6 are alleged to be members of the firm of Nobin [326] Chunder Coondoo & Co., of 90 and 91, New Market, and the accused No. 1 is a writer employed occasionally by the firm to write English letters for them.

"The accused Nos. 2, 3 and 5 are out of Calcutta and have been allowed to appear by their pleader. The accused Nos. 1, 4 and 6 are present in Court.

One Tara Prosonno Chatterjee proves that the partners in the firm of Nobin Chunder Coondoo of 90, New Market, are Nobin Chund and Gopal Coondoo, the second and fifth accused. The fourth and sixth accused have been proved to be partners in the firm; they are said by the manager of the firm, Bycunto Nath Roy, to be non-working partners, but I do not believe this, as accused No. 6, when giving evidence as a witness in a case brought against Bycunto Nath Roy concerning the same documents under the Stamp Act, has admitted that he manages the business in conjunction with Bycunto Nath Roy in the absence of his father. I find, therefore, that accused Nos 4 and 6 are ordinary partners in this firm.

"There is some meagre evidence that the second, third and fifth accused were not in Calcutta when the monies and cheques about to be referred to were received by the firm ; and although I accept that evidence, there being nothing to contradict it, as regards the whereabouts of the accused Nos. 3 and 5, I think it is quite clear from Khetter Mohun's deposition in the case against Bycunto, to which I have referred, and which deposition is marked Exhibit IX, that the second accused was in Calcutta when the letters, Exhibits D and F, were written. There is evidence to show that the sixth accused was not in Calcutta between July 1898 and February 1899, the dates between which the cheques and monies were received, but there is evidence to show he was in Calcutta in March 1899.

"The documents to which this prosecution refers are three cheques, viz., "a cheque for Rs. 400 drawn in favour of Nobin Chunder Coondoo, dated the 6th July 1898, and marked Exhibit G. ; (2) a cheque for Rs. 200 drawn in favour of Nobin Chunder Coondoo, dated the 19th October 1898, and marked Exhibit H ; and (3) a cheque for Rs. 200 drawn in favour of Nobin Chunder Coondoo, dated the 28th January 1899, marked Exhibit I, and three letters acknowledging the receipt of the above mentioned three cheques addressed to Mr. Lee, the sender of the cheque, dated 11th July 1898, and marked Exhibit B ; a letter, dated the 24th November 1898, acknowledging the receipt of the cheque Exhibit H, which letter is marked Exhibit C. And *thirdly* a letter, dated the 3rd February 1899, which is marked Exhibit D, and is a letter acknowledging the receipt of the cheque Exhibit I. All these three letters are written in English and are signed "Nobin Chunder Coondoo & Co.," and they are all addressed to Mr. Lee of Purneah, the sender of the cheques, and are unstamped as receipts. It is in evidence that the accused, the partners of the firm, cannot write English letters, and that their manager, Bycunto Nath Roy, is also unable to do so, save that he can write the name of the firm in English. It is proved that these three letters, Exhibits B, C, and D, were written and signed by the first accused, a bazar writer, who is employed by the firm of Nobin Chunder Coondoo to write their [327] English letters. The first accused, Khetter Mohun, in his deposition in the former case against Bycunto, which has been put in in this case and marked IX, admits that he wrote the letters Exhibits F and D, when Nobin Chunder Coondoo was in Calcutta, and that he signs all letters in English for the firm under a verbal authority given him by Nobin Chunder Coondoo.

"It is also proved by other evidence in this case that the letters B, C, and D, were written and signed by the first accused Khetter Mohun, Bycunto Nath Roy, the manager of the firm, stating that these letters (as also another which is Exhibit F) were all written by the first accused at his dictation and order, he being authorized to empower the first accused to write in the name of the firm.

"The three cheques, Exhibits G, H, and I, were all sent by Mr. Lee of Purneah to Nobin Chunder Coondoo & Co. in payment of his account with them ; the cheques were cashed by the firm and the monies received by the firm's manager, Bycunto Nath Roy. Mr. Lee received no stamped receipt for his cheques, and evidently wrote several letters (not produced) on the subject to the firm, but he states he never got formal receipts. Mr. Lee's letters of demand are with the accused firm, but the firm wrote in reply to Mr. Lee a letter, dated the 8th February 1899, which clearly shows a demand was made by Mr. Lee for a stamped receipt, and in that letter they refused to give a receipt. This letter is Exhibit F, and was one of the letters put to Khetter Mohun Coondoo when giving his evidence in the case against Bycunto (see his deposition Exhibit IX) and he there states that their letter (which was then marked as Exhibit B in that case) was written by him at a time when Nobin Chunder Coondoo was in Calcutta. Mr. Lee being unable to obtain stamped receipts from the firm, sent the letters, Exhibits B, C, and D, to the Collector of Calcutta, and hence this prosecution on the Collector's sanction, which is Exhibit A.

"Before the case came on, the manager of the firm, Bycunto Nath Roy, and one of the partners, the sixth accused (for I find this as a fact notwithstanding Bycunto's evidence that he went alone), went to Mr. Eagleton at the Collectorate in March 1899 and admitted their offence, and at the same time presented to him the letter, Exhibit E, which was signed by Bycunto in the presence of Mr. Eagleton ; Mr. Eagleton then states that he showed

them at the time of their conversation the letters B, C, D, and F, and I believe his statement. There is no doubt but that the letter, Exhibit E, refers to the letters B, C, D, and F, although they are not specifically mentioned. I should add that Mr. Eagleton's evidence has been attacked on the ground that he, in the case of Bycunto, stated that the letters B, C, and D, were written by Bycunto, and that now in this case he states they are written by the first accused. There is a perfect answer to his having done so; he did it merely on a comparison of the signatures, and from having once seen Bycunto write his name in Court in a third case before either of these two cases. The comparison made was with writings admitted by Bycunto to be his, and, as I think probable, it was an admission for the purpose of getting out of the case cheaply without a hearing as is often done; [328] but I think the signature which he admitted to be his was not really his from a comparison of it with the writing of the first accused. I don't think there is really any reason to say that on account of being so misled he has in this case wilfully committed perjury. I may say that Mr. Eagleton is constantly in my Court, and I believe him to be an honest and truthful witness.

"It is said in defence in this case that the partners of the firm are not to be held responsible for the non-stamping of the letters and the refusal to give a receipt, as both offences were committed by or under the authority of the firm's manager Bycunto. There can be no doubt but that the first accused has technically committed an offence under the second paragraph of section 61 of the Stamp Act, as having executed a receipt not duly stamped; he, however, is more or less in the position of a mere amanuensis and did what he was told to do, still he ought to have insisted on the letter being stamped before execution. He states that his power, however, is derived from Nobin Chunder Coondoo, and Bycunto says he dictated the letter to him and caused him to write and sign it. Under these circumstances should the first accused be convicted of an offence under section 61 of the Stamp Act?

"Then, *secondly*, although there is no doubt in my mind but that Bycunto, had he been an accused, and had the same evidence been given against him as has been given in this case, could have been convicted under section 64 of the Stamp Act for a refusal to give a receipt, yet the question before me now is whether the accused, who are the partners of the firm, can be held responsible for such refusal. There is absolutely no doubt but that accused No. 4 was in Calcutta at the time of the receipt of the monies and the writing of the letters, and that Nobin Chunder Coondoo, another partner, was present also at Calcutta at the time; the other partners, 3, 5 and 6, being out of Calcutta at the time. Can then either the second or fourth accused, or the partners Nos. 3, 5, and 6, be held responsible for this refusal. Or even, having regard to the authority given by the firm to the first accused to sign and write their English letters, can either or any of them be convicted under section 61?

"There seems to be no direct authority on the point. The general rule of criminal law seems to be that a master is not criminally responsible for the acts of his servants unless they are done by his command or directions or with his consent; but there are cases in which a statute expressly orders or forbids the doing of a particular act and imposes a penalty for disobedience, and in construing such statutes the liability of an employer for the act of his servant depends upon whether the master was or was not ignorant of the act being done, and in some cases it appears that if a master places another in complete charge of his premises, he substitutes that person for himself and accepts liability for his acts and the knowledge of that person is his knowledge, and he is as responsible as if he had suffered or permitted whatever his delegate suffers or permits; this class of cases refers no doubt mostly to License Acts. The question, however, is not without difficulty and appears to be without authority.

[329] "I would, therefore, refer the following questions to the Hon'ble the Judges of the High Court:—

"1. Has the accused No. 1, who wrote and signed the letters, Exhibits B, C and D, though under the authority of Nobin Chunder Coondoo, and under dictation of the manager of the firm, Bycunto Nath Roy, committed an offence under section 61 of the Stamp Act?

"2. Are either or any of the partners of the firm, having regard to the authority given by one of them and by their manager to write and sign English letters, whether present or absent at the time of the execution of the letters, guilty of an offence under section 61 of the Stamp Act as an abettor or otherwise ?

"3. Can (a) the accused Nos. 2 and 4, who were present in Calcutta at the time of the receipt of the monies and the writing of the letters, be held responsible under section 64 for the refusal to give a stamped receipt referred to in the letter, Exhibit F ; or (b) can any of the partners absent from Calcutta at the time be held responsible for such refusal under section 64 of the Act ?"

The Standing Counsel (Mr. O'Kinealy) for the Crown.

The opinion of the Court (Prinsep and Hill, JJ.) was as follows :—

This is a reference made by the Chief Presidency Magistrate of Calcutta under section 432 of the Code of Criminal Procedure, and arising out of a prosecution under sections 61 and 64 of the Indian Stamp Act of 1879.

The persons accused are (1) Khetter Mohun Chowdhry ; (2) "the members of the firm of Nobin Chunder Coondoo & Co.," namely, Nobin Chunder Coondoo, Radha Mohun Coondoo, Cheytan Chunder Coondoo, Gopal Chunder Coondoo and Jadu Nath Coondoo ; and (3) Nobin Chunder Coondoo of the firm of Nobin Chunder Coondoo & Co.

From the formal charge sheet, it appears that the first accused and the members of the firm of Nobin Chunder Coondoo & Co. were charged with having, on the 24th November 1898, granted an unstamped receipt in respect of a sum of Rs. 200, and also with having, on a date which is not specified, refused to grant a duly stamped receipt. The third accused was charged in his individual capacity with having abetted the commission of these offences.

The scope of the prosecution has, however, been amplified by [330] the Magistrate so as to embrace two other letters similar in their character to that of the 24th November 1898, and dated respectively the 11th July 1898 and the 3rd February 1899.

But inasmuch as the alteration does not affect the answers which we propose to return to the questions submitted to us, this point need not now be dwelt upon.

The facts of the case, in so far as they are at present material, may be shortly stated. It appears that the members of the firm of Nobin Chunder Coondoo & Co. carry on business in Calcutta as general dealers. In that character they sold goods from time to time to a Mr. Lee of Purneah. In payment (whether partial or full payment is immaterial) for these goods, Mr. Lee sent to the firm on the 6th July 1898 a cheque for Rs. 400, on the 19th October 1898 a cheque for Rs. 200, and on the 28th January 1899 a cheque for Rs. 200. All these cheques were duly received and cashed by the firm, and the receipt of them was acknowledged by the firm by letters, dated respectively the 11th July 1898, the 24th November 1898, and the 3rd February 1899. None of those letters bore a receipt stamp. Then on the 8th February 1899 a letter was written to Mr. Lee by the firm, in answer apparently to a demand on his part for a stamped receipt in respect of the above payments, declining to grant him a stamped receipt. It is upon the basis of this letter that the second head of the charge seems to have been framed.

For the present purpose, we may assume that Mr. Lee's requisition, to which the letter of the 8th February appears to have been an answer, was duly proved. We think it right, however, to direct the attention of the Magistrate to the matter, since strict proof of the requisition is quite as essential to

a conviction under section 64 of the Act as proof of the refusal, and it is not clear that the law in this respect has been complied with.

With respect to the relation in which the first accused stood at the time of the writing of the above letters to the firm of Nobin Chunder Coondoo & Co., the finding of the Magistrate is somewhat vague. At the outset of the order of reference, he is referred to as "a writer employed occasionally by the firm [331] to write English letters for them." Later on he is described as "a bazar writer who is employed by the firm of Nobin Chunder Coondoo to write their English letters," and reference is made to an admission of the first accused in another trial that "he signs all letters in English for the firm under a verbal authority given him by Nobin Chunder Coondoo." Again it is said to be proved that the letters now in question were written and signed by the first accused, "the manager of the firm stating that these letters . . . were all written by the first accused at his dictation and order, he being authorized to empower the first accused to write in the name of the firm"; and again, "he, however, is more or less in the position of a mere amanuensis . . . He states that his power, however, is derived from Nobin Chunder Coondoo, and Bycunto (the manager) says he dictated the letter to him and caused him to write and sign it." It seems to us difficult upon these statements to arrive at a very precise conclusion as to the position which the Magistrate would assign to the first accused; but in the first question which he submits for our opinion he assumes as its basis that the letters were signed by the first accused under the authority of Nobin Chunder Coondoo, and it is on that footing, we think, that the question must be dealt with.

With respect to the remaining accused, the Magistrate has devoted some space to the consideration of the question whether they were all present in Calcutta at the time at which the letters on which the trial is based were written. The Magistrate has not indicated in what way he considered that the mere presence of the accused in Calcutta could affect the question of their guilt. He may, perhaps, have regarded it as bearing on the question of knowledge, but as to this he has arrived at no finding. But however this may be, the inquiry whether the members of the partnership were present in Calcutta or absent when the letters were written is, in our opinion, immaterial, their liability depending, not on whether they were present at the writing of the letters, or knew of the writing of them, but, on their being, in contemplation of law, the persons who signed the letters of acknowledgment or refusal to give the receipt.

To revert to the case of the first accused, he is charged, under [332] section 61 of the Act, with having signed the letters of acknowledgment, which were unquestionably chargeable with duty, without their being duly stamped, and under section 64 with having refused to give a duly stamped receipt. The latter branch of the charge has, however, as we gather from the order of reference, been dropped by the Magistrate in so far as he is concerned, and properly so, for in order to bring home the charge under section 64, it must be shown that the person accused had been required under section 58 to give a receipt, and there is no pretence for saying that, in the case of the first accused, any such requisition had been made. But with respect to the charge under section 61 the matter is not so clear. The first accused did undoubtedly write the name of the firm at the foot of the letters in question, and what has to be determined is whether, by doing so, he signed these letters in the sense in which the term is employed in the section, which makes it punishable to "sign" otherwise than as a witness, &c. By "signing" here, we take it, is meant (so far as the present question is concerned) the writing of a person's

name by himself or by his authority with the intention of authenticating a document as being that of the person whose name is so written. An ordinary agent authorized to sign on behalf of his principal would fall within this description, and consequently we think within the purview of the section, and the circumstance that the letters, that is, the body of them now in question, were written at the dictation of the manager of the firm is not, to our minds, sufficient to distinguish the case of the first accused from that of any other agent if, in fact, he signed the firm's name under the authority of the firm, as appears to have been the case. The agency of the first accused was necessitated by the circumstance that neither his employers nor their manager understood English; but this cannot make any difference. Letters signed by him in the firm's name within the scope of his authority would undoubtedly bind the firm in their transactions with third persons. And he appears to have had authority to affix the firm's name, at all events, to letters dictated to him by the manager of the business as those now in question are found to have been. We are aware that a good deal might, perhaps, be said under the circumstances of this case in support of the contrary view; but, on the whole, we are of opinion that the [333] first accused did sign the letters in question in the sense of section 61 of the Act, and that he may be properly convicted under that section.

With respect to the members of the firm of Nobin Chunder Coondoo & Co., we are of opinion that they are all liable to punishment both under section 61 and section 64 of the Act, provided that in the latter case the requisition under section 58 of the Act has been established by evidence. We have no doubt that the term "person" in section 61, as well as in section 64, includes the members of a trading partnership [see the General Clauses Act (X of 1897), section 3, clause 39]; nor can it, we think, be questioned that the partners in the firm of Nobin Chunder Coondoo & Co. were in contemplation of law the persons who signed the letters acknowledging the receipt of Mr. Lee's cheques, and who refused by the letter of the 8th February 1899 to give him a receipt. The signatures were theirs, and the refusal was theirs, though the hand which actually wrote the letters was that of the first accused; and having regard to the general scope and intention of the Act, we do not think, as we have already indicated, that the knowledge of these accused enters as an element into the offence with which they are charged.

It is unnecessary that we should say anything as to the charge of abetment preferred against Nobin Chunder Coondoo.

Let the record of the case with the foregoing remarks be sent to the Chief Presidency Magistrate.

D. S.

[27 Cal. 333]

· PRIVY COUNCIL.

The 9th December, 1899.

PRESENT :

LORDS HOBHOUSE, MACNAGHTEN, DAVEY, AND ROBERTSON,
AND SIR RICHARD COUCH.

Shankar Baksh.....Plaintiff

versus

Bulwant Singh and others.....(Defendants) *Ex-parte* Shankar Baksh.

[On petition from the Court of the Judicial Commissioner of Oudh.]

*Privy Council, Practice of—Petition for special leave to appeal—Reasons
omitted in order admitting to review—Civil Procedure Code
(Act XIV of 1882), s. 626.*

With reference to the requirement in s. 626 of the Civil Procedure Code that reasons should be recorded by the Judge granting an order of [334] admission to review, the mere omission to record them was not held a ground for granting special leave to appeal from the order or from the decree, which was subsequently made.

PETITION by the plaintiff for special leave to appeal from an order (30th March 1899) of the Judicial Commissioner, admitting a review from a decree (11th November 1898) of his predecessor in office and for special leave to appeal from a decree (1st April 1899) dismissing his suit made in review of the former decree which had been in the plaintiff's favour.

The question in the suit, in which the above decree of the 11th November 1898 was made between the parties, was whether or not certain plots of land within the plaintiff's talukhdari estate were comprised within the defendants' under-tenure.

The decree of the last mentioned date was made in favour of the plaintiff by the Judicial Commissioner in concurrence with the Court below.

This decree was admitted to review by his successor in office on the 30th March 1899, and on the 1st April following it was reviewed and reversed by that successor.

The present petition stated that no reasons, such as were required by section 626 of the Civil Procedure Code, were recorded by the latter for the order admitting to review. It also submitted that there were no reasons for such an order, or for the subsequent reversal of the first decree on appeal, which was grounded upon the concurrence of the Judicial Commissioner, who first heard the suit, in the decision of the Court of First Instance.

Mr. H. Cowell, in support of the petition, argued that the following were sufficient grounds for the grant of special leave to appeal: *First*, that the successor in the office of Judicial Commissioner had exceeded the authority given by section 623 of the Civil Procedure Code for the exercise of the power of review. It was well established that the words "any other sufficient reason" did not apply, in a case such as this, to mere difference of opinion as to the balance of evidence between one judicial officer and another; and did not authorize such a review and reversal as had taken place. The section authorized admission to review on such grounds as were specified, and on grounds of a like

[335] nature with them ; but there was a substantial difference between a review and an appeal. Here there had been no right of appeal. Yet the defendant had been allowed to bring forward his case for rehearing in a way that amounted to allowing an appeal, indirectly, to the successor. Reference was made to the judgment of A. MACPHERSON, J., in *Roy Meghraj v. Beejoy Gobind Burral*, (1875) I. L. R., 1 Cal., 197. Secondly, the power of admitting to review could only be exercised where the reasons were recorded ; and in the order of 30th March 1899 no reasons had been given.

Their Lordships' judgment was, on the 9th December 1899, given by

Lord Hobhouse.—Mr. *Cowell*, their Lordships wish to express in this case a regret that the learned Judge who granted the review should not have put his reasons on record as required by section 624 of the Code. They think it a matter of importance in the administration of the proceedings of the Court, and it ought to have been done. But their Lordships cannot think it a matter affecting the admission of the appeal in such a way as to induce them to advise Her Majesty to grant an appeal on that ground. It is rather a direction to the Judge how to act when he has decided to grant the application than a condition of granting it. In other respects the case seems to be quite an ordinary dispute between the parties on matters of fact, matters of measurements, payments of revenue, and inferences from them ; and as it is under value the rule is, that the final Court of Appeal in India should not be interfered with in its judgment. Their Lordships see no reason for taking it out of the ordinary rule that the judgment of the Appellate Court must be final.

Leave refused.

Solicitors for the Petitioner : Messrs. *Ranken, Ford, Ford & Chester*.

C. B.

[336] *The 3rd May and 8th July, 1899.*

PRESENT :

LORDS HOBHOUSE AND MACNAGHTEN, AND SIR RICHARD COUCH.

Monmohini Debi and another.....Plaintiffs

versus

R. Watson & Co.....Defendants.

Sarnamoyi Debi.....Plaintiff

versus

R. Watson & Co.....Defendants.

Hemanta Kumari Debi.....Plaintiff

versus

R. Watson & Co.....Defendants.

[Three appeals consolidated.]

[On appeal from the High Court at Fort William in Bengal.]

Accretion—Ownership of alluvial land, again formed after diluvion—

Evidence of the identity of the sites—Thak and survey maps.

Riparian owners disputed the right of property in plots of alluvial land formed by the action of the current at a place where similar land, within a revenue mehal, bounded on one side by a river had been carried away by diluvion some years before. The claimants in these three separate suits, each claiming possession, had title as zemindars to the formerly existing plots. The new formations now claimed were alleged to have been thrown up on the sites of the former plots, and to be part of the claimants' several estates. These estates were represented in a thakbast map, made before the diluvion, and showing what had been mapped as the boundary lines.

On the re-appearance of the land a survey map was made. Between this and the thak map there were discrepancies as to the boundary lines. There were also differences between the thak and the state of the locality as existing when, for the purposes of this suit, a local investigation was made by an Amin appointed by the Court of First Instance.

Held, that it was not a necessary part of the claimants' cases that there should be a complete agreement between the above maps, or that the thak should be shown to accurately represent the former plots. To ascertain the precise boundaries would require more accuracy than could be well expected in a thak map; and the identity of the sites of the re-formed plots with those of the plots formerly existing, had, in the judgment of their Lordships, been established by evidence reasonably sufficient.

CONSOLIDATED appeals from three decrees (20th August 1895) of the High Court, reversing three decrees (3rd August 1893) of the Subordinate Judge of Murshedabad.

The alluvial lands in dispute were a number of chuks, or defined plots, on a chur comprehended in a mauza named Diar Shibnagar. These, formed by alluvion, were said by the claimants to [337] be on the sites of formerly existing plots, demarcated and numbered in the Collectorate. The former plots had been washed away. The proprietary possession of the new was claimed on the averment that they belonged to the several revenue-paying estates of the three sets of plaintiffs above named, who all made similar statements as to their

zemindari rights of property in them. The evidence on both sides was the same in all the three suits which were heard together.

Diar Shibnagar was made up of six separate estates assessed to the revenue, separately owned, and numbered. It was bounded on the east by the river Pudma.

Among other defences the defendants set up that they held a putni tenure granted to them by a zemindar in mauza Shibnagar which covered part of the lands in dispute, and certain jotes, or holdings, which comprehended other parts. That the jotes or tenancies entitled them to be treated as ryots within the Bengal Tenancy Act (VIII of 1885) and that they could only be evicted on due notice. They also contended that the plaintiffs could only sue upon the averment of a joint and undivided right according to their fractional shares in an estate, or estates, and could not sue for separate possession.

But the only substantial question raised in all the suits was whether the sites of the newly formed plots had been, or could be, sufficiently identified with the sites of the plots existing in Diar Shibnagar before the diluvion which commenced in 1853.

Earlier in 1853 the thak map referred to in these proceedings was made, showing the shares held in the mauza, and the alluvial plots appertaining to each were indicated, the rest of the alluvial area being held jointly in fractional shares. In that year the course of the Pudma began to wash away the land of Diar Shibnagar, and before 1869 the whole had been submerged. In 1869 re-appearance of the land set in, and after another but less encroachment of the river, the land in 1880 was again above the river's level as before. A survey map was then made by Kamal Chander Dutt, under orders of the revenue authorities. In May 1883 some of the claimants sued the Government for joint possession of the re-formed land, alleging that it had been wrongly taken by the revenue officers, on its re-appearance. They obtained [338] a decree for part of the land by consent. In 1891 a large part of the newly formed land was under the cultivation which the defendants had established thereon. In October 1891 the present plaintiffs forcibly took possession. But the defendants, under section 9 of the Specific Relief Act, 1877, obtained a decree for possession, on which they entered on the 5th April 1892.

This was followed by the present claimants' suit, on the 7th May 1892.

The Subordinate Judge, Babu Kalicharn Ghosal, gave one judgment in the three suits. He had deputed an Amin to make a local investigation, under section 392 of the Civil Procedure Code. He was satisfied that this had been properly conducted, and concluded that the identity of the sites of the new and the old plots had been fairly established. He annexed the map, which the Amin had made, to his decree, which was in favour of the plaintiffs.

The defendants appealed to the High Court. The Judges of a Divisional Bench (PETHERAM, C.J., and BEVERLEY, J.) were of opinion that, although it was very probable that the Amin had been nearly successful in ascertaining where the old chunks, or plots, were, still it was only a probability. They considered this to be altogether insufficient to entitle the several plaintiffs to obtain *khas* possession of lands, which might in reality belong to the defendants, or to one or other of the owners of land in Diar Shibnagar. They, further, were of opinion that evidence indicated that all the zemindars claiming alluvial land in that mauza had been receiving the profits of their estates in the main or original land of Shibnagar, according to fractional shares. The suit brought against the Government was a joint one, and would probably have failed if it had been asserted that each zemindar, or group of zemindars, was separately

interested in an ascertained portion of the chur, and entitled to separate possession. The High Court also were unable to find that the plots claimed were in the same position as those represented to belong to the several claimants in the thak map of 1853. They decided, accordingly, that the evidence of identity of site was insufficient, and dismissed the suit.

[339] Sir *W. H. Rattigan*, Q.C., and Mr. *C. W. Arathoon*, for the appellants.—Our cases were such that the High Court should have acted upon them as supported by sufficient evidence, instead of reversing the decree of the first Court which was based upon reasonably adequate proofs. Especially when the latter were contrasted with a defence that was not supported by substantial facts. If the case for the appellants had not been proved to demonstration by maps in perfect agreement, at all events it was more reasonably probable that the plots now claimed had been formed upon the old sites than that they had not been formed there; regard being also had to what a thak was expected to be in comparison with a survey map. The thak-bust was, and had been defined to be, “the laying down the boundary of estates, fixing their limits” preparatory to a professional survey, and practically such accuracy was not to be expected in it as in the survey, which was final in the Collectorate. The maps were then examined with a view to showing that the plots as laid down in the survey map verified the Amin’s map, annexed to the decree. He had reported that such discrepancies as existed between the thak and survey map were such as frequently occurred, the survey map in this case agreeing with the actual state of the ground. This had induced the Subordinate Judge to amend the Amin’s map annexed to his decree, to make it correspond with the survey map, and to recognize it as correct with that amendment. It was submitted that no sufficient reason had been shown by the High Court for reversing the decree of the first Court.

Mr. *J. Jardine*, Q.C., and Mr. *J. H. A. Branson* for the Respondents.—It being necessary for the plaintiffs to prove that the lands claimed were upon the identical sites with the land which had been lost by the diluvion of 1853, they had failed to give the proof which they had attempted to adduce. They should have established the identity of the sites of the new plots with the sites of the old according to the thak map of that year. The High Court had correctly decided that for the plaintiffs to succeed they had to affirm two propositions. They should have shown that the estates in Diar Shibnagar were held by the owners in defined areas, and not merely that the estates **[340]** were held by receipt of some fractional shares of profits of entire zemin-daris, and also they should have shown the possibility of the plots newly formed being assigned to the same position as the old plots on the thak map of 1853. As the plaintiffs had failed to do this they had failed to prove their title to the lands claimed.

Sir *W. Rattigan*, Q.C., replied.

Afterwards on the 8th July 1899 their Lordships’ judgment was delivered by

Sir R. Couch.—These are consolidated appeals in suits brought by the several appellants and others against the respondents to recover possession of lands in the district of Moorshedabad known as mouzah Diar Shibnagar. The mouzah consisted of six touzis or revenue-paying estates in shares numbered 405, 268, 269, 270, 271, and 1580, the last number not being included in these suits. The lands in dispute were a large number of ascertained chunks or demarcated plots of land belonging to these several estates and shown on the thak map made on a preliminary survey of the mouzah by the Government for revenue purposes, those which belonged to the estate No. 270 being coloured red, to the estate No. 271 blue, and to Nos. 405, 268 and 269 uncoloured, and the

chucks being held by the owners of the estate in fractional shares as between themselves. In 1853 the river Pudma which adjoined the mouzah began to diluviate its lands, and at some time between that date and 1869 the whole of the lands in dispute in these suits had become diluviated. In 1869 a portion of them had been reformed and a survey was made of it for the purpose of assessing revenue. Shortly afterwards this portion was again diluviated, but by 1880 it had been again re-formed and was surveyed on behalf of the revenue authorities. In May 1883 the owners of 405 and 270 brought a suit against the Government and the owners of the other estates to recover joint possession of the reformed-land on the ground that it was a portion of their estates and had been wrongfully taken possession of by the Government. The owners of 268 and 271 were at first made defendants, but were afterwards made plaintiffs instead of defendants. In 1886 the plaintiffs having come to terms with the Government there was a judgment by consent in their favour [341] as to a portion of the land claimed, and they were allowed to withdraw the suit as to the remainder with liberty to bring a fresh suit.

In 1891 a large part of the re-formed land, which then had an area about two miles in length and one in breadth, had become valuable and 600 bighas of it had been sown by the respondents with indigo and wheat and scattered plots were being cultivated by ryots from the other lands of the mouzah. The servants of the respondents having in October 1891, whilst they were reaping indigo, been attacked by persons at the instigation of the appellants and driven off the newly formed lands, the respondents brought a suit under the Specific Relief Act to recover possession and obtained a decree under which they were in April 1892 put in possession by the Court of the whole of the newly formed lands. Thereupon the present suits were brought and were tried together.

In two of the suits, 380 and 381 of 1892, the issue framed was whether the lands in suit fell within the plaintiff's alleged chuck No. 60, &c., and No. 58, &c. In the third suit 437 of 1892 the issue was in a different form,—whether the lands in suit fell within the residue of No. 34 of the thak and survey of 1853; and, if so, were the plaintiffs proprietors of the same? In the former two suits there was a formal admission by the defendants' pleader that the chucks as numbered belonged to the plaintiffs. In the latter suit it does not appear to have been disputed that the residue of No. 34 belonged to the plaintiffs, if the issue raised that question. The real question in all three suits is, whether the sites of the re-formed lands claimed are identical with the sites of the lands which belonged to the appellants before the diluviation. According to the practice of the Indian Courts in such cases from a very early period a commission was issued under the provisions of the Civil Procedure Code to the Civil Court Amin to make a local investigation and to report thereon to the Court. He began his proceedings on the 21st December 1892, and on the 27th May 1893 he made his report with a map annexed to it. The investigation had occupied him 27 days. The report with the evidence which he took is in the record, and his investigation appears to have been very carefully made in the presence of the representatives of the parties. In [342] the report he says that "the land-marks given in the thak map (preliminary survey) correspond with the land-marks given in the survey (the final) map and those existing on the boundaries in the locality; but when the thak is compared throughout from any one of the aforesaid marks or points, the thak lines do not agree in length with the survey lines and ridges in the locality. Evidence has been taken with regard to the boundaries pointed out on behalf of the plaintiff." After referring to this evidence the report says, "such discrepancies are generally found in the boundary lines of the survey map, therefore this

should not be taken into account." After noticing some discrepancies between the thak boundaries and the state of the locality, the Amin says "such faults occur in the thak in several cases and I have found such faults in course of several investigations." In conclusion he says, "in places where the thak and survey map do not agree with each other it is proper to act according to the survey, and specially, as in this case, the survey map corresponds with the locality, I determined the boundary line according to the survey and, having plotted the thak chunks according to it, I have determined the disputed land."

The Subordinate Judge, who had before him the thak field book which is in the record of the appeal in the suit 437 of 1892 as well as the thak map, agrees with the Amin that when the thak and survey maps disagreed the survey map ought to be adopted for fixing the boundary line, and after discussing the evidence in the case decided in favour of the plaintiffs in the three suits for part of the claim in each of them and marked on the Amin's map by lines described in the judgments the lands which he found to belong to them respectively. Finding other issues also for them he made a decree in each of the suits in favour of the plaintiffs, the Amin's maps being ordered to form part of it. The present respondents appealed to the High Court, which Court (consisting of the Chief Justice and another Judge) reversed the decrees of the Subordinate Judge and dismissed the plaintiffs' suits with costs. Taking the suit 380 of 1892, and saying that, if that suit fails the other two must also fail, the learned Judges in their judgment say they think the plaintiffs had failed to make out a *prima facie* case; that in order to do so the plaintiffs must prove that [343] it was then possible to find and demarcate upon the reformed land on the bank of the Pudma plots and chunks of land which occupy precisely the same position on the surface of the earth as the plots or chunks which are represented by the colour red on the thak map of 1853; that "this must depend upon whether the thak map is an accurate representation of the area and boundaries of the mouzah as it existed in 1853, and whether the materials then existed to enable a skilled Amin to lay down upon that map an accurate map of the area and boundaries of the mouzah in its present condition;" that there were inaccuracies in the thak map and the survey which the Amin and the Subordinate Judge had rectified; that if the thak map were accurate it would no doubt be possible to find from it the red enclosures upon the land, "but as soon as it appears as it does here from the plaintiff's own evidence that the thak map is inaccurate, it must follow that any attempt to place the fields shown upon it upon the present surface of the land can be nothing more than a guess, and thus, though it is very probable that the Amin has been nearly successful in ascertaining where the old chunks were, still it is nothing more than a probability, which is altogether insufficient to entitle the plaintiffs to recover khas possession of land which may belong to the defendants or to the owners of either of the other estates." Their Lordships are unable to agree in this reasoning. It requires an amount of accuracy in a thak map which cannot reasonably be expected in it. If the learned Judges are right in their view of the accuracy which is necessary there would be very few cases in which the owner of diluviated land would be able to recover possession of it when it was reformed. In most cases the persons who were alert in going upon the land and making any kind of cultivation of it would acquire a title to it. Their Lordships are of opinion that there was sufficient evidence on the part of the plaintiffs to entitle them to recover possession of the land, and they will humbly advise Her Majesty to reverse the decrees of the High Court and to order the appeals to it to be dismissed with costs, thereby affirming the decrees of the Subordinate Judge. The respondents will pay the costs of the present appeals,

but not including the costs of the petition to have the appeals [344] consolidated or of the petition of the appellants heard on the 25th day of April 1899 to have the hearing of the appeals postponed. The respondents' costs of opposing both these petitions are to be paid by the appellants.

Appeals allowed.

Solicitors for the Appellants : Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents : Messrs. *Freshfields & Williams.*

C. B.

[27 Cal. 344]

The 30th June, and 22nd July, 1899.

PRESENT :

LORD WATSON, LORD HOBHOUSE, SIR RICHARD COUCH, AND
SIR EDWARD FRY.

Balbhaddar Singh.....Plaintiff

versus

Sheo Narain Singh.....Defendant.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Oudh Estates Act (I of 1869)—Succession to a talukdari—Effect of declaration by holder as to who should be his heir.

The official enquiries made of talukdars at an early period of British administration, as to who were to be their successors, were not intended to derogate from the rights of talukdars in their heritable and transferable estates.

To such an enquiry an answer in 1862 made by a sanad-holding talukhdar, since deceased, who was entered in lists I and II (under the Oudh Estates Act, 1869), stated that she appointed to be her heir the father of the present plaintiff, appellant. The father, however, died before the talukhdar and the son now claimed that this nomination amounted to a gift of the talukhdari estate, subject to a trust for the life of the then talukhdar.

Held, that the answer of 1862 did not operate to confer any estate upon the person named.

APPEAL from a decree (30th June 1893), affirming a decree (29th September 1890) of the District Judge of Rae Bareilly, who dismissed the suit.

The plaintiff, appellant, and the defendant, respondent, were descendants, the one in the fifth degree and the other in the fourth, from an ancestor common to both. The plaintiff claimed the proprietary right as talukhdar of Gaura in the Rae Bareilly District, alleging himself to be, by more than one title, the lawful successor of the last holder, who was the late Thakur Achal Kunwar, a widow, to whom her deceased husband, Bhopal Singh,

[346] another descendant from the same common ancestor with the present parties, has transferred the entire estate of Gaura. Bhopal Singh died in December 1858, having executed a transfer of the Gaura talukhdari to his said wife.

On the 19th February 1859 the summary settlement was made with her. On the 26th July 1862 she received a sanad from the authorities, and afterwards her name, after the passing of the Oudh Estates' Act, 1869, was entered in the Lists I and II. Thus the estate was established as devolving upon a single heir, within section 8, para (1) of that Act. In November 1887 she died. The defendant, respondent, the actual holder in possession, alleged a title under the will of the late Thakurain. Both the Courts below dismissed the suit. The substantial question between the parties to this appeal was as to the effect of her answer to an enquiry of her by the Deputy Commissioner as to who would be her successor. This answer was contained in two documents to the same purport, one of the 20th April 1862, and the other dated on the following day.

The appellant alleged that by their effect his father, Sheopal Singh, had received from the Thakurain a gift of the inheritance, she having thereafter retained only the estate in the talukh for her life, the remainder having passed away from her to Sheopal, inheritable by his son after him. Sheopal had, however, died long before the Thakurain, in 1867. Besides the displacing of testamentary disposition, other grounds of claim had been negatived on the facts. Both Courts had on the facts found against an alleged adoption of Sheopal under authority to the Thakurain, and against a custom of succession in the direct male line of primogeniture, under which it was sought below to bring him.

The suit having been dismissed with costs in the Court of the Judicial Commissioner, the plaintiff now appealed.

Mr. C. W. Arathoon (Mr. W. H. Appohn, Q.C., with him) for the Appellant.—The effect of the nomination of Sheopal Singh was to confer upon him a proprietary interest in the Gaura estate, which vested in him, and was inherited by his son. The Thakurain Achal Kunwar had, by the petitions delivered in answer to the enquiry of the authorities in 1862, secured to [346] Sheopal Singh an estate of inheritance. She termed the second document a "deed of inheritance." This was to be subject to her own interest for life. There was a gift to Sheopal Singh which should receive effect, and his son, notwithstanding his father's death in the life-time of Achal Kunwar, could claim to have inherited the talukhdari.

In reference to the effect of answers to the questions put to talukhdars in earlier days as to who would be their successors, were mentioned *Hurpurshad v. Sheodial*, (1876) L. R., 3 I. A., 259; *Haidar Ali v. Tasadduk Rasul Khan*, (1890) I. L. R., 18 Cal., 1; L. R., 17 I. A., 82.

Mr. A. Cohen, Q.C., Mr. J. D. Mayne, Mr. L. De Gruyther, for the Respondent were not called upon.

Afterwards, on the 22nd July 1899, their Lordships' judgment was delivered by

Lord Hobhouse.—The property in dispute is the taluk of Gaura, to which the Courts in Oudh have held the respondent to be entitled. The last holder was a lady named Achal Kunwar, widow of Bhopal Singh, who died in December 1858. She was recognised by the Government, and her title was established by sanad granted in July 1862. The taluk was entered in Lists I and II, as devolving on a single heir, and not in List III. She died in November 1887. The Collector placed the respondent in possession as being either heir

or devisee; upon which the present suit was brought. It lies, therefore, upon the plaintiff, now appellant, to show that he has the better title.

He has attempted to do that in more than one way. He alleges that Achal Kunwar adopted his father Sheopal Singh; and from a document which will be examined presently it may be conjectured that she did at one time contemplate such an adoption; but no sufficient evidence was brought by the plaintiff to show that it was effected, and both Courts have held that it was not. He further claimed to be the heir-at-law of Acha Kunwar, tracing his title through her husband Bhopal by lineal primogeniture; but as the taluk was entered in List II and not [347] in List III, the single heir is, in the absence of any family custom to the contrary, to be ascertained by the rules of the Hindu Common Law; and the appellant is more remote in blood than the respondent. The only serious question raised at the Bar relates to the meaning of a document marked as Exhibit A2 which the appellant contends to have been a gift of the estate to his father Sheopal.

Before the issue of the sanad, enquiries, such as other cases have made familiar to us, were made by executive officers to ascertain the views of the Thakurain concerning the succession to her estate. After some uncertainties and vacillations, which the officers evidently attributed to intrigues in her household, but which are not now material to detail, the Thakurain's views were finally stated in a petition, dated 20th April 1862, marked A13. It runs as follows:—

“Your petitioner was much honoured by service on her of your order, dated 26th March 1862, inquiring as to the heir-apparent to the estate. Having been thus informed of the order, your petitioner begs to submit that since the petitioner is issueless, she appoints Sheopal Singh to be her heir. She shall be the proprietor during her life-time, and shall (herself) manage the estate affairs, and after her death, Sheopal Singh shall become the proprietor (*malik*) of the estate. Therefore during her life-time she declares Sheopal Singh to be her heir, and this application having been clearly worded is submitted by way of a deed of inheritance in order that it may be a sanad and be of use when required.

(Sd.) ACHAL KUNWAR,
Talukdar of Gaura.”

Exhibit A2 is a document, dated 21st April 1862, and purporting to be a letter from the Thakurain to Kamta, the father of Sheopal.

“From Thakurain Achal Kunwar, to Srish Sri Maharaj Koer Kamta Parshad.

“May you live long!

“I (Thakurain Achal Kunwar) offer my blessing to you, and pray for the welfare of both sides. I request you to give Sheopal Singh (may he live long!) to me, please give him to me, be obedient to me, and carry out my orders till I live; during my life-time I will be the proprietor (Thakur). I make Sheopal Singh my heir and proprietor of this estate, land, debts, and wealth, after me. I invoke the Government, brotherhood, all good men, [348] and spiritual guide. These shall punish me, if I act otherwise than in the manner described. I make Sheopal Singh (may he live long!) proprietor and landlord (Thakur) of this Raj the Gaura (estate) after me. The witnesses hereof are Binda Parshad, Kanungo; second witness, Majlis Rae, Kanungo; third witness, Thakur Bakhsh Singh of Sotha. Dated Baisakh Badi 7th, 1269 Fasli, 1919 Sambat.

(Sd.) THAKURAIN ACHAL KUNWAR.”

“The sanad executed by me is correct.

(Seal of Thakurain
Achal Kunwar.)”

It was put in by the plaintiff and admitted in evidence by the District Judge. The Court of the Judicial Commissioner thought it not proved. Without

discussing that point, the argument has proceeded here on the footing that the document is genuine.

What then is its effect? It would not suffice for the plaintiff to show that it is a testamentary instrument, because Sheopal died in 1867, and it could not take effect in his favour. The plaintiff, therefore, contends that it operated to transfer the estate, and that by it the Thakurain's absolute interest became an estate for life with remainder to Sheopal, or became burdened with a trust having the same effect.

This is not one of the cases in which a sanad has been obtained in consequence of some promise by the grantee. For all that appears the Government were quite indifferent as between Sheopal and other members of the family. The Thakurain's petition (A13) was not founded on any valuable consideration moving to her. In answer to an enquiry who was heir apparent to the estate, she says she appoints Sheopal to be her heir. Though she speaks of her petition as a sanad and a deed of inheritance, it is highly improbable that she had in her mind any idea so novel to her people as the idea of turning her inheritance into an estate for life with remainder to a collateral relative. Doubtless her idea was that she was simply pointing out who should take through her by inheritance; and if she had then died her nominee would have been quietly installed. These official inquiries as to successors had reference to the critical state of the country, and it was not their object to derogate from the hereditary transferable right which had been promised to [349] the talukdars, and which was expressed in the sanad soon afterwards granted to this lady.

It seems to their Lordships that, apart from the idea of adoption which never bore fruit, the letter A2 is to the same effect with the declaration of the day before. In effect the Thakurain informs Kamta of her inclinations towards his son—a very natural thing for her to do, when, after some inconsistent expressions of view and some family controversy, she had finally made known her intentions to the Government. But there was no contract with Kamta and no consideration moving from him. The Officiating Judicial Commissioner expresses himself thus.

“When it is said, ‘I make Sheopal Singh the owner (or the owner and heir) of this estate after my death,’ the only reasonable interpretation to be put on the words is that the writer was appointing Sheopal Singh to be heir in succession to herself. To find in this plain language any intention on the writer's part to declare herself a mere trustee for her lifetime of the estate on behalf of Sheopal Singh would be impossible without putting on the words used an interpretation which would not only be unnatural and forced, but would certainly never have suggested itself to Mussammat Achal Kunwar. There can be no doubt that if it had been suggested to any one in Mussammat Achal Kunwar's position that such an interpretation could be put on the document, she would have repudiated it without hesitation. The necessity of dealing very cautiously with documents executed by ladies in this country and the danger of ascribing to their language any other meaning than that which they themselves would attach to them is obvious enough. Now, in this instance, we have undisputed evidence of Mussammat Achal Kunwar's wishes on this point only some 24 hours before this document is said to have been executed; and that too in a document which she placed in the hands of public officials as a final declaration of her wishes with regard to Sheopal Singh.”

These remarks express also the view taken by the other Judges below, and as their Lordships concur in them they must hold that the appeal is groundless, and should be dismissed. They will humbly advise Her Majesty

in accordance with this opinion, and the appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the Appellant : Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent : Messrs. *Watkins & Lempriere.*

C. B.

NOTES.

[Petitions addressed to officials, or answers to official inquiries have been held to amount to Wills :—(1908) 36 Cal., 149; 13 C.W.N., 291.]

[350] TESTAMENTARY JURISDICTION.

The 8th February, 1900.

PRESENT :

MR. JUSTICE SALE.

In the goods of *Amrita Lal Mullick*, deceased.

Probate—Minor—Special citation—Probate and Administration (Act V of 1881), sections 50, 53—Procedure—Service of Summons—Code of Civil Procedure (Act XIV of 1862), sections 443, 647.

Where executors applied for probate and there was living a minor widow entitled to maintenance and residence under the will :

Held, that a special citation should issue upon the widow and be served personally on her and on her father with whom she resided.

AN application was made for probate of the will of the deceased by two of his brothers appointed executors. The testator, who died without issue, left him surviving a childless widow, at the date of this application, a minor of the age of ten years. She resided sometimes with the petitioner and sometimes with her father. The testator by his will provided for the maintenance and residence of his widow, and directed that in the event of his dying without leaving a male child, the whole of his estate should go to the petitioners and his three other brothers in equal shares. The petition now asked for a special citation to issue to the widow of the testator calling upon her, if she claim any interest in the estate of the deceased, to come and see the proceedings before grant of the probate also asked for in the petition.

Mr. *J. G. Woodroffe* for the Petitioners.—Except for the prayer for issue of a special citation on the widow the application is in the usual form. On an application for probate by executors citations are not ordinarily asked for. Here, however, the widow is a minor of ten years of age, and the executors on her attaining majority may be called upon to prove the will in solemn form, and the attesting witnesses and other necessary evidence may not be procurable. Want of citation on the proper parties has been held to be a ground for revocation of probate. In *Rebells v. Rebells*, (1895) 2 C. W. N., 100 it was held that the proper course is to serve the [351] minor with notice and to have a guardian *ad litem* appointed. There are no special provisions in the Code for service on minors: the service should be personal and in the usual manner.

The father of the minor, with whom she resides, may also be served. We will make a subsequent application for the appointment of a guardian *ad litem* of the minor. If the widow appears to oppose the grant, the case will proceed as a contentious cause under section 83 of the Probate and Administration Act. If the widow does not appear on proof of service of citation, the will may be proved summarily. Proof in solemn form *per testes* will not be then required hereafter. *Brinda Chowdhraïn v. Radhica Chowdhraïn*, (1895) I.L.R., 11 Cal. 492.

Sale, J.—I think you have made out a case for the issue of a special citation. I order that a special citation do issue to the widow, and direct that it be served personally on her and also on her father with whom she occasionally resides.

Attorneys for the petitioners : Messrs. *Morgan & Co.*
C. E. G.

[27 Cal. 351]
INSOLVENCY JURISDICTION.

The 22nd January, 1900.

PRESENT :

MR. JUSTICE SALE.

W. E. Howatson

versus

W. E. Durrant.*

*Insolvency—Vesting order—Civil Procedure Code (Act XIV of 1882), s. 295—
Rights created by s. 295 not affected by Insolvency—Insolvent Act
(11 & 12 Vict., Ch. XXI), s. 49.*

An order under section 295 of the Civil Procedure Code affects only interests existing at the time.

The insolvency of the debtor introduces a new state of things from the date of the insolvency, but as regards sums accrued due prior to the date of the insolvency the order under section 295 creates rights, which are not affected by the insolvency.

Soobul Chunder Law v. Russick Lall Mitter, (1888) I. L. R., 15 Cal., 202, cited.

THE plaintiff, who is the creditor of the defendant, obtained a decree, and after various proceedings an order, dated 8th September [352] 1898, under section 295 of the Code of Civil Procedure by which it was ordered that certain payments be made out of the fund in Court representing realizations made in execution of decrees, and that the Registrar should enquire and report who were the creditors of the judgment-debtor entitled to payment out of the fund in Court and be at liberty to include in his report any further sum of money which might be paid into Court to the credit of this suit up to the date of his report, and the order further

* Original Civil Jurisdiction.

directed that the balance of the fund after payment of the amounts already mentioned be applied in payment rateably to persons found by the report entitled to a distributive share therein in the proportion indicated in the report.

On 1st February 1899 the defendant applied to the Court to be adjudged an insolvent, and on the same day an order was made vesting all the immoveable and moveable property and effects belonging to the insolvent in the Official Assignee. The Registrar's report was still pending, and it was found that at this time there was in Court from the salary accruing due to the defendant to the credit of the suit a sum of Rs. 7,094-14-2. The creditors who claimed to share in this sum were the same creditors whose names were set out in the schedule to the petition of the insolvent. This application was now made by the Official Assignee by means of a rule asking that the plaintiff and the other creditors may be directed to withdraw their attachments attaching a moiety of the monthly salary of the defendant, and for an injunction restraining them from executing or attempting to execute their decrees against the insolvent, and a declaration that the plaintiff and the other creditors have no right to be paid any portion of the sum of Rs. 7,094-14-2, at present standing to the credit of the suit, and an order on the Comptroller General to pay over the sum of Rs. 7,094-14-2 to the Official Assignee and for other relief.

Mr. *Hyde* appeared for the Official Assignee.

Mr. *Sinha* appeared for the Plaintiff.

Mr. *Zcrab* appeared for the Defendants, Tichoo and Gangoo.

Sale, J.—The question in this rule is as to the effect of the insolvency of the defendant under the vesting order of the 1st of February 1899, on the previous order made in this suit on the 8th of September 1898.

[353] The plaintiff is the creditor of the defendant. He obtained a decree in this suit, and after various proceedings he obtained on the 8th of September 1898, an order under section 295 of the Civil Procedure Code, whereby, after directing certain payments to be made out of the fund in Court representing realizations made in execution of decrees, it was directed that the Registrar should proceed to enquire and report as to who were the creditors of the judgment-debtor entitled to payment out of the fund in Court, and that for the purpose of that enquiry the Registrar was to be at liberty to include in his report any further sum or sums of money which may be paid into Court to the credit of this suit up to the date of such report, and then the order proceeded to direct that the balance of the fund, after payment of the amounts already mentioned, be applied in payment rateably to persons found by the report entitled to a distributive share therein in the proportion indicated in the report. Now that is an order of a character frequently made by this Court under section 295, and the object is to provide for rateable distribution among such of the creditors of the judgment-debtor as shall be entitled to payment under section 295. It has certainly always been the practice of this Court to regard an order of this sort as an order, not merely for an enquiry, but also for payment of the sums found payable upon the enquiry. I think that is the way in which the order should be read. But so reading the order, it affects only interests existing at the time. But the insolvency of the defendant introduces a new interest and a different question arises.

Now upon the insolvency of the defendant, the whole estate of the insolvent vested under section 4 of the Insolvent Act in the Official Assignee, and the Official Assignee became empowered to administer the estate of the insolvent for the benefit of the general body of creditors. The estate so to be administered is the estate of the insolvent subject to any rights, equitable or otherwise, which

were existing at the date of the insolvency in favour of third persons. I think, therefore, that the operation of the order of the 8th September must be restricted to the period previous to the date of the vesting order.

It is clear that the Official Assignee is entitled to administer [354] all sums representing the salary of the judgment-debtor accrued, or accruing due to him subsequent to the date of his insolvency, but as regards salary which had accrued due to the judgment-debtor prior to the insolvency, the order of 8th September 1898 has created rights which are not affected by the insolvency.

I think that this view is in no way opposed to the principle explained by this Court, in the case of *Soobul Chunder Law v. Russick Lall Mitter*, (1888) 1. L. R., 15 Cal., 202.

That is a case which deals only with the rights of a judgment-creditor under an attachment made before the decree for the administration of the judgment-debtor's estate. It decides that an attachment does not create in favour of the attaching creditor any interest in or charge upon the property as against other creditors, and the principle laid down is that under an administration decree the whole of the unrealized assets of a deceased debtor are divisible among the general body of creditors. In my opinion, so much of the fund in Court as represents salary accrued due prior to the insolvency must, under the order of the 8th of September, be treated as realized assets, and as such does not fall within the principle of the decision, which has been cited. The Official Assignee is, I think, entitled under section 49 of the Insolvent Act to apply to this Court in the suit in which the order of the 8th September is made to have the operation and effect of that order restricted in the manner already indicated. I think the rule may be made absolute to that extent. The Official Assignee and the judgment-creditors, who have appeared, are entitled to their costs payable out of the balance of the fund after satisfying the payments directed by the order of the 8th of September.

Attorney for the Official Assignee : Mr. *Fink*.

Attorneys for the Plaintiff : Messrs. *N. C. Bural & Co.*

Attorneys for the Defendants : Messrs. *Dignam & Co.*

C. E. G.

[355] ORIGINAL CIVIL.

The 11th January, 1900.

PRESENT :

MR. JUSTICE SALE.

Benode Lall Roy and others

versus

Bussunto Kumari Debi.*

Practice—Cases to be entered in the list of suits for liquidated claims—Rule 281 (H. C. O.J.)—Removal of cases improperly entered in that list—

Rule 284—Ordinary Mortgage Suit.

Held that the practice of the Court having been for many years to place ordinary mortgage suits on the list of suits for liquidated claims in the view that the incidental relief sought in such suits did not prevent them from being regarded as suits in which the claim was in substance a claim only for a liquidated demand in money, the practice should be adhered to.

Held, also, that when a suit is transferred from the general list of causes (at the instance of the plaintiff) it is desirable that this should be done on notice to the defendant so that he may not be taken by surprise.

THE facts of the case are shortly these: On the 2nd of June 1889 the plaintiffs instituted this suit on the basis of a mortgage suit against the defendant for an order that an account might be taken as to the amount due to the plaintiffs for principal and interest on three several indentures of mortgage and further charge and for payment of the same, and that in default of such payment for an order that the mortgaged premises might be sold, and the proceeds of such sale be applied for payment of the amount that might be found due to the plaintiffs, and in case of deficiency the said defendant might be ordered to pay the same, and for costs of this suit as between attorney and client, and for such further and other reliefs, &c. On or about the 22nd of July 1889, the defendant filed her written statement in this suit taking various pleas of defence. The suit, which had been originally placed in the general list of causes, was transferred on the 2nd of August to the general list of suits for liquidated claims; on the 10th of the same month, being in the printed board on the general list of liquidated claims, the plaintiff paid the fee for this application for an order that this suit be transferred to the list of suits for liquidated claims to the share therein in the general list of causes. of a character frequent.

[356] Mr. A. Chaudhary, agent for the plaintiff, is to provide for rate of interest.—This suit has been improperly entered in the list of solvent-debtor as share claims. It remained on the general list of causes for a long time, always been there as at the instance of the plaintiff and without notice to the defendant, not merely transferred to the other list. No doubt the practice of this Court has generally been to treat ordinary mortgage suits as suits for liquidated claims, but it is not settled that they have been wrongly so treated, and some Judges have questioned the propriety of the practice. There is no definition to be found in the Rules of this Court as to what is a liquidated demand. But see order 3, rule 6, under the Judicature Acts, which defines the suits which can be treated as such. It will be found that in England the definition has been enlarged from time to time to include various kinds of suits, but here we have never defined the term, nor have there been

* Original Civil Suit No. 411 of 1899.

any decisions reported dealing with the matter. See the judgment of NORTH, J., in *Imbert-Terry v. Carver*, (1887) L. R., 34 Ch. D., 506, where it was held that a writ which claims foreclosure or sale and a receiver is not a suit to recover a debt or liquidated demand. Here the term "liquidated demand" has a more restricted meaning than it has under the rules framed upon the Judicature Act. In mortgage suits, as in the present case, the usual prayers are for account and sale.

In this case more has to be done. A trust deed, in favour of the defendant, has to be construed and the rights of the defendant thereunder ascertained, to determine if she could deal with the property purported to have been mortgaged. Under the Transfer of Property Act, all persons having an interest in the property are necessary parties, and to prevent multiplicity of suits their rights have to be adjudicated upon, and such a suit cannot be treated as a liquidated claim. In the case of *Roghunath Misser* (unreported), which was also a mortgage suit this Court considered it was not a liquidated demand, because the plaintiff sought to bind the son of a Mitakshara father for his dealings with the joint-estate.

Mr. S. P. Sinha for the plaintiffs.—In the case of *Roghunath Misser* the plaintiff asked for a declaration that the sons were [357] bound by the acts of their father. There is no such declaration sought for in the present suit. The practice has been to treat ordinary mortgage suits as liquidated claims in this Court. All that can be sold in this suit is the interest of the parties executing the mortgage.

Sale, J.—The question whether this suit is rightly on the list of suits for liquidated claims depends upon whether it is an ordinary mortgage suit. It is contended that it does not come within the terms of Rule 281, inasmuch as it is not a suit in which the claim is only for a liquidated demand in money. It has been the practice for many years to place ordinary mortgage suits on the list of suits for liquidated claims, in order that they may be expeditiously disposed of, and the view held has been that the incidental relief sought in such suits did not prevent them from being regarded as suits in which the claim was in substance a claim only for a liquidated demand in money. This is what I have said on previous occasions when the same question has been raised, and other Judges have said the same thing. This practice should I think be adhered to. The question then is, is this an ordinary mortgage suit? To answer this question it is necessary to look at the plaint and the relief sought. The plaint is framed as in ordinary mortgage suits. The relief sought is just the usual mortgage relief. No declaration of title is sought, nor any equitable relief of an unusual or special character. The questions arising in the suit are those appearing on the face of the deed itself, and no cause of action is introduced other than that which is based on the mortgage itself. It is not at present necessary to consider whether the amendment, which has been made in the plaint, is sufficient for the purpose of enabling the Court to bind by its decree any one but the original party. That is a matter to be considered at the hearing of the suit. The suit is, I think, rightly on the list of suits for liquidated claims. It was originally on the general list of causes and not on the general list of suits for liquidated claims.

On the 7th of December last it was transferred without notice to the defendant to the general list of suits for liquidated claims. When a suit is transferred from the general list of causes, it is, I think, desirable that this should be done on notice [358] to the defendant. When this course has not been followed, the defendant is taken by surprise, and the result very often is that an application is made for an adjournment of the case.

Having regard to the fact that this case has come suddenly on the Peremptory List of Causes I am prepared to consider any application that may be made for an adjournment.

Mr. *Chaudhuri*.—I ask for a fortnight's adjournment.

The Court.—I allow you a fortnight. The case to go out of the Peremptory List for a fortnight, in order to enable you to take steps to be prepared with your defence.

Mr. *Sinha*.—If the defendant desires to be examined under a commission I ask that it should be done and completed within the fortnight.

The Court.—No; I will deal with any application for any further adjournment when it is made.

Costs of application to be costs in the cause.

Attorney for the Plaintiffs: Babu *N. C. Bose*.

Attorney for the Defendant: Messrs. *Kally Nath Mitter & Sarbadhikary*.
N. C.

[27 Cal. 358]

APPELLATE CIVIL.

The 19th December, 1899.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Preonath Chattopadhyia.....Plaintiff

versus

Ashutosh Ghose and others.....Defendants*.

*Specific Relief Act (1 of 1877), section 27—Specific performance of a contract,
Suit for—Whether registration of an ekrarnamah was sufficient
notice of the contract.*

More registration of an *ekrarnamah* is not sufficient notice of a contract within the meaning of section 27 of the Specific Relief Act.

THIS appeal arose out of an action brought by the plaintiff for specific performance of a contract alleged to have been made [359] with him by defendant No. 2 for the sale of certain tanks. The allegation of the plaintiff was that on the 7th Jaista 1289, B. S., the husband of defendant No. 2 executed a registered *ekrarnamah* undertaking for himself and for his heirs not to sell or transfer the said properties except to the plaintiff; that subsequently defendant No. 2, who had inherited her husband's share of the property, agreed to sell the same to the plaintiff for Rs. 100 and received Rs. 5 as earnest

* Appeal from Appellate Decree No. 479 of 1898, against the decree of Babu Mohim Chandra Ghose, Subordinate Judge of Hooghly, dated the 9th of December 1897, reversing the decree of Babu Brish Chunder Mukerjee, Munsif of Howrah, dated the 5th April 1897.

money, with the understanding that she would, after taking away the fishes in the tank, execute and get registered a *kobala* on receipt of the balance of the purchase money; that the plaintiff was ready to perform his part of the contract, but the defendant No. 2 on the 27th Asar 1303 B. S., executed a registered *kobala* of the same property in favour of defendant No. 1, whom the plaintiff informed of the prior contract with him; that, notwithstanding that, the defendant No. 2 purchased the said properties with full notice of the prior contract with the plaintiff, hence the suit was brought for specific performance of the contract. The defence of defendant No. 2 was that she was not aware of the *ekrarnamah* executed by her husband, that she did contract to sell her share in the tanks to the plaintiff, and she received Rs. 5 as earnest money, but as the plaintiff neglected to complete the sale by paying the balance of the purchase money, she sold the properties to defendant No. 1. The defence of defendant No. 1 mainly was that he was a *bona fide* purchaser for value, and without notice of the alleged contract, and therefore the plaintiff was not entitled to get the relief claimed by him. The Court of First Instance, holding that "the registered *ekrar* was itself a notice to all purchasers of a right of pre-emption in the plaintiff," and upon the merits finding in favour of the plaintiff, decreed the suit.

On appeal, the Subordinate Judge reversed the decision of the first Court. Against this decision the plaintiff appealed to the High Court.

Dr. Ashutosh Mookerjee and Babu Mohini Mohun Chuckerbutty for the Appellant.

Babu Umakali Mookerjee for the Respondents.

[360] The judgment of the High Court (Banerjee and Stevens, JJ.) was as follows:—

This appeal arises out of a suit brought by the plaintiff-appellant to enforce specific performance of a contract for sale of certain immoveable property against the defendant No. 2, the vendor, and the defendant No. 1, who is a purchaser from the defendant No. 2 of the property in dispute, on the allegation that the predecessor in interest of the defendant No. 2 had entered into an *ekrarnamah* or agreement with the plaintiff and another person to sell the property to them if it was sold at all; that subsequently there was a verbal contract between the defendant No. 2 and the plaintiff for the sale of the same to the latter for Rs. 100; and that the defendant No. 1, who had notice of the *ekrarnamah* and of the verbal contract, had, in spite of such notice, purchased the property from defendant No. 2.

The defence of defendant No. 1 was a denial of the alleged verbal contract, a denial of notice of the verbal contract or of the *ekrarnamah*, and a denial of the plaintiff's right. The defendant No. 2 also denied the plaintiff's right generally.

The first Court found for the plaintiff and gave him a decree. On appeal by the defendants the Lower Appellate Court has reversed that decree and dismissed the plaintiff's suit, holding that the alleged verbal contract was not proved; that the *ekrarnamah* could not be enforced as the suit was not based upon it, and as moreover the *ekrarnamah* was not between the plaintiff and the defendant No. 2, nor for exactly the same subject-matter as that now in dispute; that the defendant No. 1 had no notice of the *ekrarnamah* or of any verbal contract for sale; and that the registration of the *ekrarnamah* was not sufficient notice within the meaning of section 27 of the Specific Relief Act.

In second appeal it is contended on behalf of the plaintiff-appellant that the Lower Appellate Court is wrong in holding that the registration of the

ekrarnamah was not sufficient notice in law to the defendant No. 1, and that the suit was not based upon the *ekrarnamah*. It is further contended that the fact of the suit not being between the same parties as those who entered into the *ekrarnamah* makes no difference when the suit is brought [361] by one of the parties in whose favour the *ekrarnamah* was executed on the allegation that the other party who was jointly interested had waived the benefit of the *ekrarnamah*.

The first question for consideration in this appeal is whether the registration of the *ekrarnamah* was sufficient notice to the defendant No. 1 within the meaning of section 27 of the Specific Relief Act. If this question is answered in the affirmative it will then be necessary to consider the other questions raised. But if it be answered in the negative, then, as admitted by the learned pleader for the appellant, it will be unnecessary to go into those questions. "Notice" is not defined in the Specific Relief Act. It has been found by the Lower Appellate Court as a fact that there was no actual notice to the defendant No. 1, either of the agreement or of the alleged verbal contract. The only notice that is relied upon is constructive notice by reason of the registration of the *ekrarnamah*. In section 3 of the Transfer of Property Act "notice" is defined in these words: "A person is said to have notice of a fact when he actually knows that fact, or when but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229." This is as comprehensive a definition of "notice" as any that has ever been given. Notwithstanding this comprehensive definition of the term it has been held by this Court in the case of *Inderdawan Pershad v. Gobind Lall Chowdhry*, (1896) I. L. R., 23 Cal., 790, that registration does not amount to notice within the meaning of section 81 of the Transfer of Property Act. If that is so, we see no reason why a different view should be taken as to the effect of registration on the question of notice in a case coming under section 27 of the Specific Relief Act. Registration is not constructive notice under the English law, see the notes to *Le Neve v. Le Neve*, W. & T. L. C., 7th Ed., Vol. II, 193. We may add, as was remarked by Mr. Justice PONTIFEX in the case of *Doorga Narain Sen v. Baney Madhub Mozoomdar*, (1881) I. L. R., 7 Cal., 199, that the doctrine of constructive [362] notice has been pushed to its extreme limit in England, and that in this country it requires even more careful application against a purchaser for value.

The learned Vakil for the appellant relies upon the case of *Lakshmandas Sarup Chand v. Dasrat*, (1880) I. L. R., 6 Bom., 168. That case was considered by this Court in the case of *Inderdawan Pershad v. Gobind Lall Chowdhry*, (1896) I. L. R., 23 Cal., 790, and was dissented from, and it has also been dissented from by the Madras High Court in the case of *Shan Mawn Mull v. Madras Building Co.*, (1891) I. L. R., 15 Mad., 268. In this state of the authorities we think it right to follow the view taken of the effect of registration on the question of notice in this Court in the case of *Inderdawan Pershad v. Gobind Lall Chowdhry*, (1896) I. L. R., 23 Cal., 790, and we must hold that the registration of the *ekrarnamah* was not constructive notice to the defendant No. 1 within the meaning of section 27 of the Specific Relief Act. That being so, it becomes unnecessary to consider the other questions raised in the appeal; and the appeal must be dismissed with costs.

S. C. G.

Appeal dismissed.

NOTES.

[This was approved in (1902) 7 C.W.N., 11, but dissented from in (1904) 6 Bom. L.R., 1043; (1902) 26 Bom., 538.]

[27 Cal. 363]

The 20th November, 1899.

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE WILKINS.

Abdul Hossein and others.....Plaintiffs

versus

Kasi Sahu, Minor by his Mother Debi Sahuni.....Defendant.*

Appeal—Order permitting withdrawal of a suit—Appeal from order setting aside the order of withdrawal and dismissing the suit—Civil Procedure Code (Act XIV of 1882), sections 2, 373, and 588.

An order under s. 373 of the Civil Procedure Code giving permission to withdraw a suit with liberty to bring a fresh one is not a "decree" within the meaning of s. 2 of the Code and is not appealable.

If, however, such an order is appealed from, and the Lower Appellate Court sets aside the order and dismisses the suit, then the order of the Lower Appellate Court is a "decree" within the meaning of section 2 of the Code, and is appealable.

Jogodindro Nath v. Sarut Sunduri Debi, (1891) I. L. R., 18 Cal., 322, followed.

[363] IN this suit the Court of First Instance acceded to the plaintiffs' prayer to be allowed to withdraw the suit with liberty to bring a fresh suit under section 373 of the Civil Procedure Code. The District Judge on appeal set aside the order of withdrawal and dismissed the plaintiffs' suit. The plaintiffs thereupon appealed to the High Court.

Babu *Nalini Ranjan Chatterjee* for the Appellants.—The order of the first Court under section 373 is not appealable as such an order, it has been held in *Jogodindro Nath v. Sarut Sunduri Debi*, (1891) I. L. R., 18 Cal., 322, is not a "decree" within the meaning of section 2 of the Code.

No one appeared for the Respondents.

The judgment of the High Court (*Rampini and Wilkins, JJ.*) was as follows.

This is an appeal against the decree of the District Judge of Purneah, dated the 10th August 1897. The suit was originally brought in the Munsif's Court, and the Munsif acceded to the plaintiffs' prayer to be allowed to withdraw the suit with liberty to bring a fresh suit under section 373 of the Code of Civil Procedure. The defendant then appealed to the District Judge, and he set aside the order of the Munsif under section 373, and dismissed the plaintiffs' suit.

The plaintiffs now appeal and contend that the District Judge's order is wrong, as no appeal lay to him from the Munsif's order under section 373.

It is clear that an appeal does lie to this Court from the order of the District Judge, because the order was one dismissing the plaintiffs' suit, and this order is a decree within the definition given in section 2 of the Code.

* Appeal from Appellate Decree No. 2030 of 1897, against the decree of D. Cameron, Esq., District Judge of Purneah, dated the 10th of August 1897, reversing the decree of Babu Mohendro Nath Das, Munsif of Purneah, dated the 8th of April 1897.

It further appears to us that the order of the District Judge is wrong, inasmuch as no appeal lay to him from an order under section 373, the matter being concluded by a decision of this Court—*Joqodindro Nath v. Surat Sunduri Debi*, (1891) I. L. R., 18 Cal., 322, in which [364] judgment the cases of the Allahabad Court on this point, which are of a conflicting nature, are considered and disposed of.

Under these circumstances we must be guided by the decision of this Court referred to above. We, therefore, set aside the order of the District Judge and restore that of the Munsif.

The appellant is entitled to his costs.

M. R. M.

NOTES.

[See also (1912) 16 C.L.J., 77.]

[27 Cal. 364]

The 24th November, 1899.

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE WILKINS.

Haro Mohun Roy Churamoni and others.....Defendants

versus

Pran Nath Mitter.....Plaintiff.*

Bengal Tenancy Act (VIII of 1885), Ch. X—Conditions or incident of tenancy—Dispute as to right of way between two neighbouring tenants—Jurisdiction of Settlement Officer.

A Settlement Officer has no jurisdiction to decide civil disputes between tenant and tenant. A dispute as to a right of way between two neighbouring tenants is of a civil nature, and the existence of a right of way cannot be regarded as a condition or incident of a tenancy.

Pandit Sardar v. Meajan Mirdha, (1893) I. L. R., 21 Cal., 378, referred and followed.

THIS was a dispute between two neighbouring tenants as to the existence of a right of way. The Assistant Settlement Officer of Puri, acting under section 105 of the Bengal Tenancy Act (VIII of 1885), found that the plaintiff had a right of way over the defendant's land, and directed an entry to be made in the record-of-rights that the plaintiff had a right of way. The Officiating Special Judge of Cuttack affirmed the order. The defendant thereupon appealed to the High Court.

Babu Karuna Sindhu Mookerjee for the Appellant.—The Settlement Officer was not justified in recording the existence of the alleged right of way ; as it is not one of the conditions or incidents of a tenancy he had jurisdiction to record under section 102, clause (h). Further it has been laid down in *Pandit Sardar*

* Appeal from Appellate Decree No. 49 of 1898, against the decree of W.B. Brown, Esq., Special Judge of Cuttack, dated the 25th of September 1897, affirming the decree of Babu Jotendra Mohun Sinha, Assistant Settlement Officer of Puri, dated the 28th of April 1897.

[365] v. *Meajan Mirdha*, (1893) I. L. R., 21 Cal., 378, that the Settlement Officer has no jurisdiction to decide a dispute between tenant and tenant.

Bahu Manmatha Nath Mitter.—A right of way is a condition of tenancy, and under Chapter X the Settlement Officer has jurisdiction to decide such a dispute.

Bahu Karuna Sindhu Mukerjee was not called upon to reply.

The judgment of the High Court (*Rampini* and *Wilkins, JJ.*) was as follows:—

This is an appeal against an order of the Special Judge of Cuttack, affirming an order by the Assistant Settlement Officer of Puri, passed in a settlement case under Chapter X, Act VIII of 1885.

All the proceedings in the case, as well as the Judge's order now under appeal, are of date prior to the passing of Act III of 1898, B.C. So this appeal has admittedly to be disposed of under the provisions of the former Chapter X.

The dispute is as to the existence of a right of way, and the parties are two neighbouring tenants. The Assistant Settlement Officer held the right of way over the defendant's land to exist, and the Special Judge has affirmed his order.

In appeal it is urged (1) that the Settlement Officer was not justified in recording the existence of the alleged right of way, as it is not one of the conditions or incidents of a tenancy he had jurisdiction to record under section 102, clause (h): (2) that under the ruling of this Court in *Pandit Sirdar v. Meajan Mirdha*, (1893) I. L. R., 21 Cal., 378, the Settlement Officer had no right to decide a dispute between tenant and tenant.

We think these contentions must prevail. We consider that the existence of a right of way cannot be regarded, strictly speaking, as a condition or incident of a *tenancy*. A *rayyat* may have a right of way over the land of another *rayyat*, but not *quā tenant*. Secondly, the case of *Pandit Sirdar* seems to us clearly to lay down the principle that under the old chapter X, now repealed, a Settlement Officer has not jurisdiction to decide civil [366] disputes arising between tenant and tenant. The dispute in this case is undeniably a dispute of a civil nature, and must under the old chapter X be left to the decision of the Civil Courts.

We decree this appeal, set aside the orders of the lower Courts and direct that all entries regarding the existence of the right of way in question be expunged from the record of rights. This order will carry costs—two gold mohurs.

M. R. M.

NOTES.

[This was followed in (1904) 8 C.W.N., 741.]

[27 Cal. 366]
CRIMINAL REVISION.

The 11th January, 1900.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Kalai and others.....Petitioners

versus

Kalu Chowkidar.....Opposite Party.*

Arrest—Village chaukidar, whether a police officer—Person unlawfully arrested by a private person and made over to village-chaukidar—Rescue from custody of village-chaukidar—Lawful custody—Penal Code (Act XLV of 1860), section 225—Criminal Procedure Code (Act V of 1898), section 59—Village Chaukidari Amendment Act, 1870 (Bengal Act I of 1892), section 13.

S, who was alleged to have committed theft, was unlawfully arrested by a private person and made over to the custody of the village-chaukidar. The theft was not committed in view of such private person. S was rescued from the custody of the village-chaukidar by the accused. The accused were convicted under section 225 of the Penal Code and sentenced each to two months' rigorous imprisonment.

Held, that a village-chaukidar cannot be properly regarded as a police-officer within the terms of section 59 of the Code of Criminal Procedure, and that S, therefore, was not in lawful custody at the time of his rescue. Conviction and sentence set aside.

In this case it appeared that one S was found picking tamarinds from a tree, which T alleged to be his. S was arrested by a private person within the terms of section 59 of the Code of Criminal Procedure. He was, however, not lawfully arrested, because the alleged offence, that of theft, was not committed in the view of such private person. S was then made over to the [367] village-chaukidar to take to the thana. S was rescued from the custody of the chaukidar by the accused. The accused were convicted under section 225 of the Penal Code and sentenced each to two months' rigorous imprisonment.

Babu Jogendra Chunder Ghose for the Petitioner.

The judgment of the High Court (Prinsep and Stanley, JJ.) was as follows:—

The question raised in this case is whether the person, who is said to have been rescued by the petitioners, was, at the time of such rescue, lawfully detained within the terms of section 225 of the Penal Code, so as to make such act by the petitioners punishable. It appears that he was arrested by a private person within the terms of section 59 of the Code of Criminal Procedure, and that he was not lawfully arrested because the alleged offence—*theft*—was not committed in the view of such person. He was then made over for custody to the village-chaukidar. The question then arises whether, on the delivery of such person to the custody of the village-chaukidar, he can from that time be considered to be in lawful detention, so far as the village-chaukidar is concerned, so as to bring him within the terms of section 225 of the Penal Code. The decision on this point depends upon the interpretation to be put upon the term

* Criminal Revision No. 774 of 1899, made against the order passed by G. Gordon, Esq., Sessions Judge of Dacca, dated the 22nd of October 1899.

Police officer in section 59 of the Code of Criminal Procedure. The only authority cited to us, which is at all in point, is the case of *Empress v. Kallu*, (1880) I. L. R., 3 All., 60. We are of opinion that a village-chaukidar cannot be properly regarded as a police officer within the terms of section 59. The duties of such an officer are in Bengal defined in section 13 of Act I (B.C.) of 1892, and clause (4) of that section declares that amongst such duties "he shall assist private persons in making such arrests as they may lawfully make, and shall report such arrests without delay to the officer in charge of the said police station." Now, having regard to the terms of this local Act, it seems to us that the Legislature contemplated that such a person was merely to assist in a private arrest, and report the fact of such private arrest to the police station, and that it was not contemplated that he should exercise the duties set out in section 59, that is, receive a person arrested by a private person or re-arrest him and take him [368] to the nearest Police station. On these grounds we think that the person, whose rescue forms the subject of the charge of which the petitioners have been convicted, was not in lawful detention at the time of such rescue. The rule is, therefore, made absolute, and the conviction and sentence set aside.

D. S.

NOTES.

[The decisions in (1913) 41 Cal., 17; (1907) 29 All., 377, were similar.]

[27 Cal. 368]

CRIMINAL REFERENCE.

The 30th November, 1899.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Queen-Empress

versus

Somir Bowra *alias* Somir Baba.*

Sessions Court—Accused person, unable to understand proceedings in Court,

Commitment of—Report by Magistrate of such proceedings to High Court—

Power of High Court to pass final orders on such report—Discretion of

High Court to order Sessions trial to be held—Code of Criminal

Procedure (Act V of 1898), ss. 341 and 471—Penal

Code (Act XLV of 1860), s. 302.

An accused person, who had been for some time confined in a lunatic asylum, was tried and committed to the Sessions by a Deputy Magistrate on a charge of murder. The accused was deaf and dumb, and could not be made to understand the proceedings which had been taken.

* Criminal Reference No. 6 of 1899, made by Babu Shoshi Bhusan Mukerjee, Deputy Magistrate of Rungpur, dated 14th November 1899.

On the proceedings being forwarded to the High Court under section 341 of the Code of Criminal Procedure it was held, that the law does not contemplate that the Sessions trial should necessarily take place. That it is discretionary with the High Court on a commitment made to order the Sessions trial to be held, and the High Court must consider whether any benefit would be likely to result especially to the accused by such trial.

The High Court in this case having come to the conclusion that no benefit would be likely to result to the accused by his being tried by the Court of Session, found that the accused was guilty of the alleged murder, but that he was by reason of unsoundness of mind not responsible for his action, and directed him to be kept in the District Jail to await the orders of Government.

IN this case the accused was charged under section 302 of the Penal Code with having murdered one K., in December 1890. On the 14th January 1891, an order was passed that the accused should be sent to a lunatic asylum. He was kept there till May [369] 1899, when the District Magistrate was directed by Government to place the accused under trial for the offence charged. The District Magistrate made over the case for trial to a Deputy Magistrate, who tried the accused and committed him to the Sessions under section 302 of the Penal Code. The accused was deaf and dumb and could not be made to understand the proceedings which had been taken. After committing the accused the Deputy Magistrate forwarded the proceedings with a report of the circumstances of the case to the High Court under section 341 of the Code of Criminal Procedure.

The **judgment** of the High Court (**Prinsep and Stanley, JJ.**) was as follows:—

The occurrence, which forms the subject matter of these proceedings, took place in 1891.

The accused, who is charged with having killed Koliman Bibi, has until recently been in a lunatic asylum. He is now reported to be able to stand his trial. He is deaf and dumb and cannot be made to understand the proceedings, which have been taken. He has been committed to the Court of Session on a charge of murder, and the proceedings have under section 341 of the Code of Criminal Procedure been sent for our orders. We have considered whether the commitment having been made the Sessions trial should be held. Section 341 declares that in such a case "if the enquiry results in a commitment, or if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit." The law evidently does not contemplate that the Sessions trial shall necessarily take place. It leaves it to the High Court to determine this. The High Court can in a case triable by a Magistrate pass sentence on what is termed a conviction, though it cannot strictly speaking be so termed, seeing that the accused cannot in such a case make a proper defence. The proceedings are anomalous, and in all respects do not represent a complete trial. If they did, a special report for the orders of the High Court would be unnecessary. If, as we understand the law, it is discretionary with the High Court on a commitment made to order the Sessions [370] trial to be held, we must consider whether any benefit will be likely to result especially to the accused by such a trial. We are unable to find any. The proceedings in the Sessions Court will in this case amount to merely a repetition of what has already been recorded before the Magistrate, and we shall then be called upon, as now, to pass final orders. In a case referred under section 341, the Legislature seems to have contemplated that there should be a finding by the Magistrate either by what are called a conviction, or a commitment that *prima facie*, that is to say, on the evidence for the prosecution, an

offence has been committed, and that the accused though not insane cannot be made to understand the proceedings, and there have been reported cases in which sentence has been passed by the High Court in the absence of any defence for such reason.

In the case before us there can be no reasonable doubt that the accused killed the woman Kaliman Bibi. So far as we can judge from the evidence he was lustfully inclined. When alarm was given he was found sitting on her bed where she was lying dead from wounds on her body. We, however, find ourselves unable to hold that he was responsible for his action. In our opinion at the time of killing Kaliman Bibi he was, by reason of unsoundness of mind, incapable of knowing that he was doing what is wrong and contrary to law. We accordingly direct that he be kept in the jail of this district until the order of the Local Government shall have been received, and the case will be reported for such orders.

NOTES.

[As regards the practice when the accused person is deaf-and-dumb, see (1911) P.R., 13 Cr. 12 I.C., 989; 4 Bom. L.R., 296; 8 Bom. L.R., 849; (1910) 11 I.C., 250.]

[27 Cal. 370]

The 7th February, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Zamunia.....Complainant

versus

Ram Tahal and another.....Accused.*

Witness—Cross-examination of Witnesses—Cross-examination of prosecution witnesses before charge—Right of accused to have prosecution witnesses recalled after charge drawn up for purposes of cross-examination—

Discretion of Magistrate—Criminal Procedure Code (Act V of 1898), ss. 254, 256 and 257—Penal Code (Act XLV of 1860), s. 342.

After a charge has been drawn up the accused is entitled to have the witnesses for the prosecution recalled for the purposes of cross-examination; [371] s. 256 of the Code of Criminal Procedure gives the Magistrate no discretion in the matter.

After a charge has been drawn up it is the duty of the Magistrate to require the accused to state whether he wishes to cross-examine, and if so which of the witnesses for the prosecution whose evidence has been taken.

The fact that there has been already some cross-examination before the charge has been drawn up does not affect this privilege. It is only after the accused has entered upon his defence that the Magistrate is given a discretion to refuse such an application, on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.

* Criminal Reference No. 13 of 1900, made by A. E. Staley, Esq., Sessions Judge of Tirhoot, dated the 17th of January 1900.

IN this case the accused were convicted under section 342 of the Penal Code by a Joint Magistrate and sentenced to pay fines of Rs. 50 each, in default one month's rigorous imprisonment each. The charge was drawn upon the 30th November 1899, and on the same date the accused applied to the Court to recall and cross-examine the witnesses for the prosecution; the Court, however, refused to allow this, on the ground that the prosecution witnesses had already been cross-examined at a reasonable length considering the importance of the case, and it was needless, in the opinion of the Court, to recall them. The case was referred to the High Court by the Sessions Judge of Tirhoot under section 438 of the Code of Criminal Procedure.

The judgment of the High Court (Prinsep and Stanley, JJ.) was as follows :—

Before the case for the prosecution had closed and the accused had been called upon to enter on his defence the accused applied to the Magistrate to re-summon the witnesses for the prosecution to cross-examine them. The Magistrate refused the application in these terms : "The prosecution witnesses have already been cross-examined at a reasonable length considering the importance of the case, and it is needless in my opinion to recall them. Refused."

Section 256 of the Code of Criminal Procedure gives the Magistrate no discretion in such a matter. The accused is entitled to have the witnesses recalled for purposes of cross-examination. Indeed, after a charge has been drawn up, it is the duty of the Magistrate to require the accused to state whether he wishes to cross-examine, and, if so, which of the witnesses for the prosecution whose [372] evidence has been taken. The fact that there has been already some cross-examination, before the charge has been drawn up, does not affect this privilege. It is only after the accused has entered upon his defence that the Magistrate is given a discretion to refuse such an application, on the ground that it is made for the purpose of vexation or delay, or for defeating the ends of justice (section 257). An amendment of the previous law has been made by section 254 for the purpose of protecting witnesses from the inconvenience of being required to attend a second time by enabling a Magistrate at any stage of the case to frame a charge in writing, and, if a cross-examination then takes place, it would be in the terms of section 256, and then, unless there has been some amendment of the charge, a second cross-examination might be refused. But that is not the case before us.

The conviction and sentence must be set aside, and the fine, if paid, refunded. The trial must be re-opened and the witnesses, whom the accused desires to cross-examine, must be resummoned. It is unnecessary that in revision we should consider the merits of this case.

D. S.

NOTES.

[See also 37 Cal., 236 ; 6 C.W.N., 424 ; 4 C.W.N., 351.]

[27 Cal. 373]
CRIMINAL REVISION.

The 20th February, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Queen-Empress
versus
Isahak and another,.....Accused.*

*Appeal, Criminal—Taking of additional evidence by Appellate Court—
Dismissal of Appeal—Accused's right of appeal from such dismissal—
Code of Criminal Procedure (Act V of 1898), s. 428.*

Where an Appellate Court has under s. 428 of the Code of Criminal Procedure taken additional evidence, the accused, whose appeal has been dismissed by such Court, has no right of appeal to the High Court.

IN this case the accused were convicted on the 9th of June 1899 by the Deputy Magistrate of Dacca under section 147 of the Penal Code, and sentenced to two years' rigorous imprisonment each. The accused appealed, and on the 26th of August [373] 1899 the case was remanded by the Sessions Court, and the Deputy Magistrate was directed to take further evidence for the defence. After the taking of such evidence the appeal was heard and dismissed by the Sessions Court. The accused applied to the High Court under its powers of revision, and contended, *inter alia*, that, inasmuch as the Appellate Court had under section 428 of the Code of Criminal Procedure taken additional evidence, the accused whose appeal had been dismissed had the right of appeal to the High Court.

Babu Tarak Nath Chakravarti for the Accused.

The judgment of the High Court (Prinsep and Stanley, JJ.) was as follows :—

It is necessary to consider only one matter raised in this application for revision.

The learned pleader contends that, inasmuch as the Appellate Court has under section 428 of the Code of Criminal Procedure taken additional evidence, the prisoner whose appeal has been dismissed has the right of appeal to this Court. He relies on the case of *Queen v. Mohesh Chander Chattopadhyay*, (1865) 2 W. R. Cr., 13, contending that section 428 of the Code of Criminal Procedure, 1898, is in the same terms as that of section 422 of the Code of 1861, under which that case was decided, and that consequently this Court is bound to follow that case. We observe that in addition to the case cited there is a judgment of a Full Bench,—*In the matter of Ram Narain Singh*, (1863) Unreported,—heard on 14th October 1863 in which PEACOCK, C.J., SETON KARR, LOUIS JACKSON and ELPHINSTONE JACKSON, JJ. (KEMP, J., dissenting), expressed the same opinion on the effect of section 422 of the Code of 1861.

Section 422 of the Code of 1861 was in the following terms :—

"In any case in which an appeal has been allowed it shall be competent to the Appellate Court, if it think further enquiry or additional evidence upon any point bearing upon the guilt or innocence of the accused to be necessary,

* Criminal Revision No. 150 of 1900, made against the order passed by S. J. Douglas, Esq., Sessions Judge of Dacca, dated the 17th of January 1900.

to direct such enquiry to be made and additional evidence to be taken. The result of the further enquiry and the additional evidence shall be certified to **[374]** the Appellate Court, and the Appellate Court shall, thereupon, proceed to pass such judgment, sentence or order as to such Court shall seem right."

By the amending Act VIII of 1869 this was repealed and re-enacted thus : —

" In any case in which an appeal has been allowed, the Appellate Court, if it thinks further enquiry or additional evidence upon any point bearing upon the guilt or innocence of the appellant to be necessary, may direct such enquiry to be made and additional evidence to be taken. The result of the further enquiry and the additional evidence shall be certified to the Appellate Court, and the Appellate Court shall thereupon proceed to dispose of the appeal in the manner prescribed by section 419. Unless the Appellate Court otherwise direct, the presence of the appellant may be dispensed with when further enquiry is made or evidence taken. The provisions of Chapter XII relating to summoning and enforcing the attendance of witnesses and their examination shall, so far as may be, apply to witnesses examined under this section."

We must, therefore, take it that the Legislature by this amendment intended to, and did overrule the judgments of this Court in the unreported Full Bench case as well as in the case of *Queen v. Mohesh Chunder Chattopadhyia*, (1865) 2 W. R. Cr., 13.

Section 282 of the Code of 1872, which reproduced this portion of the law, after re-enacting the first sentence of section 422 of the Code of 1861 as amended by the Act of 1869, proceeds thus :—

" If the Appellate Court takes further evidence and passes judgment and sentence, no fresh right of appeal arises in respect of such sentence." This is a further proof of the intention of the Legislature to supersede the cases mentioned.

Section 428 of the Code of 1882, which is the corresponding section of that Code, was in these terms :—

" In dealing with any appeal under this chapter, the Appellate Court, if it thinks additional evidence to be necessary, may either take such evidence itself, or direct it to be taken by a Magistrate, **[375]** or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate. When the Additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal. "

Section 428 of the Code of 1898, which is the present law, reproduces section 428 of the Code of 1882, except that it requires the Appellate Court to record its reasons for taking additional evidence.

The learned pleader for the petitioner contends that, inasmuch as the Codes of 1882 and 1898 do not contain the terms of section 282 of the Code of 1872, which declare that " no fresh right of appeal arises in respect of such sentence " of an Appellate Court, the right of appeal which was found to exist in the cases of this Court decided under the Code of 1861 is restored.

We cannot accept this view of the present law.

The Appellate Court is under the present law as well as under the Code of 1882 directed " to dispose of the appeal. " It is not competent, as in the previous Code, to pass judgment and sentence, if it takes further evidence. When it passed judgment and sentence under the Code of 1872, as well as under the previous Code of 1861, the Appellate Court could enhance the sentence. The sentence in all such cases (whether there was enhancement or not) becomes the sentence of the Appellate Court, and it was on this ground that this Court

held in the cases cited that there was a right of appeal against such sentence as it was a new sentence.

It is otherwise under the present Code. "The Appellate Court shall thereupon dispose of the appeal." The Appellate Court is not competent to pass a fresh sentence. Power to enhance is expressly prohibited. The Appellate Court cannot consider and determine a new case disclosed by the additional evidence except in so far as to confirm or modify or set aside the sentence under appeal or to act as otherwise provided by section 423 (b).

The law is, therefore, expressed in terms altogether different from those set out in section 422 of the Code of 1861, on which the cases in this Court proceeded. The function of the Appellate [376] Court is to dispose of the appeal, and section 430 declares that save in certain cases (which do not apply to the matter under consideration) "judgments and orders passed by an Appellate Court upon appeal shall be final."

There is, therefore, no right of appeal in the matter before us. The application for revision is discharged.

D. S.

[27 Cal. 376]
APPELLATE CIVIL.

The 27th November, 1899.

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE WILKINS.

Brahmomoyi Dasi.....Plaintiff

versus

Andi Si.....Defendant.*

*Limitation—Plaint instituted within time—Plaint insufficiently stamped—
Order to supply the deficiency not complied with within the time allowed—
Registration of plaint—Civil Procedure Code (Act XIV of 1882),
section 54—Limitation Act (XV of 1877), section 4.*

A plaint was filed one day before the expiry of the period of limitation, but the court-fees were deficient and the plaintiff was ordered to pay the deficient court-fees within a week. This order was complied with one day after the expiry of the time allowed and the plaint was registered.

Held, that the suit was barred by limitation, as the deficient court-fees were not supplied within the appointed time, and that the fact of the plaint being registered does not prevent

* Appeal from Appellate Decree No. 204 of 1898, against the decree of Babu Prosanna Kumar Ghose, Subordinate Judge of Midnapur, dated the 2nd of November 1897, reversing the decree of Babu Kali Dhan Mukerjee, Munsif of Contai, dated the 22nd of September 1896.

its rejection under section 54 of the Civil Procedure Code, the terms of which are imperative and mandatory.

Moti Sahu v. Chhattri Das, (1892) I. L. R., 19 Cal., 780, and *Huri Mohun Chuckerbutti v. Naimuddin Mahomed*, (1892) I. L. R., 20 Cal., 41, distinguished. *Habibul Hossein v. Mahomed Reza*, (1881) I. L. R., 8 Cal., 192, dissented from. *Kishore Singh v. Sabdal Singh*, (1889) I. L. R., 12 All., 583, and *Karman Singh v. Cockell*, (1897) 1 C. W. N., 670, approved.

IN this suit the plaint was filed on the 11th March 1896, one day before the expiry of the period of limitation. The court-fees [377] were deficient, and the Munsif on the 13th March ordered the balance to be paid within a week. The balance, however, was not paid till the 21st March, and the suit was registered. Objection was taken on the ground of limitation, and the Subordinate Judge held that the suit could not be regarded as instituted within the period of limitation, as the balance of the court-fees was paid after the period allowed by the Court.

From this decision the plaintiff appealed to the High Court.

Babu Debendranath Ghose for Appellant. The plaint being filed within the period of limitation, the suit is not barred by limitation, although the balance of the court-fees was not paid within the period—see *Moti Sahu v. Chhattri Das*, (1892) I. L. R., 19 Cal., 780, and *Huri Mohun Chuckerbutti v. Naimuddin Mahomed*, (1892) I. L. R., 20 Cal., 41. Further, the plaint having been once registered, it cannot be rejected—see *Habibul Hossein v. Mahomed Reza*, (1881) I. L. R., 8 Cal., 192.

Babu Jadub Chander Seal for Respondent: In the cases cited by the learned pleader the balance was paid within the time allowed by the Court, whilst in the present case they were paid after the time, and under section 54 of the Civil Procedure Code the Court is bound to reject the plaint, and this rejection may take place at any stage—see *Kishore Singh v. Sabdal Singh*, (1889) I. L. R., 12 All., 553, and *Karman Singh v. Cockell*, (1897) 1 C. W. N., 670.

The judgment of the High Court (**Rampini and Wilkins, JJ.**) was as follows:—

This suit has been dismissed by the Lower Appellate Court as barred by limitation.

The question for determination is whether it was right in doing so. The facts are that the suit was instituted on the 11th March 1896, one day before the expiry of the period of limitation. The court-fees were deficient, and the Munsif on the 13th March ordered the deficient court-fees to be paid in within a week. [378] They were not paid in till the 21st March, that is, until at least one day after the expiry of the time allowed by the Court. Objection to the suit on the ground of limitation was taken in the Court of First Instance, but was overruled. The objection was renewed in the Lower Appellate Court and prevailed. The Subordinate Judge was of opinion that the suit could not be regarded as instituted within the period of limitation, as the 21st March, when the deficient court-fees were actually paid in, was after the period allowed by the Court for their payment.

The plaintiff appeals and contends that the Lower Appellate Court is wrong. The cases reported in *Moti Sahu v. Chhattri Das*, (1892) I. L. R., 19 Cal., 780, and *Huri Mohun Chuckerbutti v. Naimuddin Mahomed*, (1892) I. L. R., 20 Cal., 41, are relied on; but we are of opinion that they are not in point, as they are cases in which the deficient court-fees were paid in within the time allowed by the Court. This is not the case in the present suit. We, therefore, consider that the Lower Appellate Court's decision on the question of limitation is correct and must be affirmed.

The pleader for the appellant, however, argues that the suit having been registered, the plaint could not be rejected, and the suit dismissed by the Subordinate Judge. He cites the case of *Hubibul Hossein v. Mahomed Reza*, (1881) 1 L. R., 8 Cal., 192, in support of this plea. But we do not agree with the view expressed by the Judges who decided this case. The terms of section 54 are imperative and mandatory, the wording being "the plaint shall be rejected." Then the matter has been considered and a different conclusion come to in cases decided both in the Allahabad High Court and this Court—See *Kishore Singh v. Sabdal Singh*, (1889) 1 L. R., 12 All., 583, and *Karman Singh v. Cockell*, (1897) 1 C. W. N., 670. Moreover, the decision in the case of *Hubibul Hossein v. Mahomed Reza*, (1881) 1 L. R., 8 Cal., 192, seems opposed to the rule apparently laid down by section 4, Act XV of 1877, illustrations (a) and (b).

[379] We do not consider ourselves bound by this decision, or that it is necessary to refer the conflicting decisions in *Hubibul Hossein v. Mahomed Reza*, (1881) 1 L. R., 8 Cal., 192, and *Karman Singh v. Cockell*, (1897) 1 C. W. N., 670, to a Full Bench, as the rule enunciated in the former case appears to us to be an *obiter dictum*, the case having been disposed of on an altogether different point.

For these reasons, we dismiss this appeal with costs.

M. R. M.

NOTES.

[This was approved in (1907) 34 Cal., 20 as regards the rejection of the plaint. When on the date on which the deficient Court-fees were paid, the suit was within time, the plaint was not rejected :—(1905) 2 C.L.J., 70 : 9 C.W.N., 844.]

[27 Cal. 379]

The 6th September, 1899.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE WILKINS.

Harnabh Pershad *alias* Rajajee.....Plaintiff
versus

Mandil Dass.....Defendant.*

Hindu Law—Customary Law—Jains—Power of sonless widow to adopt a son without permission of husband—Saraogis—Right of a sonless Jain widow—Limitation Act (IX of 1871), Article 129—Minority.

Judicial decisions recognising the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of the same custom amongst the Jains of another place, unless it is shown that the customs are different ; and oral evidence of the same kind is equally admissible. There is nothing to limit the scope of the enquiry to the particular locality in which the persons setting up the custom reside.

Upon the evidence in the case, consisting partly of judicial decisions and partly of oral testimony, it was held that the custom that a sonless Jain widow was competent to adopt a son to her husband without his permission or the consent of his kinsmen, was sufficiently established, and that in this respect there was no material difference in the custom of the

* Appeal from Original Decree No. 286 of 1897, against the decree of Babu Harekrishna Chatterjee, Subordinate Judge of Shahabad, dated the 14th of June 1897.

Agarwalla, Choreawal, Khandwal and Oswal sects of the Jains; and that there was nothing to differentiate the Jains at Arrah from the Jains elsewhere.

Held, also, that the terms *Jain* and *Saraogi* are synonymous.

A childless Jain widow acquires an absolute right in her husband's separate property.

An adoption was made by *M*, a Hindu widow, to her husband *J* in 1854, when the plaintiff's father, the then nearest reversionary heir to *J*, was alive; and the adopted son *B* got actual possession of the property left by *J*, on the 14th April 1877, under a deed of gift executed by *M*. *M* died on the 6th [380] February 1883; and *B* was succeeded by his son, the present defendant. The plaintiff's father died on the 15th October 1875, and the plaintiff attained his majority on the 29th July 1894, having been born on the 29th July 1873. The plaintiff brought the present suit against the defendant, on the 28th January 1895, for the recovery of the properties left by *J* as being his nearest reversionary heir.

Held, that the suit was barred under Article 129 of the Limitation Act IX of 1871, as it involved the setting aside of an adoption made in 1854, having been brought after 12 years from the date of the adoption, and the period of limitation having commenced to run during the life-time of the plaintiff's father.

THE plaintiff Harnabh Pershad brought the present suit on the 28th January 1895, against the defendant Mandil Dass, for recovery of possession of the disputed properties, with mesne profits, on the ground that he was the nearest reversionary heir of one Jinwar Dass, to whom the properties belonged, and who died without issue in 1850, leaving a widow, Misri Koer. It appears that Jinwar Dass was the son of one Birjpal Dass, who was a grandson of one Moti Lall; and that the plaintiff Harnabh Pershad is the son of one Jugmundil Dass, who was a great grandson of the said Moti Lall.

The plaintiff alleged that Jinwar Dass, his widow, and the plaintiff himself were all Agarwalla Hindus, governed by the Mitakshara Law; that there was a banking business at Arrah belonging to the father of Jinwar Dass, from the income of which considerable properties were acquired, and that Jinwar Dass got these ancestral properties by inheritance, and acquired other properties himself; that, on the death of Jinwar Dass, his widow, the said Misri Koer, obtained by arrangement one-half of the said properties, which share formed the subject matter of the present suit. It was further alleged that Misri Koer had only a life interest in the properties inherited from her husband, as well as in the properties acquired by her from the income of the former properties, such as every childless Hindu widow governed by the Mitakshara Law has in the estate left by her husband; that after the death of Misri Koer, Bhagwan Dass, the father of the defendant, and after the death of Bhagwan Dass, the defendant himself, took forcible possession of the disputed properties, during the minority of the plaintiff, although they had no legal right to the same; that Jugmundil Dass, the father of the plaintiff, [381] died on the 15th October 1875, that he, the plaintiff, was born on the 29th July 1873, and attained majority on the 28th July 1894; and that on the date of the death of Misri Koer, which was alleged to have taken place on the 19th February 1883, the disputed properties devolved on the plaintiff alone as heir to Jinwar Dass, and that the cause of action accrued on that date.

The defendant alleged, amongst other things, that Misri Koer died on the 6th January 1883, that the plaintiff was born in the year 1870, and that, therefore, the suit was barred by the special and general law of limitation. It was further contended that Jinwar Dass and all his relations belonged to the Saraogi Agarwalla sect of the Jains, and were governed by the customs and usages prevailing among that sect, and subject to them, by the Mitakshara Law, and that adoption in the family and in the Saraogi Agarwalla community of Arrah and elsewhere was governed by such customs and usages, and not by the Mitakshara

Law; that according to such customs, and under verbal direction given by her deceased husband, Misri Koer in 1854 adopted Bhagwan Dass, the father of the defendant as son to her deceased husband and to herself in the presence of the caste people, including the plaintiff's father, and since then Bhagwan Dass had all along been recognized and treated as their son by their relations and caste people including the plaintiff's father and the plaintiff; and that after Bhagwan Dass's death the defendant has been similarly recognized and treated, his father and himself being in possession of the properties of Jinwar Dass and Misri Koer as their son and grandson in their own right and not as trespassers. It was also alleged that on the 14th April 1877, Misri Koer executed a deed of gift in favour of the adopted son, Bhagwan Dass, whereby she divested herself of her life interest and absolutely transferred to him all the immoveable properties whether left by her husband or acquired by her; and that as by the customs and usages obtaining among the Saraogi Agarwalla sect of Jains, Misri Koer became absolute owner of the estate left by Jinwar Dass, the defendant's father became absolutely entitled to the properties under the said deed of gift and also by adoption. It was further urged that the suit was barred by limitation, the validity of the adoption not having been called into question within the time prescribed by law.

[382] The Subordinate Judge found that the date of the birth of the plaintiff, and that of the death of Misri Koer, were as the plaintiff's stated them, but, deciding all the other issues against the plaintiff, he dismissed the suit.

The plaintiff appealed to the High Court.

The *Advocate-General* (Mr. Woodroffe), Moulvie Mahomed Yusoof, Babus Sarada Charan Mitter: Mohabir Shuklay and Moulvie Mahomed Habibullah for the Appellant.

Dr. Bash Behary Ghose, Babus Saligram Singh, Makhan Lal, and Seo Sarun Lal for the Respondent.

The judgment of the High Court (Macpherson and Wilkins, JJ.) was as follows:—

The parties to this suit are Jains of the Agarwalla class and residents of Arrah in the district of Shahabad. The suit relates to properties of considerable value, which are said to appertain to the estate of Jinwar Dass, who died in 1850 without issue, but leaving a widow Misri Koer. The plaintiff's case is that Misri Koer died on the 19th February 1883 and that he then under Mitakshara Law as heir of Jinwar Dass became entitled to all the properties claimed. The suit was instituted on the 28th January 1895, and the plaintiff says that he attained majority (21 years) on the 28th July 1894.

The defendant says that the plaintiff is not the heir of Jinwar Dass, and that the suit is also out of time as Misri Koer died on the 6th January 1883, and the plaintiff attained majority more than three years before the date of suit. On the merits his case is that according to the custom prevalent among the Agarwalla Jains, a sonless widow acquires an absolute right to the property left by her husband, and can also adopt a son to him without his permission; that in 1854 Misri Koer personally adopted his father Bhagwan Dass reserving to herself the life interest and that in 1877 she executed a deed by which she gave to Bhagwan all the property which she had inherited from her husband or had herself acquired, and that since then, Bhagwan and after his death in 1893 he, the defendant, has been in undisputed possession of the same. He further says that as a matter of fact Jinwar Das did give verbal permission to [383] Misri Koer to adopt a son, that there was a good and valid adoption

whether the Mitakshara Law does or does not apply, and that the plaintiff is estopped from denying the adoption as he, his father Jug Mandil, and all the kinsmen throughout recognised and treated Bhagwan as the adopted son of Jinwar Dass. He also contends that it is not open to the plaintiff now to question either the fact or the validity of the adoption made in 1854, as no suit was brought to set it aside when the Limitation Act IX of 1871 was in force. The existence of the alleged custom and the facts of the alleged adoption, the permission to adopt, the treatment and recognition, were all denied by the plaintiff who said that, if there was any adoption at all, it was an adoption by Misri Koer to herself and not to her husband and that the defendant could derive no benefit from it.

On the issues raised to meet all the above mentioned contentions the Subordinate Judge in a full and careful judgment found that the plaintiff is the nearest heir of Jinwar Dass, and that the suit is in time, Misri Koer having died on the 19th February 1883, and the plaintiff having attained majority on the 28th July 1894. Deciding, however, all the other issues against the plaintiff, he dismissed the suit. The plaintiff appeals, and the appeal really opens the whole case, for the defendant supports the judgment of dismissal by contending that the suit ought also to have been dismissed on the preliminary grounds, that the plaintiff was not the heir of Jinwar, and that the suit was out of time under the provisions of the Limitation Act now in force. For the plaintiff it is contended--

- (1) That the alleged customs are not proved and that the Mistakshara Law must apply.
- (2) That Misri Koer did not, in fact, adopt Bhagwan Dass, and that, even if she did so, the adoption was personal to herself and conferred no title on Bhagwan to the properties now claimed : That Jinwar gave no verbal permission to his wife to adopt.
- (3) That Bhagwan was never treated or recognized as the adopted son, of Jinwar, and that the supposed acts of treatment and recognition, even if they existed, did not create an estoppel.
- [384] (4) That the suit is not barred under the Limitation Act IX of 1871, as it was not necessary under that Act to bring a suit to set aside the alleged adoption of Bhagwan.

It will be convenient to deal first with the questions raised by the defendant as they are of a preliminary character. We see no sufficient reason for dissenting from the Subordinate Judge's conclusion that the plaintiff is the nearest reversionary heir of Jinwar Dass. The evidence is certainly very meagre, but there are few male members of the family now alive. Comparing, however, the evidence of both sides we cannot say that the Subordinate Judge was not justified in considering the evidence for the plaintiff more reliable and sufficient. We feel, however, grave doubt whether he was right in finding that Misri Koer died on the 19th February 1883, and not on the earlier date stated by the defendant. The reason which the plaintiff gives for remembering the date may be more plausible than the reason given by the defendant, but still it is very vague and not of much value where the question is one of days. Much reliance is placed upon the entry in the death register, but having regard to the state in which the book is, and to the evidence of Jung Bahadoor Lall in connection with it, we think no weight can be attached to the entry. From his evidence it would appear that in 1883 the register was in charge of the police, and it is not shown that it was kept under the provisions of Bengal Act IV of 1873, or of part VIII of Bengal Act V of 1876, which was the

Municipal Act then in force. Apart also from all objections which might be taken to the register itself, there is no guarantee for the correctness of the date of the death as entered in it. The entry shows that Mir Karim Buksh reported the death, but who he was we do not know, and it is quite possible that the death may have been reported some time after it actually occurred and entered without any particular regard to the date of occurrence. The Subordinate Judge seems also to have been under some misapprehension as to the nature of the entries in the defendant's books kept by Uday Chand. There is no reason to doubt that the books were regularly kept in the course of business. Uday deposes that he made the entries [386] and refreshing his memory from them he gives the date of Mieri's death which he certainly could do, if the entries are correct. We do not understand the reason which the Subordinate Judge gives for not relying on them and no good reason for rejecting them has been suggested to us. We cannot, therefore, uphold this part of the decision. The matter is not, however, of much importance as we cannot interfere with the decision as to the date on which the plaintiff attained his majority, and if that is correctly found, the suit is within time, although instituted more than twelve years after Misri Koer's death. If Ramyad Pattak's evidence is believed, and the Subordinate Judge has believed it, there is no doubt about the date of the plaintiff's birth. The truth of his evidence is questioned on the ground that he was not the regular priest of the family, and that he is said to have been called when the regular priest Bulco Misser was temporarily absent. This may give rise to some suspicion but it would not justify us in rejecting his evidence in the absence of other evidence to show that it is false. It is said that the plaintiff did not produce the certificate under which a guardian was appointed by the Court, and that he must be taken to have attained majority at the age of 18 years, but the fact that a guardian was appointed by the Court was not questioned in the Court below and cannot be questioned now.

The most important point in the case is as to the existence of the customs relied on by the defendant, and the evidence bearing upon it is very voluminous as a great number of witnesses residing at Arrah and elsewhere have been examined, some of them at great length. This is not the first occasion on which the question of Jain customs has been raised and brought before the Courts in India, and before dealing with the evidence it will be as well to see how the cases stand.

In *Govind Nath Roy v. Gulab Chand*, (1833) 5 Select Reports, S. D. A., Cal., 276, it was held that a Jain widow could adopt a son without the sanction of her husband. This was a Moorshedabad case decided in 1833, and the decision was apparently based upon the *Vyavastha* of a Pundit. There was a further question which was not decided as to the right of the widow under the Jain law to alienate or give away property after [386] the adoption. The opinion of the Pundits as to this was conflicting. In *Sheo Singh Rai v. Dakho*, (1874) 6 N.-W.P., 382, the Allahabad High Court held in 1874 that the sonless widow of a Saraogi Agarwalla takes by the custom of the sect an absolute interest in the self-acquired property of her husband, and that she could adopt without the permission of her husband or the consent of his heirs. There was a further question whether on the adoption the estate taken by the widow passed to the son as proprietor or whether she could retain the ownership. It was not, however, necessary to decide that point. The widow had apparently claimed to retain the ownership, at least she had treated the adopted son as her successor, but as she and the adopted son were both plaintiffs and not in contest on the point, the Court made a decree declaring

her right to be maintained in possession as proprietor or in the alternative as manager on behalf of her infant son. This was a Meerut case. It was appealed to Her Majesty in Council and the decree was upheld, (1878) I. L. R., 1 All., 688 : 2 C. L. R., 193 : L.R., 5 I. A., 87. I shall have to allude to their Lordships' judgment later on, but may point out here that the decision was arrived at after a great deal of evidence had been taken at Delhi and other places as to the custom of the Jains. There appears to have been a conflict of evidence as to the extent of the widow's dominion over the ancestral property of her husband, when that property was divided or undivided, but as the suit only related to the self-acquired property of her husband, it was unnecessary to express any opinion as to the extent of her right over the ancestral property whether divided or undivided.

In *Manik Chand Golecha v. Jagat Settani Prian Kumari Bibi*, (1889) I. L. R., 17 Cal., 518, a Moorshedabad case, it was held that a widow of the Oswal Jain sect could, according to the custom of the sect, adopt a son without the authority of her husband. There the family had become Vaishnabs or orthodox Hindus, but it was held that this change did not affect the laws and customs by which the personal rights and status of the members of the family were governed.

[387] In *Lakhmi Chand v. Gattoo Bai*, (1886) I. L. R., 8 All., 319, an Aligarh case, the right of a Jain widow to adopt a son without the permission of her husband or the consent of his heirs was recognized, and it was held that the adoption must be taken to be to her husband. In this case the question was whether the widow could make a second adoption to her husband, the son whom she had first adopted having died an infant and unmarried. It does not appear that the right to make one adoption to her husband without permission was at all disputed, and it may be, for all that appears to the contrary, that the right to make the second adoption was disputed as inconsistent with the Jain customs. The case is not, therefore, of much value on the questions now raised, nor does it appear to what sect of Jains the parties belonged.

In *Bacheti v. Makhan Lal*, (1880) I. L. R., 3 All., 55, a Manipuri case, which came before the Allahabad Court on second appeal, the question was whether a Jain widow of the Bindala sect, said to be a small one confined to a few districts, could by the custom of the sect alienate ancestral property be inherited from her husband, and it was held that the custom was not established and that the Hindu law must take effect.

In *Shimbhu Nath v. Gayan Chand*, (1894) I. L. R., 16 All., 379, a Saharanpur case on second appeal to the High Court, it was held that an Agarwalla Jain widow had full power of alienation over the non-ancestral property of her deceased husband, but that no such power was proved over the ancestral property. EDGE, C.J., and BANERJI, J., seemed to consider that the decision in *Sheo Singh Rai's* case was sufficient to prove the custom as regards the non-ancestral property in the absence of any evidence to the contrary.

In *Peria Ammani v. Krishna Sami*, (1892) I. L. R., 16 Mad., 182, a Tanjore case, a Jain widow set up the right to adopt a son without her husband's permission, but it was found that the custom was not proved. From the judgment of BEST, J., it appears that the parties to the suit were natives of Southern India, whose ancestors had been [388] converted to Jainism, and it was distinguished on that ground from the case of *Rithcurn Lalla v. Soojun Mull Laliah* (9 Mad Jur., 21). In *Mandit Koer v. Phool Chand Lal*, (1897) 2 C. W. N., 154, a case from Barh in the Patna district, which is much relied on for the appellant, the parties are described as Agarwalla Saraogis of Barh,

and a sonless widow set up a right by Jain custom to take an absolute interest in her husband's property, and it was found that the custom was not proved. The case has been much relied on as an authority for the proposition that the particular custom set up must be proved to apply to the particular place where it is alleged to exist, and that evidence of a similar custom at other places is of little or no importance. We are informed that this case is now on appeal to Her Majesty in Council.

Some other cases have been cited in which a special custom of the Jains has been set up, but the custom has been either different to the customs alleged in the present case, or there has been no decision upon it. In *Chandun Koer v. Padmanath Koer* [Exhibits 26, 8, III, BBBB]* the parties resided as here in the Shahabad district. There were two brothers who were said to be joint in estate. The elder brother died leaving a widow who got possession of his share. The mother of the younger brother, a minor, brought a suit to establish the minor's right to it. The widow of the elder brother opposed the claim on the ground that according to the Jain custom it had devolved on her. The case was eventually compromised, the elder widow, the defendant, getting a life interest in some immoveable properties and an absolute interest in some bonds and decrees for money. This was a case of the year 1863. Under the Mitakshara Law, if the brothers were joint, the minor brother would have taken the whole estate. In the present case there is no question of a joint estate.

In *Lalla Mohabeer Pershad v. Kundun Koowar*, (1867) 8 W. R., 116, which was also a Shahabad case, decided in 1867, a childless Jain widow [389] claimed her husband's share of the property as hers under the law regulating succession among the Jains, whether the family was divided or undivided. The claim was opposed on the ground that the family was undivided. PEACOCK, C.J., and L. S. JACKSON, J., held that there was no sufficient evidence to show that the law of succession among Jains was different from that of the ordinary Hindu law governing the particular province in which the property was situated and which was the law of the Mitakshara. But they held that the property being separate the plaintiff was entitled to it under the Mitakshara Law as heiress of her husband. It does not appear that any evidence of custom was given, but a Vyavastha of a Pundit as to the Jain law or custom and which was in the plaintiff's favour put in. PEACOCK, C.J., considered that the Vyavastha was not based on any good authority. This case went on appeal to the Privy Council, (1873) L. R., 1 I. A., 55, but no question of Jain custom was gone into, and the decision of the High Court was affirmed on the supposition that the Mitakshara Law applied. The case has been much relied on as an authority for the proposition to which we have referred in connection with *Mandit Koer's* case, and it was cited in that case. PEACOCK, C.J., said that the custom set up must be proved, and that, if it is not proved, the law of the locality must prevail. He does not profess to deal with the question of law of how the custom is to be proved.

In *Chotay Lall v. Chunnoo Lail*, (1878) I. L. R., 4 Cal., 744 : 3 C. L. R., 465 ; L. R., 6 I. A., 15, a Calcutta case, no question of Jain custom was decided, but their Lordships explained the judgment in *Sheo Singh Rai's* case, upon which it was attempted to put too wide a construction.

In *Bhagvan Das Tejmal v. Rajmal*, (1873) 10 Bom., 241, a Jain custom was set up by which a son could be made over to a person in adoption by his

*[In the Court of the Principal Sudder Amin of Shahabad and on appeal, in that of the District Judge of Shahabad; with the Vyavastha of the Calcutta Pundit, Baidya Nath Misra—REP.]

relatives when he and his widow were both dead. It was held not to be proved. The judgment contains an account of the Jains and their religious views.

In *Bimal Dass v. Sikhar Chand* *, an unreported case, [390] from the Shahabad district decided in 1879 (Ex. 24), a widow inherited immoveable property from her husband and on her death her daughter became the heir. On the daughter's death her husband claimed the property as her heir under a custom peculiar to the Jains. It was held that the custom was not established, and that the succession must go according to the Mitakshara Law. GARTH, C. J., said he was satisfied that the Mitakshara Law was observed in questions of inheritance amongst the Agarwalla sect of Jains at Arrah, but this must, of course, be taken as having reference to the evidence in the case and the particular custom pleaded.

The cases, therefore, show that for many years past the Jains in different parts of India have been setting up a special custom by which they are regulated in certain matters relating to succession and adoption, and that at least in three cases, two of the Moorshedabad and one of the Meerut district, the right of a Jain widow to adopt a son to her deceased husband without his permission has been established and recognized. The only case in which the right was set up and not established is the Madras case, and that may be distinguished for the reasons already stated. In two cases from Meerut and Shaharanpur it was found that she acquired an absolute right to the self-acquired property of her deceased husband, and in one case from the Patna district it was held by this Court, without drawing any distinction between ancestral and self-acquired property, that no such custom was established among the Jains of that locality.

It is broadly argued on the one hand that this case must be decided on the local evidence as to the prevalence of the alleged customs in the Shahabad district without reference to the prevalence of the customs among Jains in other parts of the country; on the other, that the Jains not being Hindus in religion, the Hindu Shastras, which are founded on that religion, cannot be held to apply to them at all; or at all events that, if the Jains are subject to Hindu law, except in so far as it is controlled by their own special custom, the existence of the custom, as regards adoption, must now be taken to be judicially established, and must be recognized without further proof as applicable to all Jains. Neither argument appears to us to be sound or consistent with the rule, as stated by their Lordships of the Judicial [391] Committee in *Sheo Singh Rai's* case and explained in the case of *Chotay Lall*. In the latter case they say this: "The customs of the Jains, where they are relied upon, must be proved by evidence as other special customs and usages varying the general law should be proved, and that, in the absence of proof, the ordinary law must prevail." They add that the decision in *Sheo Singh Rai's* case "did no more than adopt and affirm the law, to be deduced from a long roll of cases in India, that when the customs of the Jains are set up, they must be proved like other customs varying the ordinary law, and that, when so proved, effect should be given to them." The mere fact that a man is a Jain is not, they say, enough to establish the conclusion that the ordinary law did not apply to him.

There is nothing in what their Lordships say to limit the scope of the enquiry to the particular locality in which the persons setting up the custom reside. The defendant is not setting up a local custom; his case is that the customs relied on prevail amongst all the Jains who are now a scattered

* [Appeal from Original Decree, No. 118 of 1877, decided by GARTH, C.J., and PRINSEP, J., on the 21st April 1879—REP.]

community and that the Arrah Jains have adhered to them. It would be impossible to prove the existence of a custom prevalent amongst the Jains generally by evidence of a purely local character, but, if the general custom is proved, the question might arise whether the Jains of any particular locality had adhered to or departed from it, and that would depend upon the facts and circumstances of each case. We consider, therefore, that judicial decisions recognizing the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of the same custom amongst the Jains of another place, unless, of course, it is shown that the customs are different. It follows that oral evidence of the same kind is equally admissible. If it were otherwise it would be extremely difficult to say where the line should be drawn, east or west of Arrah! Agra is not very much further on the one side than Calcutta is on the other. Moreover the adoption cases, to which we have referred, were not decided on the evidence of local witnesses only.

The plaintiff certainly tried to make the issue a narrow one. His case as stated in the plaint and explained by his pleader was that the Agarwallas of Arrah were not Saraogis at all, but what [392] he called Hindu Jains, who were governed entirely by the Mitakshara Law, and nearly all his witnesses say that the Arrah Agarwallas are not Saraogis. In that view of the case evidence of the customs governing the Saraogis would be immaterial. It is, however, abundantly proved, and the fact is not now disputed, that the terms *Jain* and *Saraogi* are synonymous, all Saraogis being Jains, and all Jains being Saraogis, except perhaps in so far as that term may be used to distinguish the laity from the priesthood.

The defendant has, apart from the local witnesses, examined on the question of custom a great number of witnesses residents of the districts to the west of Arrah and extending up to Delhi and Kurnal, and also witnesses residing in Calcutta, Moorshedabad and Gaya to the east of Arrah. These include persons of the Agarwalla, Chorewal, Khandwal and Oswal sects of Jains. Many of them are persons of position and independence not likely to be induced to come forward and give false evidence. The defendant has also examined eight witnesses now non-residents of Arrah. Of these one resides at Agra, one at Paniput, three at Farnchal, and three at Calcutta. We agree with the Subordinate Judge that the evidence greatly preponderates, both in quantity and value, as to the existence of the custom that a sonless Jain widow can adopt a son to her husband without his permission or the consent of his kinsmen. Taken in connection with the decisions to which we have referred we think it is sufficient to establish that custom.

The evidence of the witnesses examined for the defendant may be said to be unanimous on the point, and shows that there is in this respect no difference in the custom of the four classes of Jains mentioned above. There are no doubt some minor differences, as to whether the boy must be adopted from the same Gotra, as to the ceremonies observed, as to whether the members of the different classes can intermarry or eat together, and as to the distinction as regards customs and ceremonies between the members of the different classes who are Vaishnabs or orthodox Hindus, and those who strictly adhere to the religious views of the Jains. These differences may, however, very well exist at different places without affecting the uniformity of the custom. It is said that many of the witnesses who give [393] instances of adoptions by Jain widows at Arrah or elsewhere speak from hearsay and cannot also say whether the adoptions were made with or without permission. It would not be reasonable to expect definite evidence on the latter point. If no permission is necessary it is not likely that there would

be any discussion on the question whether permission was or was not given. It was as easy for the plaintiff to show that permission was given in any particular case as for the defendant to show that it was not given, but I think the only instance in which it is distinctly said that permission was given is in the adoption by Musstt. Tuktuk Koer at Arrah, and that appears from the evidence of the defendant's witness, Sheo Pershun Lall. As, however, his daughter had married the adopted son, it was perhaps too much to expect that by saying that the adoption was without permission, he would shut every loophole of escape if the custom to which he spoke was held not to be proved and the adoption was afterwards disputed. As Musstt. Tuktuk's husband died in 1843, and the adoption does not appear to have been made till about 1887, it is not very likely that it was made in pursuance of permission. We have no doubt that a widespread belief in the custom existed and was acted on, and it is a strong and singular circumstance that in the only three instances in this part of India in which an adoption by a Jain widow appears to have been disputed, the adoption was upheld by the Courts on the ground that the husband's permission was not necessary.

We see also no reason to dissent from the decision of the Subordinate Judge that a childless Jain widow acquires by the other custom alleged an absolute right to her husband's property when it is his separate property, and it is not necessary to go any further in the present case. There is in the evidence no reason for drawing any distinction between ancestral and self-acquired property, and we see no ground for distinction. We do not, however, consider that the two customs must stand or fall together. They seem to us quite independent. The custom by which the widow can adopt without her husband's permission does not in any way depend upon the nature of the estate which she takes from her husband. Whether she took an absolute or qualified estate, the evidence is uniform that the [394] adopted son acquires the same right to the property as her husband had, although there is some slight difference of opinion as to the extent of the control which she may retain over it. Even, therefore, if this custom fails, Bhagwan Das, if adopted, acquired a good title to the properties. The facts in this case are very similar to those in *Sheo Singh Rai's* case, although there is no connection between them either in point of time or place. Here, as there, the widow, notwithstanding the adoption, reserved to herself the estate, but here she subsequently made it over to her adopted son under a deed of gift. It is not necessary to determine in this case any more than in *Sheo Singh Rai's*, whether the effect of the adoption was to divest the widow, and it is immaterial, if there was an adoption, whether Bhagwan took as adopted son or under the deed during the life-time of Misri Koer.

It is, however, very strongly contended for the appellants that the custom of the Jains, whatever they may be in other places, did not apply to the Jains of Arrah who are governed in all matters of succession and adoption by the Mitakshara Law, and that the conduct of Jinwar and other members of the family shows that the alleged customs did not prevail. We see in the evidence no sufficient foundation for the contention that there is any difference in the customs observed at places east and west of Cawnpur. The Arrah witnesses and some witnesses of other places were examined at great length as to the ceremonies observed on death, marriage, adoption and other occasions, and as to the worship of Hindu deities with a view to show that there was no real difference in those respects between the Jains and the orthodox Hindus. We think it is unnecessary to enter upon any criticism of that evidence. It may be conceded that in ceremonials the practices vary at different places and even

in Arrah itself, and that the views of some Jains are much stricter than those of others. It may be conceded also that their ceremonies in many respects approximate pretty closely to those of the orthodox Hindus, although this is not confined to Arrah itself. The reason is pretty obvious. The Jains have no written *shastras* and no priests of their own. Brahmans are called in to officiate at their ceremonies, and it is only natural that they should perform the ceremonies with which they are best [395] acquainted. The whole matter may be pretty well summed up in what the defendant said when asked according to what custom the marriage would be performed, if the bridegroom was a Jain and the bride a Vaishnab. His reply was that the officiating priest was a Hindu Brahmin and does what he pleases, and that he would do so even if the bride and bridegroom were both Jains. But there is this fundamental distinction between the Jains and the orthodox Hindus that their belief in the nature of the future state is wholly different; a son among the Jains confers no spiritual benefit on the state of his deceased father, and the Jains do not believe in or observe the *Sradh* ceremony as it is observed by the orthodox Hindus. Some Jains also may worship or do homage to some of the Hindu deities, but they have their separate temples which no orthodox Hindu would enter, and their separate deities whom no orthodox Hindu would worship. Mere approximation in the observance of ritual or ceremonies does not, therefore, do away with the difference which exists between them, and we see nothing to differentiate the Jains at Arrah from the Jains elsewhere, as regards the observance of any customs peculiar to them or indeed in any other respect, save perhaps this that where the Jain communities are larger and more connected there may be less of the ordinary Hindu ritual. Of the plaintiff's Arrah witnesses four are Agarwalla Jains and three are Agarwalla Vaishnabs, and all but one are related to or connected with him. They state generally that the Arrah Agarwallas are governed in matters of succession and adoption by the *Mitakshara* Law, but their statements are contradicted by the evidence of the defendant's witnesses who are more numerous and on the whole more independent. They give some instances of sales or alienations by widows, but in only four instances are the deeds produced. These are (1) the will of Sriuns Koer in 1884 (Ex. PP), (2) a *kobala* by Mundir Koer in 1882 (Ex. HH), (3) a *kobala* of Tuktuk Koer and another in 1873 (Ex. Z) and (4) another *kobala* of hers in 1892 (Ex. V). They also give some instances of adoptions by widows, but these are open to the observation that some of them are comparatively recent and the widow is still alive. This is so in the case of Binda Bibi, Mohan Koer and Tuktuk. In the two former cases the witnesses can only say they heard there was no permission or that [396] they never heard of any permission and they could not be expected to say any more. Tuktuk's case has been already referred to. One witness Nanuk Chand says he was himself adopted by a widow some 13 years ago, but his position is not a very high one. Two other adoptions by Mahdun Bibi and the widow of Mohan Koer are spoken to as having taken place long ago, but the evidence as to the former is very vague, and as to the latter the evidence of the adopted son, who is said to be still alive but old, would have been the best evidence. It is not of course to be expected that there would be many instances of Jain widow adoptions in a small community like that of Arrah. The evidence on the whole leads us to the conclusion that the customs applied to the Jains at Arrah just as much as the Jains elsewhere, and Misri Koer was evidently of the same opinion in 1857 when she made and registered her will (Ex. D).

It is said, however, that the conduct of Bhagwan and other members of the family is opposed to this conclusion, and shews that the *Mitakshara* Law applied

in every respect. In 1891, at the time of the census, a memorial (Ex. 1) was submitted to the Bengal Government representing that the Jains ought not to be classed in the returns as a people separate from the Hindus. This was signed by Bhagwan, his son, the defendant, the plaintiff's witnesses Nos. 3, 5 and 10, and the defendant's witnesses Nos. 3, 8, 22, 27, 67 and 68. It represents that there was no difference between the Jains and the Hindus except on the matter of religion, that they observed the Sradh and other Hindu ceremonies, that they never had or required any separate law of inheritance, and that, if they were going to be distinguished from the Hindus, complications might arise in the disposition of their property. No doubt they all agreed in the desire that they should not be classed separately from the Hindus as a race, but a perusal of the evidence will shew that they cannot be fixed with any knowledge of the contents of the memorial which was written in English. It is not true that they observed the Sradh in the sense in which the Hindus observed it, and it was quite unnecessary to say anything about the law of inheritance. The persons who got up the memorial have not been examined, and it is easy to understand how signatures were obtained, only the direct object of the memorial being made known.

[397] Exhibits 12, 13, 14 and 15 and II, all of the year 1893, have been referred to as showing that Bhagwan Das and the defendant always claimed to be subject to the Mitakshara Law, but the defendant admits being subject to the Mitakshara Law except as to special matters which were regulated by the customs of the Jains. There was no necessity in the matters to which those exhibits relate to mention any custom. Then Jinwar Das's first cousins Jago Mohan and Mansubrit Singh were joint in estate. Jago Mohan died in 1847, leaving a widow Kanta Koer, and after his death Mansubrit got his name registered as proprietor of certain of the joint properties ignoring Kanta Koer. So also Jinwar and his brother Munni Lal were joint. Munni Lal died in 1840 leaving a widow Sriuns Koer. In 1845 Jinwar got his name registered as proprietor of certain properties ignoring Sriuns. It is said that these acts are opposed to the alleged custom according to which Kanta Koer and Sriuns Koer would have respectively taken their husband's share. That would be so in appearance at least if the custom extended to the husband's undivided as well as to his separate property, a question which we do not consider it necessary to decide. The acts can be taken at the most as an indication that the rule of survivorship prevailed. But whatever happened during the lifetime of the surviving brother, it is clear that after his death his widow recognized the widow of the other brother as entitled to a share. In 1851 Kanta Koer, Tuktuk Koer and their mother-in-law Munder Koer came to an agreement, and divided the property which belonged to Jago Mohan and Mansubrit into three shares each taking one. So also after Jinwar's death Misri Koer never denied the right of Sriuns Koer to a half share. In 1853 she got her name registered for her husband's half share only, stating that the other half belonged to Sriuns. The latter it is true was not satisfied and wanted the whole on the ground that Misri was a childless widow. The two ladies were for some time on bad terms, and in 1864 Misri brought a suit for partition, the result of which we do not know. The other three ladies also got involved in some litigation, but it is unnecessary to follow all their squabbles as we think they have no bearing on the case. In the proceedings to which we have been referred there was no necessity to refer to or rely on [398] any customs. It is sufficient to say that after the death of Kanta and Mander, Tuktuk seems to have got the shares which they held. In 1870 Sriuns got her name registered for the half-share which Jinwar and Bhagwan always

admitted to be hers. There is no trace of any further disagreement after that, and in 1884 Sriuns made a will by which she gave certain property to Bhagwan Dass and the rest to her daughter's sons. She, like Misri, asserted a right to deal with the properties as she liked.

On the first question we find that Misri Koer could, according to the Jain custom, adopt a son without her husband's permission, and that she took an absolute right to his separate property.

On the second question we have no doubt that Bhagwan Das was actually adopted by Misri Koer, that the adoption was to her husband, and that Bhagwan acquired a good title to the properties. Whether he did so at once on the adoption notwithstanding that Misri Koer professed to retain her right to the properties, it is unnecessary to decide. In the documents D, E, F, and G, executed and registered by Misri Koer in the years 1857, 1866, 1871 and 1877, she positively asserts the fact of the adoption and treats him as her adopted son. She first makes a will in his favour—then she erects a Jain temple, endows property to it, and appoints Bhagwan to be the manager. Then she makes over to him absolutely as adopted son money and ornaments, and finally she makes over all her property. The evidence shows that Bhagwan was brought from Benares when about 8 years old, and that he lived afterwards with Misri, severing entirely his connection with his own family. He was of Vaishnab parents, and in some of the deeds above referred to she says she brought him up as a Saraogi, which was her religion and that of her husband. Ex. C shows that the parents parted with the boy; and when there was a *bond fide* intention to adopt, there is not the least ground for supposing that the adoption ceremony considered necessary was not performed. Three witnesses swear that such a ceremony did take place in their presence and the Subordinate Judge believed them. One of them is Sundar Das, a man of 70, whose sister was married to Jinwar Das, and who was certainly in a position to know. The [399] other two were also men of mature age at the time of the adoption. On the plaintiff's side there is only one witness, whose age might have been 10 at the time of the adoption; the others were all infants or unborn. There is not even the negative evidence of persons who could say that they never heard of such a ceremony, although they must have known of it, if it had taken place.

It is said, however, that the adoption, if any, was to Misri herself and not to her husband. There is not a suggestion in the voluminous evidence in this case that when a Jain widow adopts without permission she adopts to herself only. Misri herself declared more than once that she made the adoption to perpetuate the name and prestige of herself and her husband, and that is a pretty clear indication of what her intention was. The fact that after the adoption she still considered herself the owner of the properties affords no reasonable indication to the contrary, and the widow in *Sheo Singh Rai's* case did the same. The transaction must be looked at from the point of view of those who were concerned in it, even if it was a mistaken view. It is true that in a plaint of 1875 (Ex. 20) Misri described herself as widow and heir of Jinwar, that in 1877 (Ex. 37a) Bhagwan described himself as adopted son of Misri Koer, widow and heir of Jinwar Das, and that he gave himself the same description in certain plaints filed in 1875, 1882 and 1883 (Exhibits 34—36).

In a deposition of 1883 (Exhibit 28) he calls himself, however, the son of Jinwar Das, and we find him so described in an earlier document of 1874 (Ex. BB). These are not, we think, matters of much importance, especially when Misri Koer considered, rightly or wrongly, that the adoption did not at once divest her.

We must admit that we regard with considerable suspicion the evidence of the permission to adopt given by the witnesses, who say they were present at the adoption ceremony. It looks like an afterthought to fill up what might be a weak place. It is evidence which could not be contradicted, and it is very significant that Misri, although she several times mentioned the adoption, never referred to it as having been made with permission. This is not evidence upon which we should be prepared to act, if evidence is necessary ; but the matter is immaterial in view of [400] the other conclusions at which we have arrived, and no Court would we think put a defendant to express proof of permission in respect of an adoption made more than 40 years ago and recognized ever since.

As regards the third question, Jugmandil, the plaintiff's father, lived next door to Misri Koer ; their houses were only separated by a wall, and Jugmandil must have been, according to the plaintiff's account, Jinwar's nearest male relative. The plaintiff's mother's evidence shows that she and Misri were on good terms, and that they used to frequent each other's houses. Sundar Das swears that Jugmandil was present at and took an active part in the adoption ceremony, and in this respect we see no ground for disbelieving him. Misri was not making a surreptitious adoption, and Jugmandil, who was himself a Saraogi, may be assumed to know that she was not making an adoption personal to herself. Jugmandil must have known of the adoption, and the probability is extremely strong that he was, as Sundar Das says, present at the ceremony. Bhagwan was married in about the year 1862 to a girl of the Gya District. Madho Pershad, who is the brother of the girl's father, says that he negotiated for the marriage, that Jugmandil took an active part in the negotiation, and that Bhagwan was married as the son of Jinwar Das. Jugmandil was not present at the marriage which took place some nine or ten months after the betrothal, as he had then gone on pilgrimage. We see no reason to disbelieve the evidence of Madho Pershad, and there is no improbability about it. In 1866, when Misri endowed property to the Jain temple and appointed Bhagwan manager, Jugmandil was one of the persons appointed to be a *punch*, and who were to take the management out of Bhagwan's hands, if he misconducted himself. We cannot suppose that Jugmandil was ignorant of this. The evidence shows that Bhagwan acted as *Samdhi* [*Dadsali Samdhi*—Master of the ceremony—REP.] at the marriage of the plaintiff and his sisters and we believe it. He could not have done so in any capacity other than that of Jinwar's son. There is also evidence that Bhagwan acted as *Kandhya* [*Kandhya*—carrier or bearer.—REP.] at the funeral of members of the family, that he observed mourning ceremonies when any member of the family died, and that when he died the plaintiff and others went into mourning in the same way as they would have done for a relative. We have no doubt that he was throughout recognized as the adopted son of Jinwar and not merely as the adopted son of Misri Koer, that he ceased to be a gotra in his own family, and became a gotra of Jinwar. We entirely disbelieve the evidence for the plaintiff that Bhagwan was in Misri's house as a gomastha or a manager of her property. The evidence would go so far as to show that he was not even adopted by Misri. There is a mass of evidence, a good deal of it beyond suspicion, that Bhagwan was generally known and regarded as the adopted son of Jinwar. On these facts, especially the fact that he took part in the adoption ceremony, and in the marriage of Bhagwan, we think Jugmandil would have been estopped from denying the adoption. At all events no Court would listen to his objection that the adoption was invalid because made without the permission of Misri's husband, or call upon the defendant after 40 years to give proof of that fact. The plaintiff cannot be in any better position than his father.

We must hold also that the suit is barred under article 129 of the Limitation Act, IX of 1871, which provides that a suit to set aside an adoption must be brought within 12 years from the date of the adoption, or (at the option of the plaintiff) the date of the death of the adopted father. That Act was passed by the Governor-General in Council on 24th March 1871, but was not to apply to suits instituted before the 1st of April 1873. It was repealed by Act XV of 1877 which came into force on the 1st of October 1877, but the repealing Act did not revive any rights which were barred under the Act repealed. Jugmandil died on the 15th October 1875. The plaintiff was born on the 29th July 1873, and attained majority on the 28th July 1894.

The case of *Jagadamba Chaudhrain v. Dakhina Mohun Roy*, (1886) L. R., 13 I. A., 84 : I. L. R., 13 Cal., 308, was brought while the Limitation Act (IX of 1871) was in force. Their Lordships, speaking of Article 129, say that the rational and probable principle to apply to the [402] Act is that of allowing a moderate time within which such delicate and intricate questions as those of adoption shall be brought into dispute, and that the article must be read as striking alike at all suits, in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession. They add that the expression 'set aside an adoption' is and has been for many years applied to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature. In that case the plaintiff did not sue to set aside an adoption, but for the recovery of land of which the defendant was in possession as adopted son. It was held that the form of pleading was immaterial, and that it was enough, if the case raised the issue of the validity or invalidity of an adoption.

The case of *Mohesh Narain Munshi v. Taruck Nath Moitra*, (1892) L. R., 20 I. A., 30 : I. L. R., 20 Cal., 487, was brought when the present Limitation Act (XV of 1877) was in force, and it raised the question of the validity of an adoption made in 1851. Nothing appeared to turn on the question whether the defendant was or was not in possession as adopted son while time was running under the Limitation Act IX of 1871, but it was found that the adoption was openly and constantly asserted, and that the plaintiff had full knowledge of it, and had acknowledged or acquiesced in the assertion of the right. It was held that the suit was barred under Article 129, Act IX of 1871. Their Lordships say "the plaintiff had thus upwards of two years after March 1871, within which he might have brought his suit to set aside the adoption, and had notice under the statute that the period of limitation of twelve years from the date of the adoption would be applicable on the expiry of that time. Accordingly, on the 1st April 1873, no such suit having been raised, the plaintiff's right of action was barred."

This is not, we must admit, such a strong case as that, but we have found that the adoption was an adoption to Jinwar and not to Misri Koer alone, and that Jugmandil knew of it and assisted in it, and we think that the fact that Bhagwan did not get actual [403] possession until 1877 when Jugmandil was dead, makes no difference.

It is argued that the plaintiff cannot be barred as he claims as heir of Jinwar Das on the death of his widow, and that he does not claim through his father Jugmandil, that he was not born till after the 1st of April 1873, and could not before that date have brought a suit to set aside the adoption. But, if the time for a suit to set aside the adoption was running, still less if it had expired, before the plaintiff was born, he would not get the benefit of the extended time allowed to minors under the Limitation Act. Under Article 129

time in this case commenced to run from the date of the adoption. A similar contention was raised in the case of *Siddhessur Dutt v. Sham Chand Nundun*, (1875) 23 W. R., 285, and overruled. The decision of the Subordinate Judge is in our judgment right, and we dismiss the appeal with costs. There is an issue in the case as to which of the properties were ancestral and which self-acquired. The matter was not considered in the lower Court nor was there any discussion upon it before us.

M. N. R.

Appeal dismissed.

[27 Cal. 403]

PRIVY COUNCIL.

The 17th November and 9th December, 1899.

PRESENT :

LORDS HOBHOUSE AND DAVEY AND SIR RICHARD COUCH.

Ah Shain Shoke and others.....Defendants

versus

Moothia Chetty and others.....Plaintiffs.

[On appeal from the Court of the Recorder of Rangoon.]

Contract—Contract of sale—Want of assent—Broker's bought and sold notes.

To contract through a broker, to sell a quantity of paddy at a price stated, the plaintiff firm signed the sold note. This was taken by the broker to the defendant firm, of which a member, before signing the bought note, wrote in Chinese characters, not understood by the vendor, a term as to quality. This was to the effect that the paddy was to be without yellow grains and not wet.

A part delivery was made of paddy not answering this description. For this the defendant firm made a part payment at a reduced rate. Of the [404] rest they refused to take delivery, when tendered, because it was not of the quality contracted for.

Held, that the plaintiffs' suit for the balance of the price of the part delivered, and for damages for non-acceptance of delivery of the rest, failed.

If the plaintiffs—neither they nor their broker understanding Chinese—did not assent to the term written by the defendant, then there was no contract entered into to buy. If, on the contrary, the plaintiffs had assented to that term, then the paddy was not of the quality required by the contract.

APPEAL from a decree (16th September 1890) of the Recorder awarding damages.

The plaintiff-respondents sued the defendant-appellants for the breach of an alleged contract of the 6th September 1897 to take delivery of paddy, and sued also for the balance of a sum claimed to be due on a delivery of part taken under that contract. The arrangement, made through a broker, was for the purchase of from 35,000 to 40,000 baskets of paddy, of which 10,957½ baskets were delivered before the 29th September. For this delivery Rs. 14,664 were paid, that being less than the price claimed by Rs. 432 now sued for; the defendants having deducted that amount on account of the

quality of the paddy alleged by them not to be according to the contract. For the same reason the defendants refused to take delivery of the rest, which was tendered before the 6th October.

The first defendant, Ah Shain Shoke, to whom the signed sold note was taken with the bought note for his signature for paddy of the usual quality, wrote upon the bought note, before signing it, words in the Chinese language to the effect that paddy with yellow and wet grains would not be taken. When the broker returned both the bought and sold notes to the vendors, who did not understand Chinese, no notice was taken of any additional term. The paddy contained yellow grains.

The facts are stated in their Lordships' judgment.

The Recorder found that a contract was made through the broker as evidenced by the bought and sold notes for paddy of the usual quality, and that the produce delivered and tendered came up to this quality. In effect, his judgment was that there was a [405] contract between the parties, not altered by the addition of the Chinese words, which had represented nothing to the vendors.

Mr. A. Phillips, for the Appellants.—There was error in the Recorder's judgment. There had been no completed contract effected by the broker. The bought and sold notes should have been evidence of it; but it was clear that the defendant firm had never assented to the proposal made to them to accept paddy of the usual quality, without any exclusion of wet paddy, and with yellow grains. If, as had been decided by the Recorder, the term as to these things, to which the defendants objected, had not been introduced, then the parties were not "*ad idem*." The one party had offered, and the other party had not accepted, the offer. The addition of the Chinese characters to the bought note had been treated below as not affecting the claim, because they had been unintelligible to the opposite party. But either a new term had come in, and was, in the event, not complied with, or else there had been no contract at all.

Mr. Haldane, Q.C., Mr. F. McCarthy, and Mr. R. S. Giles, for the Respondents, argued in support of the judgment below. The complete contract was expressed in the broker's notes, the bought note containing some writing in Chinese, unintelligible to the vendors, and to the broker who brought back the notes; and these notes gave no intimation of a new term sought to be introduced.

Thus the sale was established of paddy of the usual quality; and the plaintiffs had fulfilled all that was required of them by their contract.

Mr. A. Phillips was not heard in reply.

Afterwards, on the 9th December 1899, their Lordships' judgment was delivered by

Sir R. Couch.—The suit in this case was brought by the respondents against the appellants for a breach of contract in not taking delivery of a large quantity of paddy sold by the [406] former to the latter on or about the 6th September 1897. The defendants had taken delivery of part of the paddy sold and paid Rs. 14,664 on account of it, being Rs. 432 less than the amount of the contract price for it, and the plaintiffs claim this sum and Rs. 17,448-15-9 as damages for not taking delivery of the remainder. The defence was that the contract was for the purchase of 35,000 to 40,000 baskets of paddy on the terms and conditions set out in the written contract embodied in bought and sold notes, that the quality of part of the paddy which was taken delivery of was objected to, and a reduction of eight rupees per 100 baskets was agreed to by the respondents, and the quality of the remainder of the paddy which the appellants refused to take delivery of was not according to the contract.

The suit was tried before the Recorder of Rangoon and the following facts were proved at the trial. The appellants are a firm of Chinamen trading in Rangoon under the name of Shain Leong, and the respondents are traders and money-lenders carrying on business there. The contract was made through a broker named Oothooman, the price after some negotiation being fixed at Rs. 138 per 100 baskets. He had bought and sold notes written by one Moideen which were in English and were copied from another contract altering the names. The sold note was signed by Ramanathan and Patail, two of the respondents, and was then taken away by Oothooman. He and Moideen then went to the defendants' house and gave both the bought and sold notes to Ah Shain Shoke, who called a clerk Lok Shain and asked him to read the contract. After he had read it, Ah Shain Shoke refused to sign, unless it was inserted that yellow and wet grain would not be taken. He wrote on the bought and sold notes in Chinese and signed the bought note and gave it to Oothooman who went with Moideen to Patail's house and gave it to him. It had on it in Chinese "Yellow rice will not be accepted, will not accept if it is wet." The respondent did not know Chinese and none of them noticed the writing till after the dispute. The paddy contained a sufficient quantity of yellow grains to make it not in accordance with the Chinese addition to the bought and sold notes, and Rs. 8 per 100 baskets was a reasonable reduction to be made in the contract price on account of the yellow grains. Moothia Chetty, one of the respondents, said in his evidence he [407] did not consider the contract as concluded until bought and sold notes were signed. He was right in this. They were the only evidence of the contract. As signed by the appellants the bought notes contained the term that there should be no yellow grains. If the respondents did not assent to this and insisted on the sold note signed by them being without that term, the notes would not agree and a contract would not be proved by them. If the respondents did assent they did not perform their part of the contract by offering paddy which was free from yellow grains. In either case the decree appealed from which gives to them the whole of their claim is erroneous, and their Lordships will humbly advise Her Majesty to reverse it and order the suit to be dismissed with costs. The respondents will pay the costs of the appeal.

Solicitors for the Appellants : Messrs. *Sanderson, Adkin & Lee*.

Solicitors for the Respondents : Messrs. *A. H. Arnold & Son*.

C. B.

NOTES.

[As regards the *parol evidence* rule in respect of bought and sold notes, see also (1904) 31 Cal., 614 : 8 C.W.N., 489.]

[27 Cal. 407]
PRIVY COUNCIL.

The 14th November and 9th December, 1899.

PRESENT :

LORDS MORRIS, DAVEY, AND ROBERTSON, AND SIR RICHARD COUCH.

Tara Lal Singh.....Appellant
versus
Sarobar Singh and others.....Respondents.

[On appeal from the High Court at Fort William in Bengal.]

Land Tenure—Sale of an under-tenure in execution of decrees for arrears of rent—Act VIII of 1865—Execution—Attachment—Sale proclamation—Joint interest of three brothers in joint possession validly sold.

A zemindar brought to a judicial sale an under-tenure in execution of three *ex parte* decrees obtained by him for arrears of rent thereof, for different periods. The property was held by three Hindu brothers in joint possession. The zemindar purchased it at the sale.

At the instance of the zemindar execution had been issued against only one of the brothers. Another of them, referring to this, afterwards disputed the validity of the sale, and claimed his one-third share, alleging, as the fact was that the decrees had not, each and all of them, been against each and all of the three brothers, and that the sale was invalid. One at least of the three decrees was against the three brothers, who all understood that they were judgment-debtors under the decrees. They had been served with [408] proper notices under Act VIII of 1865, and separate attachments of the land under each decree, and separate proclamations of sale thereunder, had been made.

Held, that the sale was a valid one, and operated to transfer the tenure to the purchaser. APPEAL from a decree (2nd March 1896) of the High Court, reversing a decree (30th September 1893) of the Subordinate Judge of Manbhum.

The appellant represented his father the late Raja Nilmoni Singh Deo Bahadur, against whom this suit was brought on the 2nd June 1890 by Gadadhar Singh, who died after the decree of the High Court, in his favour, and was now represented by his brother Sarobar Singh, the first respondent.

The claim was for a declaration of Gadadhar's proprietary right and for possession of a one-third share of ten villages held, before the proceedings now in question, as a jaghir tenure under the Raja by the plaintiff and his two brothers Chatradhari Singh (now deceased and represented by his son Shumbonath Singh), and Sarobar who were joint in estate. This under-tenure had been attached and sold under, and in conformity with, Bengal Act VIII of 1865, in execution of three *ex parte* decrees for arrears of rent (Act X of 1859) obtained by the late Raja against the brothers. The first of these decrees was dated 3rd December 1870, and was for rent of the tenure, from April 1866 to April 1869, against defendants Chatradhari and Gadadhar, the latter of whom got this decree afterwards struck off as against him. The second decree was dated the 2nd September 1874, for rent from 1870 to 1873 against Chatradhari alone. The third decree, dated 13th April 1877, was for rent from April 1873 to April 1876 against the three brothers, together defendants.

In June 1878 the Raja, holding the three decrees, applied for and obtained an order for execution of them against Chatradhari alone. Proceedings were then taken under Act VIII of 1865, regulating the sale of under-tenures for

arrears. Attachment, proclamation of sale, and notices took place. Order for sale was made by the Deputy Commissioner as Collector of Manbhum, and on the 15th July 1879 the villages were put up for sale in execution of the decrees. The Raja became the purchaser for Rs. 7,000, and [409] to him a sale certificate was issued on the 28th October 1878. The Commissioner of the Division dismissed an appeal from the order of sale, and the Board of Revenue confirmed it.

The question now was whether the execution ending in the sale was valid, and rendered it effectual. This had been raised by the issues fixed by the Subordinate Judge at Purulia, as well as one of limitation. On this latter point only he dismissed the suit as out of time, not having been brought within one year, under Act. 12 of Sch. II of Act XV of 1877.

On an appeal to the High Court by the Raja a Division Bench (BANERJI and GORDON, JJ.) considered that the question of limitation did not arise. In their opinion the decree-holder had deliberately proceeded against Chatradhari alone, and the sale had been caused to be held in the execution case against the same defendant only. According to their view there was no valid sale of the plaintiff's interest in the under-tenure brought to sale. They treated the objection as not merely technical and decreed the claim.

Mr. J. D. Mayne and Mr. J. H. A. Branson, for the appellant.—The right decision would have been to hold that the sale in July 1878 was a sale under all the three decrees and in all the three execution cases.

If, indeed, there was an objection tenable in favour of Gadadhar's claim, on the ground of the striking off of the decree of 3rd December 1870 as against him, there still remained the decree of 13th April 1877 against all the three brothers together and the execution case upon that. Thus he remained liable at all events in these proceedings. The property might have been lawfully sold under the last decree. There had been nothing to limit the execution to Chatradhari's interest, or to render any of the proceedings a nullity. The issue of execution against Chatradhari alone was passed over, if irregular, in the subsequent proceedings, which made all the defendants fully aware that the property was to be sold in execution of all the three decrees against all the three brothers. The proceedings were regularly taken under Act VIII [410] of 1865, relating to sales of under-tenures for arrears. In execution proceedings the Court would regard the substance of the transaction, and if that were sound, as in the present case, a technical irregularity, or informality, would not affect the validity of the sale *Bissessur Lal Sahu v. Maharaja Luchmessur Singh*, (1879) L. R., 6 I. A., 233. The execution in this instance became valid against all the three in the course of the proceedings, the attachment against their land, the sale proclamations, the notices, and the sale itself having all taken place. The sale, it was submitted, should have been declared valid.

The respondents did not appear.

Afterwards, on the 9th December, their Lordships' judgment was delivered by

Lord Davey.—The suit out of which this appeal arises was one for possession of one-third share of certain mouzahs, the entirety of which had been sold by auction in certain execution proceedings in the year 1878. A similar suit was commenced by another claimant and the two suits were heard together. The validity and effect of these execution proceedings is the matter in dispute. The following are the material facts:—

In and prior to the year 1870 three brothers named Chatradhari, Gadadhar and Sarobar were in joint possession of the mouzahs in question on a jaghir.

tenure under the late Raja Nilmoni (the predecessor in title of the present appellant). The Raja obtained three decrees in the Court of the Assistant Commissioner of Purulia : (1) No. 136 against Chatradhari alone for the rent of the mouzahs for the Fasli years 1293—1295; (2) No. 107 against Chatradhari and Gadadhar (misdescribed as Gungadhur) for the rent for the years 1297—1299; and (3) No. 1334 against all three brothers (Sarobar being misdescribed as Surleswar) for the rent for the years 1280—1282. All these decrees were obtained *ex parte*, the defendants in the several actions not appearing. On the 3rd June 1879, and after execution proceedings, Gadadhar obtained an order for restitution of Suit [411] No. 107 to the Judges' list for trial, and it was ultimately struck out, so far as he was concerned, for default of the plaintiff. The decrees in No. 136 and No. 107 were therefore in effect against Chatradhari alone, and that in No. 1344 against the three brothers (subject to any question as to the misdescription of Sarobar).

The decree-holder applied for execution of these three decrees. The execution proceedings under No. 136 were numbered 225, those under No. 107 were numbered 224 and those under No. 1334 were numbered 226. The decree-holder appears for some reason to have wished to take out execution against Chatradhari alone. Some objection appears to have been made (though the Record does not contain the document raising the objection or show by whom it was made) and the following orders were passed by the Deputy Commissioner :—

“ Raja of Pachete, *Decree-holder v. Chatradhari Singh and others, Debtors.*

“ I am of opinion that the objection, though in point of abstract justice of no real importance, must in point of law be allowed.

“ (a) In each case when the application has not been made setting forth the names of actual parties the application must be amended.

“ (b) A separate notice of sale for each decree must be made. This notice shall be hung up in (1) Mr. Renny's Court, (2) in the Collector's Court, (3) in the Subordinate Judge's Court, (4) in the Court of the Judicial Commissioner to whom a memo in English will be sent, (5) in one of the villages on the land, to wit, Assensole, (6) in the nearest village to the land.

“ (c) The notice shall specify the name of the mouzah and pergunnah in which the under-tenure is situated, the rent payable, viz., Rs. 671 per annum, and the entire amount (correctly calculated, and if both are agreeable admitted by signature of both parties) recoverable under the decree under which the under-tenure is to be sold.

“ (d) In each copy of the notice (the copies for Mr. Renny's Court and the Collector's Court will be hung up not later than the 20th June) it shall be said that the sale shall take place on the 15th day of July 1878, at noon, in the Cutchery of the Collector.

“ B. W. MORTON, D.C.

“ The 15th June 1878.”

“ As the decree-holder does not choose to take out execution against all the persons against whom he obtained decrees, and only against Chatradhari Singh, it does not appear to me that he is bound to take out execution against all. He says Chatradhari Singh is the only man who has any right. [412] Decree-holder knows his own business best. In the notice the claims of all parties will be given, as the law directs this to be done. If the other men are real tenure-holders they may protest. I direct that they be served personally with notice of the proposed sale of the under-tenure.

“ B. W. MORTON, D.C.

“ The 21st June 1878.”

It appears clearly from the language of these orders that the Deputy Commissioner had the several decrees before him, and that his order applied to each decree, and it must, their Lordships think, be assumed that his orders

were complied with and the proper notices were given to the several defendants in suit No. 1334 as well as in the other suits so as to bind the interest of all these defendants.

The sale took place on the 15th July 1878, and the decree-holder was declared the highest bidder and purchaser of the villages at the price of Rs. 7,000. It is plain from the rubokari of the Court of the Collector confirming the sale that it was made in Execution Cases Nos. 224, 225, and 226. It is headed with those numbers. It mentions attachment was made separately of the said lands in the several cases numbered separately ; that separate sale proclamations were published and that the three records were put up on the day fixed for the sale. There can therefore be no doubt that the sale was made in suit 1344, and there can be no doubt that the proper notices were given and proclamations made to bind all the defendants in that suit. There is no allegation or proof to the contrary in the present suits.

A sale certificate was issued to the purchaser on 28th October 1878. Before the granting of this certificate the three brothers on the 6th August 1878 filed a memorandum of objection for the purpose of having the sale set aside, and their first two grounds of objection are that the sale was made in three separate execution cases in which they were the judgment-debtors separately ; each of them not being the judgment-debtor in each of these decrees. They also made objections to the regularity of the proceedings on the sale and raised certain questions as to the disposal of the purchase money.

The appeal of the judgment-debtors was dismissed by the Commissioner, and his judgment appears to have been confirmed by the Board of Revenue. Their Lordships do not think that this [413] judgment can be regarded as *res judicata* in the present suits, if, as the High Court has held, there was no sale of anything but Chhatradhari's interest, but the proceedings are important as showing that the three brothers understood that the sale was in all three decrees, and that they were all judgment-debtors and the property had been sold in execution of at least one judgment against them all. They also show that Sarohar recognised himself as the person sued, notwithstanding the mistake in his name on the record of 1344.

The present suit was commenced on the 2nd June 1890, and in his plaint the plaintiff alleged that the property was sold under decree No. 107 and the execution case 224 (without mentioning the other decrees and execution cases), and that inasmuch as that decree had been set aside, the sale on execution of it was void as against him. Their Lordships have already intimated the grounds upon which this contention cannot be maintained. The High Court have however held that having deliberately elected to execute the decrees against Chhatradhari alone, and having after the sale chosen to have the sale treated as made in execution 224, the decree-holder cannot be allowed to treat the proceedings differently and support it as a sale of the interests of all three brothers. Their Lordships cannot accede to this reasoning. The learned Judges do not seem to have thought that if the sale took place and is to be treated as having taken place in execution No. 226, the sale would not be valid, but they seem to have thought that the decree-holder and the present appellant are in some way estopped from treating the sale as made under execution No. 226. It is not, however, a question of estoppel but of fact, and on this point their Lordships need not repeat what they have said. There can be no estoppel when the truth of the matter appears, as it does in the present case, on the face of the proceedings. And it is plain from their memorandum of objections that Gadadhar and Sarohar were not deceived as to the facts or prevented by any misstatement of the Raja from asserting any rights they may have conceived themselves to possess. On the whole their Lordships cannot find

on this record that either in form or substance any injustice was done to Gadadhar or Sarobar and they hold that the sale passed the entirety of the property.

[414] They will therefore humbly advise Her Majesty that the order appealed from be reversed, and the appeal to the High Court be dismissed, the parties bearing their own costs as in the first Court. As this is a pauper case there will be no costs of the appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

C. B.

NOTES.

[Interest, not declared by decree was held payable by estoppel in (1904) 28 Bom., 393 : Bom. L.R., 417.]

[27 Cal. 414]

APPELLATE CIVIL.

The 4th December, 1899.

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE WILKINS.

Suja Uddin.....Petitioner

versus

Reazuddin and another.....Opposite Party.*

Appeal—Order rejecting an application for restoring to the file an application to set aside a sale in execution of a decree—Civil Procedure Code (XIV of 1882), ss. 311, 588 (8)—Execution Proceedings—Dismissal for default.

No appeal lies from an order rejecting an application to restore to the file an application to set aside a sale under s. 311 of the Civil Procedure Code, which has been dismissed for default.

IN each of these cases, the petitioner Suja Uddin applied under section 311 of the Civil Procedure Code to set aside a sale in execution of a decree. He failed to appear, and the application was dismissed for default. He then applied under section 623 of the Civil Procedure Code to restore the application to the file, but that application was also dismissed by the Munsif. The petitioner then appealed to the District Judge, who held that no appeal lay. He then appealed to the High Court.

Babu *Jatra Mohan Sen* for the Appellant.

Babu *Digamber Chatterjee* for the Respondents.

[415] A preliminary objection was taken that no appeal lay in each case.

* Appeals from orders Nos. 69 and 74 of 1899 against the order of J. Windsor, Esq., District Judge of Burdwan, dated the 11th of January 1899, affirming the order of Babu Kadereswar Moitra, Munsif of Burdwan, dated the 14th of October 1898.

The **judgment** of the High Court (**Rampini and Wilkins, JJ.**) was as follows :—

A preliminary objection has been raised to the hearing of these two appeals (Nos. 69 and 74 of 1899), namely, that no appeals lie; and in support of this contention the case of *Raja Pudmanund Singh Bahadoor v. Doorga Pershad Doobry*, (1899) 4 C. W. N., 39, recently decided in this Court has been cited. We think that the facts of the present appeals are similar to the facts of that case, and on the authority of this ruling and also of the rulings *Ningappa v. Sangawa*, (1885) I. L. R., 10 Bom., 433, and *Raja v. Strinivasa*, (1888) I. L. R., 11 Mad., 319, we dismiss these appeals with costs, which we assess at two gold mohurs in each case.

M. N. R.

Appeals dismissed.

NOTES.

[In (1914) 19 C.W.N., 25, a similar case, the decision was similar. See also (1906) 3 C.L.J., 276; (1907) 10 O.C., 353.]

[27 Cal. 416]

The 24th November, 1899.

PRESENT :

SIR FRANCIS WILLIAM MACLEAN, K.C.I.E., CHIEF JUSTICE,
MR. JUSTICE BANERJEE, AND MR. JUSTICE HARINGTON.

Gahar Khalipa Bipari and another.....(Judgment-debtors,) Appellants
versus

Kasi Muddi Jamadar.....Decree-holder.

*Civil Procedure Code (Act XIV of 1882), section 244—Question for Court
executing decree—Question between decree-holder and judgment-debtor
as to saleability or otherwise of an occupancy holding.*

Under section 244 of the Civil Procedure Code the question as to the saleability or otherwise of an occupancy holding between the decree-holder and judgment-debtor can be determined in the execution proceeding.

Durga Charan Mandal v. Kali Prasanna Sarkar, (1899) I. L. R., 26 Cal., 727, and *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha*, (1897) I. L. R., 24 Cal., 355, referred to.

[416] THIS appeal arose out of an application for execution of a decree. One Kasi Muddi Jamadar obtained a decree for rent against Gahar Khalipa Bipari and another, and in execution of that decree attached certain immoveable properties of the judgment-debtor. The defence was that the properties could not be attached and sold, inasmuch as they were occupancy holdings, and not transferable by custom. The Court of First Instance having held that under section 244 of the Civil Procedure Code the judgment-debtors could not raise the question of saleability or otherwise of an occupancy holding in the execution proceeding, allowed the application. On appeal the learned District Judge confirmed the said decision. Against this decision the judgment-debtor appealed to the High Court.

* Appeal from Order No. 158 of 1899, against the order of B. C. Mitter, Esq., District Judge of Faridpur, dated the 28th of February 1899, affirming the order of Babu Ashini Kumar Guha, Munsif of that district, dated 27th of July 1898.

Babu Surendra Chunder Sen for the Appellants.

Moulvi Serajul Islam for the Respondent.

The judgment of the High Court (MACLEAN, C.J., BANERJEE and HARRINGTON, JJ.) was as follows :—

Maclean, C.J.—The learned Judge in the Court below has stated with accuracy what the question in this case is. First, he says, the question is, whether as between the decree-holder and judgment-debtor, the question of the saleability, or otherwise, of an occupancy holding can be determined in the execution stage under section 244 of the Code of Civil Procedure, and his conclusion is—it is stated at the end of his judgment—that “the point now under discussion could not be raised by the appellant tenant; or in other words, the question did not properly arise.” I have the misfortune to differ from the learned Judge. It seems to me clearly a question arising between the parties to the suit, a question arising between the decree-holder and the judgment-debtor in the suit, in which the decree was passed and relating to the execution of the decree. This view is consistent with that held by this Court in the cases of *Durga Charan Mandal v. Kali Prasanna Sarkar*, (1899) I. L. R., 26 Cal., 727; *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha*, (1897) I. L. R., 24 Cal., 355. The appeal must be allowed, and the case remitted to the lower Court for retrial with this intimation of our opinion. [417] We assess the hearing fee at two gold mohurs; the costs to abide the result of the remand.

Banerjee, J.—I concur.

Harrington, J.—I concur.

S. C. G.

Appeal allowed; case remitted.

NOTES.

[See also (1905) 9 C.W.N., 972.]

[27 Cal. 417]

The 30th November, 1899.

PRESENT:

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, MR. JUSTICE BANERJEE, AND MR. JUSTICE HARRINGTON.

Bhoopendra Narain Dutt and others.....Plaintiffs

versus

Romon Krishna Dutt.....Principal Defendant.*

Bengal Tenancy Act (VIII of 1885), sections 52, clause (6) and 188—Abatement of rent—Suit for rent by several joint landlords against one of the joint tenants, whether in such a suit the tenant can claim abatement of rent—Tenant, Meaning of.

The expression “tenant” in section 52 of the Bengal Tenancy Act does not include the case of a mere co-sharer tenant who has only a fractional share in the tenure: it means the tenant of the tenure and not one of many tenants.

*Appeal from Order No. 449 of 1898, against the order of Babu Bulloram Mullick, Subordinate Judge of 24-Pergunnahs, dated the 8th of September 1898, reversing the order of Babu Shyama Churn Chuckerbutty, Munsif of Baruipur, dated the 15th of March 1898.

In a suit for rent, brought by some of several joint-landlords against one of several joint-tenants for recovery of the plaintiff's share of the rent payable on account of the defendant-tenants' share of the tenure under a previous arrangement, such tenant-defendant cannot claim abatement under the provisions of section 52 of the Bengal Tenancy Act.

THIS appeal arose out of an action brought by the plaintiffs for recovery of their share of the rent payable by the defendant. The allegation of the plaintiffs was that they were the part proprietors of a certain *taluk*, and that the defendant was one of the joint-tenants of the tenure in respect of rent which was claimed, and that by an arrangement the defendant used to pay his share of the rent separately, that he failed to pay the rent and hence the suit was brought. The defence *inter alia* was that the actual quantity of land held by the defendant was much less than what it was stated to be by the plaintiffs, and that therefore the defendant was entitled to an abatement of rent upon measurement. The [418] Court of First Instance disallowed the objection of the defendant and decreed the plaintiffs' suit. On appeal, the Subordinate Judge reversed the decision of the first Court. Against this decision the plaintiffs appealed to the High Court.

Dr. *Ashutosh Mukerjee* for the Appellant.

Mr *Caspersz* and Babu *Bidhu Bhusan Ganguli* for the Respondent.

The following judgments were delivered by the High Court (MACLEAN, C.J., BANERJEE and HARRINGTON, JJ).

Maclean, C.J.—In this case certain persons, as landlords, granted a lease of certain immoveable property to certain persons as tenants. By an arrangement between some of the co-sharer landlords and one of the co-sharer tenants who was entitled to a fractional share in the tenure, the latter has paid for many years past his share of the rent to the co-sharer landlords I have referred to, who are now suing him for arrears of his share of the rent. The co-sharer tenant now sets up for the first time, and after this long period of payment, that he is entitled to a reduction of rent in respect of a deficiency existing in the area of his tenure as compared with the area for which rent has been previously paid by him, and claims the benefit of section 52, sub-section (b) of the Bengal Tenancy Act. The question we have to decide is whether or not, as a mere co-sharer in the tenure, he is entitled in this suit to which neither the other co-sharer landlords nor the other co-sharer tenants are parties, to ask for a measurement, and to obtain any reduction, if any deficiency be proved. The Munsif has held that he is not so entitled; the learned Subordinate Judge has reversed that decision; hence the present appeal by the plaintiffs, who are the fractional landlords.

The solution of the point turns upon what is the true meaning of the expression "every tenant" in section 52 of the Bengal Tenancy Act; whether it applies only to a tenant of the entire tenure, or whether it includes a tenant who has only a fractional interest in the tenure and who claims the benefit of the section in a suit constituted as is the present. In my opinion the question ought to be answered in the negative.

[419] It has been held in this Court—I am referring to the most recent decision in the case of *Baidya Nath De Sarkar and another v. Ilm and others*, (1897) I. L. R., 25 Cal., 917—that a fractional shareholder, I mean one of several joint-landlords owning a share, cannot bring a suit for enhancement of rent. That decision doubtless turned to a considerable extent upon section 188 of the Act, but it is difficult to see why the principle, which evidently underlies section 188, should not apply to the converse case of a co-sharer tenant claiming the benefit of section 52 in a suit such as the present.

In my opinion the expression "tenant" in section 52 does not include the case of a mere co-sharer tenant who has only a fractional share in the tenure; it means the tenant of the tenure, not one of many tenants. To hold that, in a case of this class it applied to a co-sharer tenant would result in much confusion, and almost endless litigation. For, if such were the true construction, every co-sharer landlord and every co-sharer tenant might possibly bring separate suits under this section. That can scarcely be. This view inflicts no injustice upon the co-sharer tenant, who can bring a suit under sub-section (b) of section 52 of the Act for the purpose of having the rent reduced on the ground of deficiency in the area, if, as I think he must, he make all the joint-landlords and all the joint-tenants parties to the suit.

On these grounds I consider the view taken by the Munsif was right, and that this appeal must be allowed with costs.

Banerjee, J.—I am of the same opinion. The question raised in this suit, which was brought by some of several joint-landlords against one of several joint-tenants for recovery of the plaintiff-landlords' share of the rent payable for the defendant-tenant's share of the tenure under a previous arrangement, is whether the tenant defendant can claim abatement under the provisions of section 52 of the Bengal Tenancy Act in such a suit. The first Court answered that question in the negative and gave the plaintiffs a decree at the old rate of rent. On appeal by the tenant-defendant, the Lower Appellate Court has answered the question in the affirmative, reversed that decree, and remanded the case to [420] the first Court. And against this decision of the Lower Appellate Court the present appeal has been preferred by the plaintiffs.

The contention on behalf of the tenant-defendant was that he was entitled to abatement of rent under clause (b) of sub-section 1 of section 52 of the Bengal Tenancy Act. That clause provides that "every tenant shall be entitled to a reduction of rent in respect of any deficiency proved by measurement to exist in the area of his tenure or holding as compared with the area for which rent has been previously paid by him," &c., &c., and the question is whether the term "tenant" there includes one of several joint-tenants, the term rent, "any portion of the rent" and the term "tenure" a share of a tenure.

Evidently the language of the section is in favour of the appellants' view. Then is there anything in reason or justice which would support the defendant's contention and justify our holding that a tenant-defendant in a suit like the present is entitled to claim the benefit of this clause. The only reason which the learned Counsel for the respondent has been able to point out is, that if his contention be not accepted, then the result will be that great difficulty will be thrown in the way of a tenant's obtaining abatement of rent when he is circumstanced as the defendant is in the present case, where he is one of several joint-tenants holding a tenure under several joint-landlords, who have been in separate receipt of rent. But I do not think there is any real hardship in the case, so far as the tenant-defendant is concerned. It is always open to him to bring a suit for abatement of rent, making all the joint-landlords, and his co-sharers in the tenancy parties to the suit; and he can obtain abatement, if his case is well-founded. On the other hand to accept the respondent's contention as correct would result in much inconvenience and many anomalies. For, in that case the plea of abatement may be raised in every one of the suits, which the several joint-landlords may bring against the several joint-tenants, and as the judgment in none of these suits would be evidence in any of the others, the Court will have to try the question of abatement as often as there are suits brought, and it may be, with as many varying results, according to the nature of the evidence adduced in each case.

The contention on behalf of the appellants, therefore, is in accordance not [421] only with the words of the section relied upon, but also with the spirit of the law and with reason and justice.

I may add that, so far as the landlord's right to claim enhancement or increase of rent is concerned, that right can be claimed only in a suit brought by all the joint-landlords. It is true that under the Bengal Tenancy Act that is so under the express terms of section 188 of that Act; but under the law as it stood before the passing of the Bengal Tenancy Act, the rule was the same, and the rule was based upon considerations of justice. And if that was so, there is no reason why similar considerations should not be given effect to in the converse case of a tenant seeking to obtain against one of several joint landlords abatement of rent, though such a case may not be provided for by any express provision of the Tenancy Act applicable to it.

Harington, J.—I am of the same opinion. In the absence of any express power given under the Act to a person having a share in a tenancy to exercise the rights which are given by the Act to a tenant, I think that the principle which obtains in the case of a joint-landlord being unable to sue except jointly must obtain. I can see no difference in principle and for that reason I think this appeal must succeed.

S. C. G.

Appeal allowed.

[27 Cal. 421]

The 28th November, 1899.

PRESENT :

SIR FRANCIS WILLIAM MACLEAN, K. C. I. E., CHIEF JUSTICE, MR. JUSTICE BANERJEE, AND MR. JUSTICE HARINGTON.

Deno Nath Santh.....Plaintiff

versus

Nibaran Chandra Chuckerbutty and others.....Defendants.*

Interest—Mortgage Bond—Failure to pay on due date—Stipulation for the payment of enhanced interest from date of default till date of realization. Whether such stipulation is a penalty where a sum is mentioned in the contract as the amount to be paid in case of a breach of the contract—Contract Act (IX of 1872), s. 74.

In a mortgage bond where the parties are adults, the provision as to interest was to the following effect: "On account of interest of the said sum [422] of money, you shall take

* Appeal from Appellate Decree No. 132 of 1898, against the decree of Babu Rajendra Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 15th of December 1897, modifying the decree of Babu Shama Kanta Nag, Munsif of Diamond Harbour, dated the 22nd of May 1897.

the profits of the said lands, and I will pay Rs. 20 per annum as the balance of interest from year to year by getting the said amount endorsed on the back of this document ; and if I fail to do so, then at the end of the year the said amount of interest shall be added to the principal ; and for the total amount whatever it will be I will pay up to the date of repayment at the rate $\frac{1}{2}$ anna per rupee per mensem."

Held, that inasmuch as what was specified in the contract was only the enhanced rate of interest, while no definite amount was specified as being payable in the event of a breach, nor could it be said that the amount, though not expressly stated in definite terms, was an ascertainable and definite amount which could become payable at the date of the breach, the stipulation for the payment of enhanced interest did not come within the scope of s. 74 of the Contract Act.

Mackintosh v. Crow, (1883) I. L. R., 9 Cal., 689, and *Wallis v. Smith*, (1882) I. L. R., 21 Ch. Div., 243, referred to.

THIS appeal arose out of a suit for redemption. The plaintiff, who was the purchaser of the equity of redemption of an usufructuary mortgage, deposited a certain sum of money in Court to the credit of defendant No. 3, the mortgagee, being the principal and interest due upon the mortgage bond, and prayed that a decree for redemption be made. The defendant No. 3, on the other hand, urged that he was entitled to get more money than what was deposited by the plaintiff, the stipulation for interest in the bond being enforceable in law. The stipulation was to the following effect:—

"On account of interest I will pay annually Rs. 20 left after deduction of the proceeds of the said lands, and get the payment endorsed on the back of this document ; if I fail to do so the said money on account of interest shall be considered as principal, and I will pay interest on the total amount of money, whatever it will be, at the rate of half-anna per rupee per mensem up to the time of payment."

The Court of First Instance, relying upon the case of *Bairdnath Das v. Shamanand Das*, (1894) I. L. R., 22 Cal., 143, held that the stipulation to pay compound interest was not enforceable by law, and gave the plaintiff a decree. On appeal, the learned Subordinate Judge reversed the decision of the first Court. Against this decision the plaintiff appealed to the High Court.

[423] *Babu Saroda Charn Mitter* and *Babu Shyma Prasanna Mozumdar* for Appellant.

Babu Charu Chunder Ghose for Respondent.

The judgment of the High Court (MACLEAN, C. J., BANERJEE and HARRINGTON, JJ.) was as follows:—

Maclean, C.J.—The question in substance which we are called upon to decide is whether, or not, we should allow to the mortgagee, under the mortgage, which is set out in the Paper Book, a less amount in the shape of interest than he alleges is stipulated for by the contract, and we are asked by the mortgagor to do this by putting in force the equitable principles of section 74 of the Contract Act.

The parties in this case are adults, they made their own bargain, and as regards interest, the contract runs in these terms: "On account of interest of the said sum of money, you shall take the profits of the said lands, and I will pay Rs. 20 per annum as the balance of interest from year to year by getting the said amount endorsed on the back of this document, and if I fail to do so, then at the end of the year the said amount of interest shall be added to the principal ; and for the total amount whatever it will be I will pay up to the date of repayment interest at the rate of $\frac{1}{2}$ anna per rupee per mensem."

It is urged for the appellant that the provision for the payment of this additional interest is, upon the construction of the document, a penalty, and

that, being a penalty, it is open to the Court, under the provision of the section to which I have referred, to give a less amount than that stipulated for by way of reasonable compensation.

The question of whether in cases of this class the payment which is stipulated for is by way of penalty or of liquidated damages is often a somewhat perplexing one, as is illustrated by the variety of authorities upon the point in the Courts of England: but section 74 of the Contract Act was intended, as I understand, to do away with the distinction between a penalty and liquidated damages as was pointed out by Mr. Justice WILSON in the case of *Mackintosh v. Crow*, (1883) I. L. R., 9 Cal., 689, and to determine the perplexity. I am not quite satisfied that the latter result has ensued.

[424] Now, upon the best consideration that I have been able to give to the construction of the mortgage in this case,—and in each of these cases, the decision of the question depends, in effect, upon the construction of the document, and upon ascertaining what the parties really intended by it—I do not think that the provision can be regarded as a penalty. The bargain may have been a stringent one, but the parties made it, and they were competent to make it, and the language to my mind only shows that in certain events, and under certain circumstances, a certain amount of interest was to be paid. Unless this is to be regarded as a penalty—a view I have negatived—this is not a “sum named in the contract as the amount to be paid in case of such breach,” and section 74 does not apply. As was pointed out by Sir GEORGE JESSEL, Master of the Rolls, in the case of *Wallis v. Smith*, (1882) L. R., 21 Ch. Div., 243, Courts of Law should be chary about interfering with the contract made by the parties. His Lordship says: “It is of the utmost importance, as regards contracts between adult persons not under disability, and at arms length that the Courts of Law should maintain the performance of the contracts according to the intention of the parties; that they should not overrate any clearly expressed intention on the ground that the Judges know the business of the people better than the people know it themselves.”

In this view I do not propose to go through the rather numerous authorities to which our attention has been directed, and for the simple reason that each of these cases depends upon the actual language used in the contract, and what, upon the construction of that language, was the true bargain between, and intention of, the contracting parties. Whilst I do not propose to go through those authorities, I may perhaps say that I agree in the view of the law as laid down by Mr. Justice WILSON in the case of *Mackintosh v. Crow*, (1883) I. L. R., 9 Cal., 689, to which I have already referred. Upon these short, but I think, sufficient grounds, the appeal fails and must be dismissed with costs.

Banerjee, J.—I am of the same opinion. We are asked by the learned Vakil for the plaintiff-appellant, to hold that the [425] stipulation relating to the payment of interest at an increased rate is not enforceable, *first*, because the case comes within the scope of section 74 of the Contract Act, and the creditor is entitled, not to the sum named in the contract, but only to reasonable damages, and, *secondly*, because, even if the case did not come within the scope of that section, still, having regard to the nature of the contract, we should hold upon equitable principles that it is not enforceable, and that the mortgagee is entitled only to reasonable compensation.

In support of the first branch of the contention the cases of *Kala Chund Kyal v. Shib Chunder Roy*, (1892) I. L. R., 19 Cal., 392, *Ramendra Roy Chowdhury v. Serafuddin Ahmed*, (1898) 2 C. W. N., 234; and *Manoo Bepari v. Durga Churn Saha*, (1898) 2 C. W. N., 333, are especially relied upon, and in

support of the second branch of the contention the case of *Pardhan Bhukhan Lal v. Nursing Dyal*, (1898) I. L. R., 26 Cal., 300, is cited.

I am of opinion that the stipulation for the payment of enhanced interest in this case does not come within the scope of section 74 of the Contract Act, for this simple reason that here no sum is named in the contract as the amount to be paid in case of a breach of the contract. What is specified in the contract is only the enhanced rate of interest, but no definite amount is specified as being payable in the event of a breach. Nor can it be said that the amount, though not expressly stated in definite terms, is an ascertainable and definite amount which would become payable at the date of the breach. If the provision had been that interest would be charged at the enhanced rate, not merely from the date of default in payment but from the date of the original loan, then it might be said that so far as the increased interest between the date of the loan and the date of default was concerned, that was a definitely ascertainable amount which became payable on the date of the breach of the contract. But here there is no such provision: the increased rate of interest is claimable only from and after the date of default in payment.

[426] It was argued that in the case of *Kala Chand Kyal v. Shib Chunder Roy*, (1892) I. L. R., 19 Cal., 392, the interest at the enhanced rate accruing due subsequent to the date of default was held to come within the scope of section 74 of the Contract Act, but that was only because it was considered by the majority of the Full Bench to be a part of the whole amount that became payable on the breach of the contract, the other part being interest at the enhanced rate that had become payable in regard to the period between the date of the loan and date of default. This is what Mr. Justice PIGOT, whose judgment was concurred in by the majority of the Full Bench, said in his judgment: "Upon the second question I think that when the provision in the contract in question amounts to a provision for a penalty (or which is the same thing, stipulated for a sum in case of breach within the meaning of section 74), that that goes to the whole sum which may accrue due under the provision, although it may be that by non-payment for an indefinite time the aggregate amount ultimately payable may greatly exceed the amount—the fixed ascertainable amount—to be due at time of default. I think they cannot be separated, and that section 74 applies to all, that is, that it applies to the money claimed at the increased rate of interest from the date of the bond until realisation." But the reason for the application of that principle, which consisted in a part at least of the amount claimable being already due and ascertainable at the date of the default, is wanting in this case, there being no provision that the enhanced interest is to be recoverable from any date anterior to the date of default.

In the two cases cited from 2 C. W. N., this distinction is expressly pointed out, and the learned Judges in those two cases held that they came within the scope of section 74, because they were of opinion that under the terms of the contract they had before them, the increased rate was claimable, not merely from the date of default, but from the date of the loan.

Then, as to the second branch of the contention urged on behalf of the appellant, it is enough to say, that although it is in the power of the Court, if a proper case is made out, to refuse to enforce a clause in a contract quite independently of section 74 [427] of the Contract Act, no such case has been made out. The parties to the contract were *sui juris*. The party seeking the benefit of the contract stood in no fiduciary relation to the other party, which would require the application to this case of considerations such as those

that were applied by the Privy Council in the case of *Kamini Sundari Chaudhrani v. Kali Prossunno Ghose*, (1885) I. L. R., 12 Cal., 225. Nor can it be said that the terms of the contract here are in themselves so extortionate that the Court is bound to hold that it was an unconscionable bargain, and as such not enforceable.

Both branches of the contention urged before us on behalf of the appellant therefore fail, and the appeal must be dismissed with costs.

Harington, J.—I am of the same opinion. It appears to me that the parties have made an arrangement for the payment of the interest during the continuance of the mortgage which has been put into an alternative form. The mortgagee may, if he likes, either pay Rs. 20 a year during the time the mortgage is subsisting, or he may pay $\frac{1}{2}$ anna a rupee a month on the principal and interest, these payments all coming to an end, when the time arrives for the repayment of the money borrowed under the mortgage deed. The parties have chosen to make an alternative stipulation as to the payment of the interest on the mortgage; that, it seems to me, they were quite entitled to do, and it is impossible to say that the second stipulation involving the payment of interest at a different rate from that provided by the first stipulation is "a sum named in the contract to be paid in the case of a breach" as provided in section 74*. If that is so, I am also of opinion that this appeal fails.

S. C. G.

Appeal dismissed.

NOTES.

[The judgment of SUNDARA AYYAR, J., in *Muthukrishna Iyer v. Sankaralingam Pillai* (1912) 36 Mad., 229 F.B., is exhaustive of the subject and it was there held overruling 25 Mad., 343, that the interest specified, even if it were the only interest payable under the contract, could be relieved against. See also 29 Cal., 823; 30 Cal., 15; 31 Cal., 293.]

* [Sec. 74 :—When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named.]

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law or under the orders of the Government of India or of any Local Government, gives any bond for the performance of any public duty or act, in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty or promise to do an act in which the public are interested.]

[428] APPEAL FROM ORIGINAL CIVIL.

The 19th, 20th and 21st December, 1899 and the 10th January, 1900.

PRESENT :

SIR FRANCIS W. MACLEAN, K. C. I. E., CHIEF JUSTICE,
MR. JUSTICE MACPHERSON AND MR. JUSTICE HILL.

Nundo Lal Bose.....Appellant

versus

Nistarini Dassi.....Respondent.*

Suit—Compromise, of matters in suit, of matters outside scope of suit—Authority of Counsel to make such compromise—General authority—Special authority—Notice—Evidence, statement of Counsel not made on oath, if objected to.

Counsel possesses a general authority, an apparent authority, which must be taken to continue until notice be given to the other side by the client, that it has been determined to settle and compromise the suit in which he is actually retained as Counsel. Where the compromise, however, extends to collateral matters, to matters quite outside the scope of the particular case in which Counsel is engaged, in order to bind his client it must be shown that he had from his client special authority to compromise, upon the terms upon which the compromise was effected, and the other side cannot avail themselves of the position that they did not know that it had not been given; they are not entitled to assume, as in the case of an apparent authority, that it was given and was existing.

Where Counsel under a misapprehension of his client's instructions and believing himself to have authority acts in fact without it, he cannot bind his client.

Though it has been the practice in Courts in England to accept the statements of Counsel made from his place at the Bar, the Court entertained great doubt whether, if that course be objected to by the opposite side, the party putting forward such statement could insist upon its being made without the sanctity of an oath.

THIS was a suit instituted by one Srimati Nistarini Dassi as the widow and heiress of one Rai Mohendra Nath Bose against Rai Nundo Lal Bose and Rai Pasupati Nath Bose his brothers in their personal character, and also as executors of the last will and testament of her husband and against one Srimati Kadumbini Dassi, a Hindu widow, and the object of the suit was to have a certain trust deed of which the said Kadumbini Dassi was the surviving trustee, dated the 24th May 1877, an award, dated the 16th July 1889, and a certain decree, dated the 29th August 1889 declared fraudulent and void as against her, and in no way binding upon the plaintiff, and to have the will of the said Rai Mohendro [429] Nath Bose construed, and the rights of all parties thereunder ascertained and declared, for the administration of his estate, and for certain consequential relief. The defendant Kadumbini Dassi did not appear in this suit, but the other defendants put in written statements, and the case came on for hearing in due course before Mr. Justice STANLEY, and after a hearing which occupied many days, suggestions for a compromise of this and of other litigation between the parties were made. After certain negotiations between the parties the terms of an alleged compromise were put in before Mr. Justice STANLEY, who, on the 29th of June 1899, made a decree in terms of the compromise so alleged to have been entered into. Subsequently however, and before the

* Appeal from a decision of STANLEY, J., sitting in Original Civil Jurisdiction, dated 14th June 1899 [(1899) 1. L. R., 26 Cal., 891.]

decree was drawn up, Nundo Lal Bose applied on notice to the parties before Mr. Justice STANLEY for an order to stay the drawing up of the so-called compromise decree and to have the alleged compromise set aside and the suit retried, on the grounds that though there were negotiations for a compromise, he had never authorized his Counsel to agree to the compromise alleged, that his Counsel had no such authority and that the compromise was not effective as against him. Although the defendant Kadumbini Dassi did not appear to the suit or upon the hearing before Mr. Justice STANLEY she was served with notice of the application, and upon the application coming on for hearing Mr. Justice STANLEY refused to hear her by her Counsel, on the ground that, as she had not previously appeared in the suit, she was not entitled to be heard. During the hearing of the application Mr. Mitter, who had consented to the compromise on behalf of the defendant Nundo Lal Bose, at the request of the Court, made an unsworn statement from his place at the Bar, as to what had happened with regard to the compromise. This course was objected to by Counsel who appeared on the application on behalf of Nundo Lal Bose, and the case of *Wilding v. Sanderson*, (1897) 2 Ch. Div., 534, was cited in support of his objection.

The application was refused with costs.

From this decision the defendant Nundo Lal Bose appealed.

Sir Charles Paul, Messrs. Pugh and A. Chowdhuri for the Appellant.

[430] Mr. J. T. Woodroffe (*Officiating Advocate-General*), Messrs. Dunne and J. G. Woodroffe for the Respondent, Nistarini Dassi.

Sir Griffith Evans, Messrs. Allen and Garth for the Respondent, Pasupati Nath Bose.

Mr. Hyde for the Respondent, Kadumbini Dassi.

DEC. 19TH, 20TH AND 21ST. Sir Charles Paul.—Counsel has authority to compromise a suit in which he is acting unless he is forbidden to do so expressly by his client. If he compromises a matter outside the suit he must get special authority to do so from his client with regard to that particular matter. This is admitted by the other side. It will be for this Court to find on the evidence whether or not Counsel had authority to compromise in this case.

Mr. Mitter's statement is not admissible in evidence under the rules of evidence in India, the statements made in our affidavits must be rebutted by statements which are admissible in evidence. The Indian Evidence Act has repealed all rules of evidence not contained in any statute or regulation in force, see section 2 of the Evidence Act; and the other side must, therefore, show that Mr. Mitter's statement is admissible under the Evidence Act. *Rani Lekraj Kuar v. Mahpal Singh*, (1879) L. R., 7 I. Ap., 63, 70; as to the English law on the point the former practice is laid down in *Hickman v. Berens*, (1895) 2 Ch. Div., 638. In a later case of *Wilding v. Sanderson*, (1897) 2 Ch. Div., 534, 539, Counsel made their statement on oath and were cross-examined, that was the course which ought to have been adopted in this case, especially as we insisted upon it in the Court below.

[MACLEAN, C.J.—Assuming that the decree ought not to have put an end to the *debuttar*, if you did give your consent, does it lie in your mouth now to say that it should not have been set aside?]

Sir Charles Paul—Yes. In *Hara Sundari Debi v. Kumar Dukhinessur Mahā*, (1885) I. L. R., 11 Cal., 250, where a petition of compromise was filed one of the parties to it was subsequently allowed to come in and say that effect should not be given to it, and that the suit should proceed.

[431] Here also the plaintiff was aware that we objected to the compromise before the decree was drawn up, and therefore the compromise under the

circumstances ought to have been set aside. As a matter of fact the decree has not yet been drawn up. *Harrison v. Rodrigues*, (1886) I. L. R., 13 Cal., 115. This decree deals with matters beyond the scope of this suit, and the Court cannot make such a decree, see section 375 of the Civil Procedure Code. All that the Court can do is to leave the matter as a compromise between the parties, and then we could resist any suit that might be brought against us for specific performance.

Mr. Chaudhuri, following.—Mr. Mitter's statement is not admissible in evidence. The Courts in this country should be guided by the Evidence Act alone. *Balkishen Das v. Legge*, (I. L. R., 22 All., 149).

I submit the lower Court ought to have taken into consideration the statements sworn to in our affidavits and not to have decided the case only on Mr. Mitter's statement.

Mr. Mitter was retained in this case only ; he consented to a compromise which affected other suits in which he was not retained. There was, therefore, no implied authority in him to consent to this compromise, and it was for the other side to ascertain that he had express authority or not.

Mr. Hyde. I submit I am entitled to be heard on this appeal.

Mr. Woodroffe.—I object to Mr. Hyde being heard. His client did not appear at the hearing of the suit, and the suit was withdrawn as against her ; she is not affected in any way by the compromise.

Mr. Hyde.—It is true my client did not appear at the hearing of the suit. It was not necessary for her to do so, she could trust to the Court to look after her interest. As trustee I should have been served with notice of the compromise, which deals with the deed of trust. I was served with notice of motion and appeared in the Court below, but was not allowed to be heard. I have also been made a respondent in this appeal. The suit ought not to have been withdrawn as against me. I was a necessary party to it.

[432] [MACLEAN, C.J.—I think we ought to hear Mr. Hyde.]

Mr. Hyde then urged his objections to the compromise.

Mr. Woodroffe, *contra*.—With regard to the objection raised by the other side that Mr. Mitter's statement is not admissible in evidence, I submit that it is evidence and admissible as such, though it may not be evidence as defined by section 3 of the Evidence Act. There is no provision of the Code which says that the Court is to decide only upon evidence as defined in the Evidence Act. Section 165 of the Evidence Act says that the judgment must be based upon facts which are relevant and "duly proved." A fact is said to be "proved" when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought to act upon the supposition that it exists, see section 3 of the Evidence Act. Matters fall within the definition of "proved" in section 3, which are not proved by evidence as defined in that Act. So long as a judgment is based on relevant facts clearly proved, though not necessarily on evidence as defined in the Act, it cannot be set aside. In *Joy Coomar v. Bundhoo Lall*, (1882) I. L. R., 9 Cal., 363, where a Munsif in a suit respecting boundaries visited the locality, and in his judgment relied upon certain facts which had come under his observation during his visit, and which were not proved by any evidence, it was held that though the result of the inquiry was not evidence according to the definition in the Evidence Act, it was a matter before the Court, which might have been taken into consideration.

It has been held that a statement of a Judge is incontrovertible though not on oath—*Regina v. Pestanji*, (1873) 10 Bom. H. C., 75 ; that is not evidence

according to the Act, but it is as much admissible in evidence as the statement of a Counsel. There is a sanction in the case of a barrister making a statement though not that of an oath. An oath is not the only sanction. For instance, a dying declaration may not have the sanction of an oath yet it is invariably acted upon and has been made admissible as being a relevant fact which may be proved—see section 32 of the Evidence Act—though it does not come within the definition of evidence as given in the Act.

[433] In the case of *Moonshee Ameer Ali v. Maharnnee Inderjeet Singh*, (1871) 14 Moo. I. A., 203, Counsel for the appellant before the High Court gave an undertaking that no appeal to the Privy Council should be made from a decree of the High Court; notwithstanding such undertaking an appeal was filed before the Privy Council, the High Court then called upon Sir *Charles Paul*, who was the Counsel for the appellant, to make a statement from his place at the Bar, and not upon oath as to what had transpired in Court at the trial, as to the undertaking. The Judges then certified as to what Sir *Charles* stated in Court, and that certificate was acted upon by the Privy Council; that was not strict evidence. All these facts do not appear in the report, but Sir *Charles* will bear me out.

Sir *Charles Paul*.—That was so, my Lords.

Mr. *Woodroffe*.—In *Aitken v. Bachelor*, (1893) 62 L. J., Q. B. N. S., 193, it was held that endorsements made by Counsel on both sides on their briefs and bearing their signatures were evidence of a submission to arbitration.

Mr. *Pugh* did not object to Mr. Mitter's statement, but merely suggested that the practice in *Wilding v. Sanderson*, (1897) 2 Ch. Div., 534, 539, should be followed; he never pressed his objection, but suggested that Mr. Chackravarty, Mr. Mitter's junior, should also be asked to make a statement.

Mr. *Pugh*.—I objected to Mr. Mitter's statement and asked the Court to follow the procedure in *Wilding v. Sanderson*, (1897) 2 Ch. Div., 534, 539, and that Mr. Mitter should be put upon his oath, if his statement was required.

Mr. *Woodroffe*.—In the case of *Kempshall v. Holland*, (1895) 14 R., 336 C. A., on Counsel in the case being asked if he were willing to make a statement as to what had happened with regard to a compromise of that case Counsel stated that he had written out a statement and had also put it in the form of an affidavit in case **[434]** the Court required an affidavit. Lord *ESHER* said that the Court would never admit an affidavit in these cases, but trusted to the honor of Counsel; the statement was then read. That procedure was approved of and followed in the case of *Hickman v. Berens*, (1895) 2 Ch. Div., 638. That procedure was followed by the lower Court in this case and, as I submit, rightly followed.

[*MACLEAN, C.J.*—If the other side object to Counsel's statement not being on oath, is Counsel in any better position than an ordinary witness? Could the Judge accept his statement without putting him on his oath].

Mr. *Woodroffe*.—I submit he can, there was in truth no objection taken in this case. I say it was a suggestion and not an objection made by Mr. *Pugh*, as he asked the Court to invite Mr. Chackravarti to make a statement. Mr. Jackson and Mr. Bonnerjee also made statements, and the Court has acted on those statements.

* Counsel have authority to settle with regard to all matters in suit, unless there is express prohibition, and that prohibition has been communicated to the other side. The Judge here has found that we had no notice that Nundo Lal had resiled from his agreement. *Matthews v. Munster*, (1887) L. R., 20 Q. B. Div., 141, and *Lewis v. Lewis*, (1890) L. R., 45 Ch. Div., 281.

The Evidence Act contains no provision for putting the witnesses on oath. If STANLEY, J., was wrong in not putting Mr. Mitter on oath the Court by the Oaths Act is enabled to get rid of that defect. The word "omission" in the Oaths Act includes intentional omission. Section 13, Act X of 1873. See *Queen v. Sewa Bhogta*, (1874) 14 B. L. R., 295.

Sir *Griffith Evans*, following.—The Evidence Act does not affect this matter. It does not deal with the question of the swearing of witnesses—that is left to the Oaths Act. The whole of the procedure with regard to this has been left out of the Evidence Act, which gives a special definition of what is evidence; it excludes *inter alia* matters judicially noticed. Section 5 of the Oaths Act is the only section which gives a definition of who are witnesses, [435] but there is no provision in it that every person, who makes a statement, is to be sworn or affirmed; so a statement not on oath may be evidence, though the person making the statement is not a witness as defined in that section.

Section 118 of the Evidence Act provides as to who may testify, but does not provide for any sanction for speaking the truth under which they are to testify. Section 14 of the Oaths Act brings a person making a false statement within the Penal Code, whether that statement is in solemn affirmation or not. Affirmation is merely a ceremony—it is merely reminding a man that he must speak the truth, otherwise he will be punished. If STANLEY, J., was wrong in admitting Mr. Mitter's statement without his being sworn, that omission is covered by the Full Bench ruling in *Queen v. Sewa Bhogta*, (1874) 14 B. L. R., 294; see also *Emp. v. Viraperumal*, (1892) I. L. R., 16 Mad., 105, 110, 116; *Emp. v. Shava*, (1891) I. L. R., 16 Bom., 359; *Queen v. Mussamut Itwarya*, (1874) 14 B. L. R., 54.

This matter could be put beyond a doubt by asking Mr. Mitter to make an affidavit under section 568 of the Code of Civil Procedure.

With regard to the compromise, an express authority to Mr. Mitter is necessary under the circumstances of this case involving, as it does, matters outside the scope of the suit. I say that express authority was given him by Nundo Lal.

Mr. *Chaudhuri*, in reply.

CUR. ADV. VULT.

JANY. 10TH. The following judgment was delivered by **Maclean, C. J.**:—This is a suit instituted by one Srimati Nistarini Dassi as the widow and heiress of one Rai Mohendra Nath Bose against Rai Nunda Lal Bose. Rai Pasupati Nath Bose his brothers, in their personal character, and also as executors of the last Will and Testament of her husband, the said late Rai Mohendra Nath Bose, and against one Srimati Kadumbini Dassi, a Hindu widow; and the object of the suit is to have a certain Trust Deed, of which the said Kadumbini Dassi was the surviving trustee, and dated the 24th of May 1877, an award dated the 16th [436] of July 1889, and a certain decree, dated the 29th of August 1889, declared fraudulent and void as against her and in no way binding upon the plaintiff, and to have the Will of the said Rai Mohendra Nath Bose construed and the rights of all parties thereunder ascertained and declared, for the administration of his estate, and for certain consequential relief.

The defendant Kadumbini Dassi did not appear in this suit, but the other defendants put in written statements, and the case came on for hearing in due course before Mr. Justice STANLEY, and after hearing, which occupied many days, suggestions for a compromise of this and of other litigation between the parties were made.

It is alleged for the respondents in the present appeal, namely, the plaintiff, and the defendant, Pasupati Nath Bose, that after certain negotiations a compromise of this suit and the other suits, to which I have referred, was effected, that the defendant Nundo Lal Bose expressly authorized his counsel to consent to this compromise on his behalf, that the terms of the compromise came before Mr. Justice STANLEY, and that he made a decree in terms of the compromise so alleged to have been entered into.

Nundo Lal Bose, the present appellant, however, contends that though admittedly there were negotiations for a compromise, he never authorized his Counsel to agree to the compromise alleged, that his Counsel had no such authority, and that the compromise was not effective as against him. Holding that view, he, on the 15th of July 1899, gave the notice of motion, which will be found set out at page 1 of the paper book which in effect was one asking the Court to stay the drawing up of the so-called compromise decree, and to have the alleged compromise set aside.

Although the defendant Kadumbini Dassi did not, as I said before, appear to the suit or upon the hearing before Mr. Justice STANLEY, she was served with the notice of motion, and upon that motion coming on for hearing, Mr. Justice STANLEY refused to hear her by her Counsel, on the ground that as she had not previously appeared in the suit, she was not entitled to be heard on the motion.

The motion was supported by two affidavits of Nundo Lal Bose himself with certain documents exhibited to those affidavits and [437] by the affidavit of Hirendra Nath Dutta, the solicitor of Nundo Lal Bose, of one Benode Behary Bose, the son of Nundo Lal Bose, and of one Nilratan Sen, who appears to have been a friend of the defendant Nundo Lal Bose, and to have been present at some of the interviews to which I shall refer in a moment, as also a joint-affidavit in reply by Hirendra Nath Dutta and Nundo Lal Bose.

The respondents supported their case by an affidavit of Romesh Chunder Bose, the attorney of the plaintiff, of one Monmotho Nath Singha, a brother of the plaintiff, of the said Pasupati Nath Bose, and of his solicitor Gonesh Chunder Chunder, and by a statement made from his place at the Bar by Mr. R. Mitter, a member of the Bar and an advocate of this Court, and who was at the time leading Counsel for Nundo Lal Bose.

The matter was heard before Mr. Justice STANLEY on three or four days during the month of last July, and, in the result, Mr. Justice STANLEY dismissed the application with costs, and Nundo Lal Bose has appealed to this Court.

His principal ground of appeal is that he never gave Mr. Mitter any authority to settle litigation, involving not only this suit but some other four or five suits, upon the terms of the alleged compromise. He further challenges the decree made on the ground that the learned Judge in the Court below ought not to have accepted the unsworn statement of Mr. Mitter when objection was taken by the appellant's Counsel that Mr. Mitter ought to have been sworn, that the decree was made in the absence of Kadumbini Dassi who was a party, and a necessary party to the suit, and that the decree determines certain trusts and provisions relating to a portion of the property in dispute, which under the award and decree of 29th August 1889 was declared to be *Debittar*, and that it was not competent to the Court with the consent only of some of the parties interested, to set aside the decree of the 29th August 1889, which was a decree of a competent Court, and in the absence of those members of the family who were, or who might be interested in maintaining the *Debittar* character of such property.

On the present appeal, we have allowed the respondent, Kadumbini Dassi, to be heard by her Counsel, and to put in an [438] affidavit, which she desired to put in in the lower Court, but which she was unable to put in by reason of the ruling of the learned Judge that he could not hear her. In our opinion, as she was a party to the suit and had been served with notice of the application to set aside the compromise decree, she was entitled to be heard.

It must be obvious, from what I have said, that if we are of opinion upon the evidence—for it is a question of fact—that the present appellant did not authorize his Counsel Mr. Mitter, to consent to this compromise, the compromise decree cannot stand, and equally obvious that the other questions, except that, as to the admissibility of Mr. Mitter's statement, would become of no practical importance; and the stress of the argument adduced on behalf of the respondent's Counsel has been to show that such authority was, in fact, given by Nundo Lal Bose to Mr. Mitter.

There cannot, I think, be any reasonable doubt at the present day that Counsel possesses a general authority,—an apparent authority, which must be taken to continue until notice be given to the other side by the client that it has been determined—to settle and compromise the suit in which he is actually retained as Counsel, and in the exercise of his discretion to do that which he considers best for the interest of his client in the conduct of the particular case in which he is so retained. Here, however, the compromise extended to collateral matters, to matters quite outside the scope of the particular case in which Mr. Mitter was retained as Counsel, and, in order to bind the client, it must be shown that Mr. Mitter had, from his client, a special authority to compromise, and compromise upon the definite terms which are set up by the present respondents. This proposition was not disputed in the lower Court, nor has it been contended for before us. As to the authority of Counsel to compromise on behalf of his client, I may refer to the cases of *Strauss v Francis*, (1866) L. R., 1 Q. B., 379; *Swinfen v. Swinfen*, (1857) 1 C. B. N. S., 364; 2 De. Gex. and Jones, 381; and *Matthews v. Munster*, (1887) L. R., 20 Q. B. Div., 141.

There are other authorities, but I need not refer to them as the proposition of law is not questioned.

[439] Before I deal with the facts of the case, I must say a word or two as to whether or not the statement of Mr. Mitter, not being on oath, was admissible in evidence. So far as my personal experience goes, it has been the undoubted practice in the Courts in England to accept the statement of Counsel in matters of this nature, statements made from their place at the bar. I am not prepared, however, to go so far as to say that if that course be objected to by the opposite side, the party putting forward such statement could insist upon its being made without the sanctity of an oath. In the recent case of *Wilding v. Sanderson*, (1897) 2 Ch. Div., 534, it was thought prudent, as there was some doubt upon the point, to have the learned Counsel sworn, as they were, and they gave their evidence from their places at the bar. That course was not adopted in the case of *Hickman v. Berens*, (1895) 2 Ch. Div., 638, 640, but there is nothing in that case to indicate that any objection was raised. I entertain great doubt whether, if there be any such objection, the other side can insist upon the statement being accepted, unless upon oath, and in making this observation, I am not unmindful of what Lord ESHER is stated to have said—for we have not Lord ESHER's own words—that he would never admit an affidavit in such cases. I should have thought, however, that as a matter of substance, the matter was not of much practical importance, for I can scarcely suppose that any Counsel, if he understood that the other side were not prepared to accept his statement made upon his word of honor, would not himself ask that he might

be allowed to give his evidence in the usual way. I need not discuss this matter further, for we should not have been disposed to allow the appeal on this ground, but if necessary would have given the respondent the opportunity of putting in an affidavit by Mr. Mitter, saying that his statement before the Court below was a true one. In this view it becomes unnecessary to discuss whether, as the *Advocate-General* urged, the statement was admissible, not only under the Indian Evidence Act, but as a statement made by a *quasi* officer of the Court to whose word some sort of special sanctity must be taken to attach, a proposition which, before its acceptance, would require much consideration ; or [440] to deal with the argument of Sir *Griffith Evans* that having regard to section 13 of the Oaths Act, it made no difference whether the statement was or was not upon oath, a proposition which is at once novel and startling, and which, if well founded, must apply to the case of every witness, and possibly to every Jurymen.

I will now proceed to deal with the facts of the case, and, I think, I am doing no injustice to the judgment of the learned Judge in the Court below when I say that it appears to be almost entirely based upon the statement of Mr. Mitter, which the learned Judge regards as clear, cogent and convincing. Save a quite passing reference to the evidence of Benode Behary Bose and Hirendra Nath Dutta I can find no reference to any of the affidavits on either side, nor can I discover any analysis of the statement made by Mr. Mitter himself. This, to my mind, is a case in which the evidence ought to be scrutinized with very careful attention.

I will now deal with Mr. Mitter's statement with the view of ascertaining and determining whether, if there were nothing but that statement in the way of evidence in the case, the respondents have satisfactorily made out that the appellant Nundo Lal did give an express, or special, authority to his Counsel to consent to the terms of the compromise.

It is not necessary to go back further than Monday, the 26th June, when it was mentioned to the Court that negotiations for settlement were proceeding, and the case was adjourned. It is clear from Mr. Mitter's own statement that at the consultation, which took place between Nundo Lal Bose and his Counsel, on Monday, Nundo Lal's offer was to pay Rs. 60,000 to the plaintiff as a lump sum to be paid by instalments, and that on that occasion Nundo Lal Bose never agreed to pay any of the plaintiff's costs, but was willing to pay a lump sum to cover everything. There were several other points discussed at that interview, but to cite Mr. Mitter's own words, our offer was that " each party was to pay their costs." It will be seen from this, that from the very outset the appellant objected to paying the plaintiff's costs of the suit, which admittedly amounted to a very large sum. According to Mr. Mitter he handed over the terms to Mr. Bonnerjee, who was the plaintiff's leading Counsel, the same day [441] (Monday), and Mr. Bonnerjee said that his client would not take the Rs. 60,000, but she must have the costs as between party and party. It is obvious that from the very first, one of the main, if not the main points in dispute was the payment of the plaintiff's costs of the suit.

On Tuesday morning, the 27th, the case again stood over, and ultimately on that day Mr. Bonnerjee put down his terms in writing ; and those terms were given to Mr. Mitter.

I may here interpose that according to the evidence of Babu Gonesh Chunder Chunder, who was the attorney for Pasupati Nath Bose (see paragraph 14 of his affidavit) Mr. Mitter, Mr. Bonnerjee and himself had on Tuesday a discussion as to the terms of the proposed compromise, and it was arranged that Mr. Mitter should see the defendant Nundo Lal Bose and try to induce him to accept the plaintiff's terms of payment to her of Rs. 40,000, and her party-and

party costs of the suit, and that Mr. Mitter left that interview in order to see Nundo Lal Bose, that he came back to the Bar Library after a short time, and told Mr. Bonnerjee and Babu Gonesh Chunder Chunder that he had succeeded in inducing Nundo Lal Bose to accept the above last mentioned terms, and that thereupon Mr. Bonnerjee put the terms into writing and wrote out the Exhibit marked A. Mr. Mitter does not say a word about all this. It is, therefore, reasonably clear that the memory either of Mr. Mitter, or of Babu Gonesh Chunder Chunder, must be defective upon this point.

However be that as it may, Mr. Mitter saw Nundo Lal at about 1 o'clock in Mr. Chakravarti's Chambers, and there were present at that interview besides the two Counsel Mr. Mitter and Mr. Chakravarti, Nundo Lal, his two sons, his attorney, Babu Hirendranath Dutta and his friend one Nibratan Sen.

I may, perhaps, mention that when this motion was being heard before Mr. Justice STANLEY, Counsel for Nundo Lal asked that Mr. Chakravarti should be asked to state his recollection of what passed, but the learned Judge in the Court below declined to allow that course to be pursued.

On the occasion of this interview on Tuesday Mr. Mitter went through with the present appellant all the terms [442] suggested by Mr. Bonnerjee and wrote down his objections, and I will take it for the moment that the paper Exhibit B. did indicate all the objections which Nundo Lal had to Mr. Bonnerjee's terms.

It is perfectly clear that at that interview Nundo Lal was unwilling to pay the costs of the suit as between party and party. Mr. Mitter says so, and he also says that the only two points as to which there was any difference were the party and party costs of the suit and the costs of suit No. 68. However he sums up the result of these interviews by saying that both he and Mr. Chakravarti were perfectly certain that the only thing that stood in the way of a settlement was the plaintiff's claim to a separate house worth Rs. 10,000, or the value thereof. I confess feeling some difficulty as to how Mr. Mitter could have arrived at this conclusion, in the face of his own memorandum in writing which indicates that there were other points in dispute still open.

Mr. Mitter then went back to Mr. Bonnerjee, and Mr. Bonnerjee on behalf of his client refused to accept the terms as proposed by Mr. Mitter.

There then for the moment was an end of the matter in the sense that the negotiating parties were not at one, and that there was then no concluded agreement of compromise.

The only express or special authority, which Mr. Mitter then had to compromise on behalf of his client Nundo Lal Bose, was thus at an end, as Mr. Bonnerjee would not accept the terms proposed by Nundo Lal Bose through his Counsel Mr. Mitter. I am taking it that looking at Exhibit B. the words as to all parties paying their own costs applied only to suit No. 68 of 1898. That suggestion was, however, met by a direct negative from Mr. Bonnerjee, but I am not unmindful that Mr. Mitter says that he understood Nundo Lal to say that that was not to stand in the way of a settlement.

On Tuesday then no agreement binding on either party had been arrived at. On Wednesday, the 20th, it was stated to the Court that the parties had been unable to come to terms, and the case was again adjourned in the hope of an amicable settlement. Mr. Mitter stated that there was only one very small item, which had not been settled, but, if the evidence filed on behalf of the [443] appellant to be trustworthy, Mr. Mitter must have known on the Tuesday afternoon, that even if in his interview with Mr. Mitter on the Tuesday Nundo Lal Bose had agreed to pay the plaintiff's costs of this suit he had resiled from that position later on in the same day. It is quite clear on Mr. Mitter's own

showing that Nundo Lal never agreed to contribute anything towards finding a residence for the plaintiff, and it is equally clear that on the evening of the Wednesday Mr. Mitter was expressly told that Nundo Lal was not willing to pay the plaintiff her party and party costs. On the Wednesday then the whole matter was open, for the terms offered by Nundo Lal through Mr. Mitter had not been accepted; that this was so is clear from Mr. Bonnerjee's statement on the Thursday morning to the Court: "I am sorry to say we have been unable to settle and the case must proceed," and the case did proceed.

By the Thursday morning then there was no agreement of settlement, and it is important to see what took place on that day in the way of express authority being given to Mr. Mitter to compromise on his client's behalf. After the midday adjournment on that day Mr. Mitter mentioned to the Court that the case had been settled, the only obstacle in the way of settlement having been removed. I will quote what he says: "I was also informed by Hirendra Nath Dutta that Gonesh Chunder and Pusupati had gone to see Nundo Lal on the subject and before the mid-day adjournment I was informed that Pusupati had consented either to buy a house worth Rs. 10,000 or to pay the Rs. 10,000 himself. The only obstacle in the way of settlement being removed your Lordship will remember that Mr. Woodroffe was putting in some Bengali accounts, which had not been translated, I said that Mr. Woodroffe would undertake to translate them, if necessary, because I had then been informed that the only obstacle had been removed, and after the mid-day adjournment I mentioned to the Court that the case had been settled. Hirendra Nath Dutta was present in Court at that time and also Binode, and the other son of Nundo Lal and also Babu Romanath Ghose and several others. Then the terms were fair copied in Court by Mr. Shelley Bonnerjee, and whilst being copied, I was told by Hirendra Nath Dutta that Nundo Lal [444] wanted to see the terms. I told him that the terms were the same as agreed to by him on Tuesday last. The only difference was that the plaintiff's maintenance, instead of being a charge upon mortgaged properties, had been charged upon the dwelling houses of Nundo Lal and Pasupati. Hirendra Babu said that Nundo Lal was particularly anxious to see the terms."

I feel some difficulty in understanding how Mr. Mitter could have thought, and told the Court that the only obstacle in the way of a settlement had been removed, when on the previous evening he had been expressly told that Nundo Lal was unwilling to pay the plaintiff's costs, or what authority he had to agree to the terms of the previous Tuesday, as in the interval, Nundo Lal had told him that he would not pay the party and party costs of the plaintiff.

I can only suppose that this important point has escaped his memory. Taking Mr. Mitter's statement most favourably to the plaintiff, the only special authority which Nundo Lal gave Mr. Mitter was to agree to Mr. Bonnerjee's terms in Ex. A., as modified by Ex. B., and when those modifications were rejected by Mr. Bonnerjee it seems to me that Mr. Mitter's special authority was determined, and that in order to bind Nundo Lal, as to any fresh terms, a further special authority would be requisite.

We now come to the interviews of the 29th between Mr. Mitter and Nundo Lal at which the solicitor Hirendra Nath Dutta, Nundo Lal's son, Romanath Ghose, and one Nil Ratan Sen were present. Mr. Justice STANLEY would appear to regard this as the only important part of the statement; I am unfortunately unable to share that view, for, to my mind, it is extremely important to ascertain what preceded that interview. It is quite clear that at that interview Nundo Lal objected to pay the party and party costs of the plaintiff or her costs of suit No. 68. He commenced the conversation in that way.

It is clear that he was determined not to pay those costs, for he had told Babu Gonesh Chunder Chunder only an hour or so before that he would not pay the plaintiff's costs. Seeing Nundo Lal in that state of mind, his solicitor very properly suggested to the Counsel that he should get the terms signed by Nundo Lal, when Mr. Mitter said that he would not insult Nundo Lal [445] by asking him to put his signature to the paper. The suggestion of the solicitor is, to my mind, very significant by indicating that he at any rate was under the impression that there was at least great doubt whether Nundo Lal was agreeing to the terms. Nundo Lal said nothing more. He only smiled and Mr. Mitter told him, "I am going back to Court and these terms will be put in," and he also told him that he was going to consent on his behalf, to which Nundo Lal said nothing, and so the interview came to an end.

If this were all the evidence in the case I should entertain a very grave doubt whether, having regard to the fact that Nundo Lal had at the very outset of the interview of 29th said that he would not pay the party and party costs of the plaintiff in this suit, but only a specified sum, and would not pay the costs of Suit No. 68, we should be justified in holding that under the circumstances narrated by Mr. Mitter, the latter was justified in consenting to the minutes, or that we should be justified in saying that Nundo Lal gave him express authority to consent to these terms. I do not think we should be warranted under all the circumstances in inferring from the smile and the subsequent silence of Nundo Lal Bose, a tacit acquiescence on his part to the terms proposed, or as giving any authority to Mr. Mitter to consent on his behalf.

It is significant that according to Mr. Mitter's own statement the solicitor Hirendra Nath Dutta followed him into Court and told him that he had no instruction from him to consent to this compromise.

I have hitherto dealt with the case entirely upon the statement of Mr. Mitter, but there is a great deal of evidence in the matter to which the learned Judge in the Court below has given no attention. We have the affidavits filed on behalf of the appellant, and, if the story of these witnesses is to be believed and none of them have been cross-examined, Nundo Lal Bose never did agree to the terms of this compromise or authorized his Counsel to agree to them. As regards Nundo Lal's affidavits I will only deal with those portions of them in which he speaks from his own personal knowledge. He tells us in paragraphs 18 to 20 of his affidavit, the terms upon which he was prepared [446] to settle the matter at his interview with Mr. Mitter on Tuesday, the 27th. It is to my mind reasonably clear that, whilst he did not object to pay Rs. 20,000 towards the plaintiff's costs of this suit, which sum was subsequently raised to Rs. 25,000, he did object to an unlimited liability in respect of those costs, and he tells us that at this interview he did not give Mr. Mitter authority to settle the suit on his behalf. He tells us that at the interview at which he was present at his attorney's office at about half-past 12 on the 29th (the Thursday) he absolutely declined to settle the suit unless the costs of the plaintiff in the suit were limited to Rs. 20,000 and in this he is substantially corroborated by Gonesh Chunder Chunder himself who says that Nundo Lal said "I won't pay any costs of the plaintiff, why should I pay any costs to her and settle this suit." This is extremely probable as he had learnt that the costs would be very heavy, certainly exceeding 25,000 rupees.

And, now I come to what he says as to the interview between Mr. Mitter and himself on Thursday, the 29th, and his account of that interview will be found at paragraphs 43, 48, and 49 of his affidavit. I may perhaps here interpose the observation that Mr. Mitter, at the moment that he left the Court to see Nundo Lal on the Thursday, could scarcely have thought that he

had any sufficient authority from him to consent to the proposed compromise, for, if so, he would not have thought it necessary to go outside the precincts of the Court to the office of the attorney who was instructing him to interview his lay client. It is clear that at this interview the defendant Nundo Lal went through the proposed terms and put marks in blue pencil against those terms to which he objected, one of which admittedly was as to the payment of the party and party costs and the costs of Suit No. 68. If Nundo Lal is to be believed he pointed out other objections as well. It is, however, very unfortunate that this document is not forthcoming; its disappearance is not, I think, satisfactorily accounted for. Nundo Lal says he never authorized Mr. Mitter to accept the terms of the compromise, or to compromise or settle the suit on those terms, and it will be observed that Mr. Mitter himself does not go so far as to say that he had authorized him, but only that he honestly believed that Nundo Lal had accepted the terms. I am not desirous of making or suggesting any imputation upon Mr. [447] Mitter in the matter: I am prepared to accept, to the fullest extent, his statement as to the honesty of his belief that Nundo Lal had authorized him to act as he did; for I should be sorry to think that any member of the bar could act as Mr. Mitter has done, unless he were under such a belief. But the question of such an honest belief in the mind of Counsel is one thing, whilst the question of whether special authority to settle were actually given by the client is quite another. As to this interview between Mr. Mitter and Nundo Lal Bose, the latter's account of it is corroborated by his solicitor Hirendra Nath Dutta, his son Benode Behary Bose, and Nilratan Sen, as to which evidence the learned Judge in the Court below has been altogether silent. It would appear from the evidence of Hirendra Nath Dutta that at the interview which took place between Mr. Mitter and Nundo Lal on Tuesday, when Mr. Bonnerjee's written terms were discussed, an assurance was given to Nundo Lal that the plaintiff's costs of the present suit would not exceed Rs. 20,000, and according to his statement the consent of Nundo Lal to pay those costs was conditional upon the other terms upon which he insisted being complied with, and that afterwards when Nundo Lal learnt from his solicitor that the costs of the suit would, in all probability, exceed Rs. 20,000, he instructed his solicitor to go to Mr. Mitter and tell him that he would not pay those costs, unless they were limited to that amount, and the solicitor says he went and told Mr. Mitter so, and if this story be true, and it is not an improbable one, Mr. Mitter knew on the Tuesday, through his own professional client, that Nundo Lal Bose would not pay the party and party costs of the plaintiff of the suit, unless they were limited to Rs. 20,000. Anyway he knew on the Wednesday evening.

Nundo Lal Bose's story is corroborated in important particulars by the evidence of the witnesses he has called, and coupling that evidence with Mr. Mitter's own statement, I think it clear that Nundo Lal Bose was throughout determined not to pay these costs, if they exceeded Rs. 20,000 or Rs. 25,000.

I must now say a word or two as to what occurred after the interview on the Thursday. After some conversation between Nundo Lal's solicitor, and his son and his friend Nilratan Sen, the solicitor, Hirendra Nath Dutta followed Mr. Mitter into [448] Court and made the observations which he states in paragraph 47 of his affidavit and which are corroborated by the son Benode Behary Bose. Mr. Mitter admits that something to the effect stated by Hirendra Nath Dutta passed, but he says that he does not recollect the exact words, but that something was said about responsibility in the matter is apparent, not only from the evidence filed on behalf of the appellant, but also from that filed on behalf of the respondent, and Babu Gonesh Chunder Chunder, though he denies hearing what Babu Hirendra Nath Dutta says he said as to his client not being willing to settle the suit, admits that he heard something

being said about responsibility in settling the suit, but that he regarded it as a joke. It must be remembered in this connection that only an hour or two previously Gonesh Chunder Chunder himself had heard Nundo Lal say that he would not pay the plaintiff's costs and why should he settle the suit.

Looking then at the evidence, as a whole, I am satisfied that Nundo Lal Bose did not authorise his Counsel Mr. Mitter to accept the terms of the proposed compromise.

It is contended, however, that, as the respondents were not told that Mr. Mitter had no authority to settle, the appellant is bound. I am unable to take that view. Counsel no doubt has an apparent authority to compromise the case in which he is retained, and the other side are entitled to rely upon the continuance of that apparent authority, until they receive notice that it has been determined. But that principle does not apply to the present case, where an express or special authority was requisite. The respondent must be taken to know that as this compromise covered matters outside the scope of the suit an express authority to Mr. Mitter to settle was requisite, and if, in fact, that authority were not given, the respondents cannot avail themselves of the position that they did not know that it had not been given. They were not entitled to assume as in the case of an apparent authority that it was given and was existing. This is pointed out by CROWDER, J., in the case of *Swinfen v. Swinfen*, (1857) 1 C. B. N. S., 364. That learned Judge says: "If therefore in such a case (*i. e.* a case of special authority given) a Counsel under a misapprehension of his client's [449] instructions, and believing himself to have authority, acts in fact without it, he cannot in my opinion bind his client."

In this view it becomes immaterial to consider whether such a compromise, even if otherwise binding, should have been adopted by the Court in the absence of Kadumbini Dassi, though I must confess I feel considerable doubt upon the point, nor is it necessary to decide the question, whether it was competent to the Court by this compromise decree not made in the presence of all the members of the family of Nundo Lal Bose and Pasupati Nath Bose, to virtually set aside the decree of the 29th August 1889, which had declared that certain portions of the property in dispute were clothed with a *Debttar* character, and to direct part of the property to be divided between Nundo Lal Bose and Pasupati Nath Bose.

For the reasons I have given, the appeal must succeed and the order of the Court below must be discharged, and Nundo Lal Bose must have the costs of the motion in the Court below.

As regards the costs of this appeal, seeing that the respondents have at the bar offered to the appellant all that, and even more than he had previously asked for with a view of putting an end to this litigation, there will be no costs of this appeal.

Macpherson, J.—I agree.

Hill, J.—I also agree.

Attorney for the Defendant Appellant, Nundo Lal Bose: Babu *Hirendra Nath Dutta*.

Attorney for the Plaintiff Respondent, Nistarini Dassi. Babu *Rames Chandra Basu*.

Attorneys for the Defendant Respondent, Pasupati Nath Bose: Messrs. *G. C. Chunder & Co.*

Attorney for the Defendant Respondent, Kadumbini Dassi: Mr. *J. C. Dutt*, D. S.

NOTES.

[Although a pleader has no power to compromise a suit unless he is specially authorised in that behalf, (5 Bom. L.R., 798) he can bind his client by an admission upon a question of fact, provided that such question falls within the scope of the suit in which he has been retained :—(1911) 17 C.W.N., 156.]

[450] CRIMINAL REVISION.

The 31st January, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Aiunddi Sheikh and others.....Petitioners

versus

Queen-Empress.....Opposite Party.*

Forest Act—Conviction for offence under—Subsequent order for confiscation of boats—Confiscation a punishment—When such order should be made—Indian Forest Act (VII of 1878), ss. 25 and 54.

Certain accused persons were tried summarily and convicted under s. 25 of the Indian Forest Act, and sentenced to pay fines. By a subsequent order under s. 54 of the same Act their boats were confiscated. *Held*, that under the terms of s. 54 an order of confiscation cannot be regarded as an order incidental on the conviction. The confiscation is by the terms of that section declared to be a punishment, for it is in addition to any other punishment prescribed for the offence.

That, being a punishment, the order should have been passed simultaneously with the other punishment for the offence, of which the accused have been convicted.

Empress v. Nathu Khan, (1892) I. L. R., 4 All., 417, referred to.

THE accused who had permits to fell *sundri* poles in the Satkhira circle, under color of the permits, cut *sundri* poles and logs in the Bagirhat circle. The accused were tried summarily and convicted under section 25 of the Indian Forest Act by the Deputy Magistrate of Bagirhat and sentenced to pay a fine of rupees twenty-five each, or in default suffer rigorous imprisonment for one month each, and that out of the fine when realized rupees one hundred should be paid to the Forest Department. By a subsequent order under section 54 of the same Act the accused had their boats confiscated.

Babu *Provash Chunder Mitter* for the Petitioner.

The judgment of the Court (Prinsep and Stanley, JJ.) was as follows:—

We have had some difficulty in ascertaining the facts of this case relating to a breach of the rules passed under the Forest [451] Act in which the petitioners have been convicted and sentenced to a fine, and by a subsequent order have had their boats confiscated under section 54. The matter has been tried under summary procedure, and although it may be admitted that the object of this procedure is to shorten the course of the trial, it was nevertheless incumbent upon the Magistrate to put on record sufficient evidence to justify his order.

* Criminal Revision Nos. 826, 828 and 835 of 1899, made against the order passed by Babu Prassanna Kumar Karfarman, Deputy Magistrate of Bagirhat, dated the 29th of March 1899.

The rule before us relates to the order of confiscation of boats belonging to the petitioners. The evidence regarding the use of these boats for purposes forbidden by the rules passed under the Forest Act by no means proves that the boats belonging to the petitioners were used for illegal purposes. But in addition to this, we are of opinion that the order for confiscation cannot be maintained on the authority of the case of *Empress v. Nathu Khan*, (1882) I.L.R., 4 All., 417. Under the terms of section 54 of the Forest Act, an order of confiscation cannot be regarded as an order incidental on the conviction. The confiscation is by the terms of that section declared to be a punishment, for it is in addition to any other punishment prescribed for the offence. Having regard to the terms of the law, we agree with the judgment cited that, being a punishment, the order should have been passed simultaneously with the other punishment for the offence of which the petitioners have been convicted. On both grounds, therefore, we think that the order of confiscation cannot be sustained, and that the boats must be restored to the petitioners.

No. 828. In the case of Jaun Mirdha there is, we think, sufficient evidence to identify the boats as being the boats seized by the forest officers on finding a breach of the law on the part of the petitioner. But in this case, the objection taken in the case of *Empress v. Nathu Khan*, (1882) I. L. R., 4 All., 417, also applies. The order for confiscation was not passed, until a considerable time after the order of conviction. We think, therefore, that on this ground the order of confiscation must be set aside and the boats restored to the petitioner.

No. 835. The case of Basir Sheikh is exactly similar to that of Jaun Mirdha, and the order of confiscation must be set aside and the boats restored for the same reasons.

D. S.

NOTES.

[In (1905) A. W. N., 143, this was distinguished on the ground that that was an appealable case governed by the additional requirements of sec. 264, Cr. P. C., 1898.]

[452] *The 27th February, 1900.*

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Ramasory Lall.....Petitioner

versus

Queen-Empress.....Opposite Party.*

Sanction—Information by accused of offence—Report by police of falsity of information—Sanction by District Magistrate on police report—Judicial proceeding—Subordination of police officer to District Magistrate—Complaint—Criminal Procedure Code (Act V of 1898), ss. 195 and 480—Penal Code (Act XLV of 1860), s. 182.

The accused gave certain information to the police, who after investigating the matter reported that the information given was false and constituted an offence under s. 182 of the

* Criminal Revision No. 899 of 1899, made against the order passed by F. W. Ward, Esq., Assistant Magistrate of Champaran, dated 2nd September 1899.

Penal Code. The District Magistrate on this sanctioned the prosecution of the accused who was convicted and sentenced under that section. The accused appealed against the conviction and sentence. His appeal was heard and dismissed by the District Magistrate, who had previously sanctioned his prosecution. On revision the accused contended that the District Magistrate having sanctioned his prosecution on the police report was not competent to hear the appeal.

Held, that s. 487 of the Code of Criminal Procedure did not apply, as the offence was not committed before the District Magistrate, nor was it in contempt of his authority, nor brought to his notice in the course of a judicial proceeding.

Held, further, that although police officers in a district were generally subordinate to the District Magistrate, the subordination contemplated by s. 195 of the Code of Criminal Procedure was not such subordination. That subordination contemplated some superior officer of police. Nor could the report of the police officer be regarded as a complaint under s. 195 of the Code of Criminal Procedure, and therefore no proper sanction had been obtained. The defect, however, was cured by s. 537 of the Code of Criminal Procedure, as no failure of justice had been occasioned.

ONE Sheonarain had lately married a girl of ten, named Manorma, who was the sister of the accused. About a fortnight after the marriage the girl went with a maid-servant to live with her husband, who dismissed the maid a few days afterwards. The maid went to the accused and told him that Sheonarain was acting improperly to his wife. Accused went at once to Sheonarain and asked him to allow his wife to go to her home and remain there, till she had attained puberty. Sheonarain refused. That same evening the accused sent a telegram to the District Super-[453]intendent of Police of Motihari, stating that he suspected Sheonarain would kill Manorma that night and to send the police even by goods train. The telegram was sent to the Sub-Inspector with orders to inquire into the case at once. The Sub-Inspector reported that the information given by the accused by telegram was false, and constituted an offence under section 182 of the Penal Code. The District Magistrate of Champaran on this sanctioned the prosecution of the accused. The accused was convicted under section 182 of the Penal Code and sentenced to a fine of Rs. 30 by the Assistant Magistrate of Champaran.

Against this decision the accused appealed, and his appeal was heard and dismissed by the District Magistrate of Champaran who had previously sanctioned his prosecution.

Mr. *Swinhoe* (Bahu *Dasarathi Sanyal* with him) for the Petitioner contended that inasmuch as the District Magistrate had under section 195 of the Code of Criminal Procedure sanctioned the prosecution of the petitioner on the police report, he was not competent under section 487 of that Code to hear the appeal.

The judgment of the Court (Prinsep and Stanley, JJ.) was as follows:—

The petitioner has been convicted under section 182 of the Penal Code and sentenced to a fine of Rs. 30 and his appeal has been dismissed.

A rule has been granted to consider the objection now raised that as the District Magistrate gave sanction to the prosecution on the police report he was not competent to hear the appeal. Section 487 of the Code of Criminal Procedure which has been relied upon does not apply to this case, because the alleged offence was not committed before the District Magistrate, nor was it in contempt of his authority, nor was it brought to his notice as a Magistrate in the course of a judicial proceeding.

The Sub-Inspector reported the information given by the petitioner by telegram to be false and to constitute an offence within the terms of section 182

of the Penal Code. The [484] District Magistrate on this sanctioned the prosecution of the petitioner, who admittedly gave that information. Under section 195 of the Code of Criminal Procedure, the sanction or complaint of the public servant concerned or of some public servant to whom he is subordinate was necessary before proceeding under section 182 of the Penal Code could be taken. Now, although police officers in a district are generally subordinate to the District Magistrate, we think that the subordination contemplated by section 195 of the Code of Criminal Procedure is not such subordination. That subordination contemplates some superior officer of police. Nor would the report be regarded as a complaint, because the definition of "complaint" excludes the report of a police officer. No proper sanction was therefore obtained. But although section 195 declares that no Court shall take cognizance of any offence under section 182 of the Penal Code except with previous sanction or complaint as specified, section 537 declares that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on account of the want of any sanction required by section 195, unless such want has in fact occasioned a failure of justice. Here we cannot find that the want of sanction has so resulted. The information given was manifestly false, and was known to be so, for the petitioner had no valid ground for requiring the intervention of the police because he had reason to believe, as he stated, that his brother-in-law was about to kill his wife, and he knew that, if the true state of the facts had been shown to the police, the Sub-Inspector would not have left his other duties to go to the spot. From the nature of the case the offence has been properly punished with fine.

The rule is therefore discharged.

D. S.

Rule discharged.

NOTES.

[This was dissented from in 27 All., 292; (1910) P. R., 6. See also (1904) 32 Cal., 180.]

[485] *The 11th January, 1900.*

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Hari Charan Singh.....Petitioner

versus

Queen-Empress.....Opposite Party.*

Evidence—False evidence—Examination on oath of person by Magistrate for purpose of obtaining information in order to take proceedings—Whether such person a witness—Contradictory statement made by such person at trial as witness—Code of Criminal Procedure (Act V of 1898), s. 190, clause (c)—Indian Oaths Act (X of 1873), s. 5—Indian Penal Code (Act XLV of 1860), ss. 191 and 193.

Held, that where an accused person was examined by a Magistrate for the sake of obtaining information on which proceedings could be taken, the Magistrate, although he might examine

* Criminal Revision No. 775 of 1899, made against the order passed by F. S. Hamilton, Esq., Officiating Judicial Commissioner of Chota Nagpore, dated 16th September 1899.

him to obtain information, could not legally examine him on oath, nor could the accused be said at that stage of the proceedings to be a witness even though he were examined on oath. There was no authority that being so examined the accused was bound by any express provision of law to state the truth.

Consequently any charge for giving false evidence founded on this statement was bad, and it therefore followed that a conviction and sentence founded on this statement as being contrary to another statement made by the accused when examined as a witness at the trial, without any proof or finding that the second statement was false, could not be maintained.

AN accused person was charged with a breach of the Coolie Emigration Act, and was acquitted on the ground that he was not responsible, being a servant of some one who might have transgressed the law. The Magistrate in passing this order was inclined to proceed against the master, but before doing so he wished to ascertain clearly whether there were sufficient grounds for his taking action, that is to say, for his proceeding under section 190 (c) of the Code of Criminal Procedure to take cognizance of the offence. He accordingly examined the accused on oath, and thereupon summoned the master to appear before him and answer a charge under the Coolie Emigration Act. At the trial, the accused was examined as a witness, and he then gave evidence contradicting the former statement that he had made to the Magistrate. The accused was prosecuted and convicted under section 193 of the Indian Penal Code and sentenced to three months' rigorous imprisonment.

[456] On appeal the conviction and sentence were confirmed.

Babu Atulya Charan Bose for the Petitioner.

The **judgment** of the Court (**Prinsep** and **Stanley, JJ.**) was as follows:—

The petitioner before us was charged with a breach of the Coolie Emigration Act, and was acquitted on the ground that he was not responsible, being a servant of some one who might have transgressed the law. The Magistrate, in passing this order, was inclined to proceed against the master, but, before so doing, he wished to ascertain clearly whether there were sufficient grounds for his taking action, that is to say, for his proceeding under section 190 (c) of the Code of Criminal Procedure to take cognizance of the offence. He accordingly examined the petitioner on oath, and he thereupon summoned the master to appear before him and answer a charge under the Coolie Emigration Act. At the trial, the petitioner was examined as a witness, and he then gave evidence contradicting the former statement that he had made to the Magistrate. He has accordingly been prosecuted and convicted by the Magistrate for having intentionally given false evidence by reason of such contradictory statements, which were not reconcilable. On appeal the conviction and sentence were confirmed. An objection has been taken before this Court on which a rule has been granted that the conviction and sentence are contrary to law, inasmuch as no offence is established. Now, in order to establish the offence found, it was necessary to prove that both the contradictory statements were such that a charge of giving intentionally false evidence might have been made in regard to either of them or in regard to both of them in the alternative. The question, therefore, arises whether the first statement was a statement coming within the terms of section 191 of the Penal Code, which defines the offence of giving false evidence. There was at that time, it may be observed, no case before the Magistrate, and the examination was directed simply to obtain information upon which a case might be started against some person not before the Court. The Indian Oaths Act, section 5, declares **[457]** that oaths or affirmations shall be made by the following persons: "All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law

or consent of parties authority to examine such persons or to receive evidence." Now, the petitioner was at that stage of the proceedings certainly not a witness. He was examined by the Magistrate for the sake of obtaining information on which proceedings could be taken, and, therefore, the Magistrate, although he might examine him to obtain information could not, as we understand the law, examine him on oath. Moreover, there is no authority that, being so examined, the petitioner was bound by any express provision of law to state the truth. Consequently, any charge for giving false evidence founded on this statement is bad, and it therefore follows that the conviction and sentence founded on this statement as being contrary to another statement without any proof or finding that the second statement was false cannot be maintained. The conviction and sentence must therefore, be set aside and the rule made absolute.

D. S.

Rule made absolute.

NOTES.

[See also (1911) 10 I. C., 622 (Sind) ; (1906) 8 Bom., L. R., 589.]

[27 Cal. 457]

The 2nd March, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Durga Charan Jemadar and others.....Petitioners

versus

Queen-Empress.....Opposite Party.¹

Arrest—Warrant of arrest directed to police-officer—Endorsement of warrant by another police-officer to process-serving peons—Legality of such endorsement—Peons not police-officers—Arrest by peons—Rescue of persons arrested—Whether lawful arrest—Code of Criminal Procedure (Act V of 1898), ss. 68 and 79.

A warrant of arrest was endorsed over to a Court Sub-Inspector for execution. The Court Sub-Inspector being away the Court Head-Constable by an order in writing signed by himself endorsed this warrant over to two process-serving peons for execution. The peons arrested a number of men under the warrant, some of whom were forcibly rescued by the accused and other persons. The accused were convicted under various sections of the Penal Code of rescuing the persons arrested and obstructing the execution of the warrant of arrest.

[458] *Held*, that the endorsement of the warrant by the Court Head-Constable to the peons did not make them competent to execute the warrant, that, even if the peons had been legally appointed, they could not have made the arrest, inasmuch as they were not police officers within the terms of s. 79 of the Code of Criminal Procedure.

The terms of s. 79 are express in this respect, and no other person except a police-officer is competent to execute a warrant of arrest under an endorsement from another police-officer.

THE manager of the Kollain Tea Estate obtained a warrant for the arrest of certain agreement coolies, who had absconded from his garden and gone to

¹ Criminal Revision No. 952 of 1899, made against the order passed by Bernard V. Nilcholl, Esq., Sessions Judge of Cachar, dated the 6th of October 1899.

another tea garden. This warrant was endorsed over to the Court Sub-Inspector for execution. The Court Sub-Inspector was away at the time, and the Court Head-Constable acting for him. The warrant was by an order in writing signed by the Court Head-Constable endorsed for execution by two process-serving peons of the Deputy Commissioner's Criminal office of Silchar. The peons succeeded in arresting a number of coolies under the warrant. Some of the coolies were forcibly rescued by the accused and other persons. The first accused was convicted by the Assistant Commissioner of Silchar under ss. 143, 225B, 341, and 353 of the Penal Code, and the remainder under the first three of the above sections and sentenced to various terms of imprisonment. The appeal preferred by the accused was dismissed by the Sessions Judge of Cachar.

Mr. *Swinhoe* (Babu *Prosonoo Gopal Roy* with him) for the Petitioners.—The conviction of the accused is bad and cannot stand. The execution of the warrant by the peons did not constitute a lawful arrest, therefore the rescue by the accused of the persons so arrested was no offence. The warrant was addressed to the Court Sub-Inspector, and under s. 79 of the Criminal Procedure Code he alone could endorse it to some other police-officer. The Court Sub-Inspector was absent, and the Magistrate says the Court Head-Constable was acting for him; that, however, is not sufficient; there is nothing to show that the Court Head-Constable was at that time actually filling the office of Court Sub-Inspector, so that the Court Head-Constable had no authority to endorse the warrant, without, in the first place, getting it endorsed to [489] himself. Then, again, s. 79 requires the warrant to be endorsed to a police-officer, and process-serving peons can in no way be regarded as police-officers, so that, even if the warrant had been lawfully endorsed, the two peons, not being police-officers as required by that section, were not competent to make the arrest.

The judgment of the Court (**Prinsep and Stanley, JJ.**) was as follows:—

The petitioners have been convicted, Durga Jemadar under ss. 353, 225B, 143 and 341 of the Indian Penal Code, and Hari Manjhi under ss. 143, 341 and 225B, of the Indian Penal Code, and their offences may be shortly described as rescuing four persons who had been arrested and otherwise obstructing the execution of the warrant of arrest.

The only point for our consideration in this case is whether the warrant was being rightly executed so as to make the arrest lawful and the obstruction thereto an offence. The warrant was addressed to the Court Sub-Inspector, and it was by an order in writing, signed by the Court Head-Constable, endorsed for execution by Churai Nath, and Guana Nath, and these two persons made the arrest which led to the occurrence constituting the offences of which the petitioners have been convicted.

It was contended both before the Magistrate and before the Sessions Judge in appeal that the execution of the warrant by these persons did not constitute a lawful arrest inasmuch as the officer to whom the warrant was directed did not lawfully endorse it to these persons, and it was further contended that, even if it had been lawfully endorsed, these two persons, not being police-officers, were not competent to make the arrest.

We think that on both points the objections are good. We observe from the Magistrate's judgment that he states that the Court Sub-Inspector "was away then, and the Court Head-Constable acting for him" made the endorsement in question. Now, unless the Court Head-Constable was at that time actually filling the office of Court Sub-Inspector, any temporary arrangements made for the conduct of the office during the absence of the Court Sub-Inspector

would not constitute him a Court Sub-Inspector for the purpose of endorsing this warrant. It would be [460] a matter of no difficulty for the Court Head-Constable, if he had realized the consequences, to have obtained the entry of his own name on the face of the warrant as one of the persons to whom it was directed for execution. The endorsement, therefore, for service by these two persons did not make them competent to execute the warrant.

The second objection is also good because these persons, even if they had been legally appointed, could not have made the arrest, inasmuch as they were not police-officers. The Sessions Judge in appeal, as well as the Magistrate, got rid of this objection by considering that these two persons being persons on the process-serving establishment of the Court, should be regarded as police-officers within the terms of section 79 of the Code of Criminal Procedure. We think that the terms of section 79 are express in this respect, and that no other person except a police-officer is competent to execute a warrant of arrest under an endorsement from another police-officer. And in regard to the opinions expressed by the Sessions Judge and the Magistrate, we would draw attention to the difference between the service of a summons and the execution of a warrant of arrest. Section 68 declares that a summons shall be served by a police-officer or subject to such rules as the Local Government may prescribe in this behalf by an officer of the Court issuing it or other public servant. It is by reason of this provision that such officers as the two persons named in the endorsement are competent to act as process servers for the purpose of serving summonses and such processes, but under the terms of section 79 they cannot by reason of such office be properly regarded as police-officers. The conviction must, therefore, be set aside, and the petitioners acquitted, the rule being made absolute.

D. S.

Rule made absolute.

NOTES.

[See also 4 C. W. N., 85.]

[461] *The 15th February, 1900.*

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Natabar Ghose.....Petitioner

versus

Provash Chandra Chatterjee.....Opposite Party.*

Presidency Magistrate, Judgment of—Sentence of imprisonment—Reasons for Conviction to be recorded—Code of Criminal Procedure (Act V of 1899), s. 370, cl. (i)—Penal Code (Act XLV of 1860), s. 408.

Section 370 of the Code of Criminal Procedure requires that in a case in which the accused is sentenced to imprisonment a Presidency Magistrate shall record a brief statement of the reasons for the conviction.

* Criminal Revision No. 107 of 1900, made against the order passed by Syed Amir Hossein, Presidency Magistrate of Calcutta, dated the 29th December 1899.

It is not sufficient for him to record that the offence is proved, for that may necessarily be implied to be his opinion from the fact that he has convicted the accused. The law contemplates something further as the reasons for the conviction.

THE accused was charged with an offence under section 408 of the Penal Code. On the night of the 25th of December 1899 one Nonee Bala gave the accused, who was a servant of her uncle, a pair of gold *balas* and a chemise to take to her dressing-room. She subsequently missed them, and the accused was also missing. Upon search being made for him he was found and caught at the Sealdah Railway Station. On being questioned the accused stated that he had put the articles in the dressing-room, but later on he stated that he had given them to one G, to keep for him. The accused was taken to the house of G, who admitted having received the *balas* from the accused, and promised to return them, but subsequently denied all knowledge of them. The accused was convicted under section 408 of the Penal Code. The judgment of the Presidency Magistrate was as follows: "The charge is proved against No. 1. He has no defence to make. I convict him under section 408 of the Penal Code and sentence him to four months' rigorous imprisonment."

Babu *Brojo Lal Chakravarti* for the Petitioner.—The judgment is defective as the Magistrate does not give any reason for the conviction as required by s. 370, cl. (i) of the Code of Criminal [462] Procedure. The conviction for criminal breach of trust is wrong as there is no evidence to prove that the articles were misappropriated by the petitioner. A great part of the evidence for the prosecution has been disbelieved as the second accused has been discharged. I submit the charge against my client is not proved. *Yacoob v. Adamson*, (1886) I. L. R., 13 Cal., 272.

The judgment of the Court (Prinsep and Stanley, JJ.) was as follows:—

Section 370 of the Code of Criminal Procedure requires that in a case such as that now before us, the Magistrate should record a brief statement of the reasons for the conviction. The Magistrate has failed to comply with the law. He has recorded no such reasons as are contemplated by section 370. It is not sufficient for him to record that the offence is proved, for that may necessarily be implied to be his opinion from the fact that he has convicted the accused. The law contemplates something further as the reasons for the conviction. We have accordingly considered the whole case, and, although we agree with the Presidency Magistrate that the accused should be convicted, we think that he should have been convicted of theft as a servant rather than of criminal misappropriation. The error, however, is immaterial, as it has not prejudiced the accused. The rule is, therefore, discharged.

D. S.

Rule discharged.

[27 Cal. 462]
APPELLATE CIVIL.*The 22nd December and 5th January, 1900.*

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE WILKINS.

Koka Mahton and others.....Plaintiffs

versus

Manki Jagar Nath Sahi.....Defendant.*

*Chota Nagpore Encumbered Estates Act (VI of 1876), ss. 2, 3, (c) 4,—12—**Meaning of the words "holder" and "heir"—Capacity to mortgage.*

[463] The words "holder" and "his heir" are used throughout the Chota Nagpore Encumbered Estates Act in the sense of the *holder* of the property *at the time* of the determination of the debts and liabilities under s. 8 of the Act and *his* heir. The word "heir" in the Act always applies to the person who is the holder's heir at the time of such determination of the debts and liabilities and to no other heir, nor to the heir's heir.

The estate of *F* came under management under the Chota Nagpore Encumbered Estates Act in 1880. He had several sons, of whom *B* was the eldest and *J* the next in age. *F* died in 1884, and according to the custom of the family, *B* succeeded him to the estate, and on *B* dying in 1892 without leaving a male issue, *J* succeeded him. On the 8th June 1884, *J* mortgaged a village which had been granted to him by his father for his maintenance, and which never came under the management of the Encumbered Estates.

Held, that there was nothing in section 3, clause (c), of the said Act to incapacitate *J* from mortgaging the property.

The object of Act VI of 1876 explained.

THE present suit was brought by Koka Mahton and others against Manki Jagar Nath Sahi for the recovery of a mortgage debt, due on a bond, dated the 8th June 1884, in which a village named Kamta was mortgaged as security for the debt. The defendant admitted the execution of the bond, but pleaded that the consideration-money was not paid; and contended further that according to section 3, clause (c) of Act VI of 1876, the defendant had no authority to make any contract, and therefore the bond was null and void.

It appears that the estate of one Manki Faninder came under management under Act VI of 1876 on the 23rd April 1880. Manki Faninder was the father of one Bhola Sahi, the eldest son, Jagar Nath Sahi, the defendant, and two younger sons. According to the custom of the family, after the death of Faninder in 1884, Bhola Sahi succeeded to the estate, and Bhola Sahi having died in 1892 without any male issue, the defendant succeeded to the estate as *malik*, the estate having all the time continued under management under Act VI of 1876. It appeared also that the village Kamta, mortgaged by the defendant, was his *korposh* village obtained from his father for his maintenance, and that it never became a part of the encumbered estate.

The Subordinate Judge found that the plea of the defendant that the consideration-money had not been paid was not made out; he further held that the defendant was not the "heir" of [464] Bhola Sahi, whose estate was under management under Act VI of 1876, when the bond in suit was executed, and

* Appeal from Appellate Decree No. 1429 of 1898, against the decree of F. B. Taylor, Esq., Judicial Commissioner of Chota Nagpore, dated the 28th of April 1898, reversing the decree of Babu Atal Behari Ghose, Subordinate Judge of Ranchi, dated the 27th of August 1896.

that it could not therefore be held to be null and void. He accordingly decreed the suit.

On appeal, the Judicial Commissioner agreed with the lower Court as to the consideration for the bond, but held that the defendant appellant was the "heir" of the holder of the estate within the meaning of the Act at the time the bond was executed, and as heir he was incapacitated from alienating or charging any immoveable property, although such property might have no concern with the encumbered estate. He accordingly held that section 3, clause (c), of the Act rendered the defendant incapable of entering into the contract, and allowed the appeal and dismissed the suit.

The plaintiffs appealed to the High Court. The case came on for hearing on 22nd December 1899.

Dr. *Rash Behary Ghose*, and *Babu Jogesh Chandra Dey*, for the Appellants.
Babu Kally Kishen Sen, for the Respondent.

CUR. ADV. VULT.

JANY. 5, 1900. The judgment of the High Court (**Rampini and Wilkins, JJ.**) was as follows:—

This is an appeal against an order of the Judicial Commissioner of Chota Nagpore, dated the 28th April 1898.

The suit is one in which the plaintiffs seek to enforce a mortgage bond, dated 8th June 1884, and the defendant pleads that under section 3, clause (c), of Act VI of 1876 (the Chota Nagpore Encumbered Estates Act) he could not contract, and so the bond is null and void. Both Courts have found that the defendant duly received the consideration-money of this bond.

The Subordinate Judge held that the bond was valid, while the Judicial Commissioner has allowed the defendant's plea as to his incapacity to contract, and has dismissed the suit.

The facts are that the estate of one Manki Faninder came under management under Act VI of 1876 on the 23rd April 1880. Faninder had then two sons: Bhola, who had no son, and Jagar Nath, the present defendant-respondent. Faninder died [465] in 1884, and Bhola succeeded him. Bhola died on the 19th June 1892, and the defendant Jagar Nath succeeded him. The plaintiffs instituted this suit on the 17th September 1895.

The question then is whether the bond executed by the present defendant-respondent after the death of Faninder, when Bhola had succeeded to his father, is null and void or not.

For the defendant-respondent it is contended, and this is the view taken by the Judicial Commissioner, that it is void: (1) because Jagar Nath, when he executed it was the heir to Bhola, the holder of the immoveable property for the time being who had then no son, and that therefore under section 3, clause (c), he could not contract; (2) that although the property is not part of the encumbered estate taken charge of under the Act, still, under section 3, the holder and his heir are incapacitated from alienating or encumbering not merely the encumbered estate, but their immoveable property or any part thereof, the object of the Act according to this view being to prevent any one who may at any time succeed to the estate from contracting debts which may in any way interfere with the preservation of their property in its entirety.

On the other hand, on behalf of the appellant it has been argued: (1) that Jagar Nath was not Bhola's heir at the time of the execution of the mortgage bond; (2) that in any case he was not the heir to Faninder; and that under section 3, clause (c), it is only Faninder's heir that was incapacitated from contracting; (3) that the property mortgaged was no part of the encumbered estate, and that it is not the intention of the Act to protect the property of any successor to the holder of the estate at the time of its management being

undertaken, or to incapacitate such successor from in any way alienating or charging it.

It is not necessary on the view we take of this case to deal with the first and third of these pleas. We may, however, observe incidentally that we think the word "heir" appears to us to be used in the Act in its ordinary acceptation rather than its strictly legal intendment, and further, that the Judge appears to us to be right in the view he takes of section 3 incapacitating the holder of immoveable property and his heir from alienating or charging their immoveable property or any part thereof. [466] But the question remains: Can the defendant Jagar Nath be said to be the heir of the holder of the said immoveable property within the meaning of section 3 of the Act?

Undoubtedly Faninder was the "holder" of the immoveable property when its management was undertaken under the Act and Bhola Nath was his heir. At first sight it may appear that on the death of Faninder, Bhola became the holder of the estate, and Jagar Nath his heir. But on consideration we do not think that this is the meaning of section 3. In the first place it will be seen that under section 2 what vests in the manager is "the management of the whole or any portion of the immoveable property of or to which the said holder is then possessed or entitled in his own right, or which he is entitled to redeem or which may be acquired by or devolve on him or his heir during the continuance of such management." Thus, it is the holder's property and the property which may be acquired by or devolve on him or his heir which the manager is to manage, and it is such holder and his heir who are precluded from alienating or charging their property, and it would seem that it is such holder and his heir (but not the latter's heir) who are declared by section 3, clause (c), incapable of contracting.

Then, it will be seen from section 4 that the manager during his management of the said property (*i.e.*, of the holder at the time the management is undertaken and the property which may be acquired by or may devolve on him or his heir) is to deal with the profits in a certain way, and to apply the residue in discharge of the debts and liabilities of the holder of the property and his heir "under the provisions hereinafter contained."

These provisions are contained in sections 5 to 12. From these it appears the manager is to prepare a schedule of the debts and liabilities due to the creditors of the holder and to persons holding mortgages, &c., at the time of such determination. Debts not notified to the manager within three months are as a rule to be barred. A scheme for the settlement of such debts is to be submitted to the Commissioner, and finally as soon as such debts and liabilities are paid off, the estate is to be released from management.

From these provisions it would seem to us to follow: (1) that Act VI of 1876 provides a system for the management of property not in consequence of the incapacity of the owner of such [467] property to manage it, but with the object of paying off certain specified debts, and for this purpose the property is for a time placed beyond the jurisdiction of the Civil Courts; (2) that it is the property of the holder at the time of the determination of these debts and the property which may be acquired by or devolve on him or his heir that the manager is vested with the management of, and that it is such holder and his heir who cannot alienate or charge their immoveable property and who cannot contract. The terms "holder" and "his heir" appear to us to be throughout the Act used in the sense of the holder of the property at the time of the determination of the debts, and his heir. They are, we think, employed in no other sense. If the holder at the time of the determination of the debts dies, his heir no doubt in one sense becomes the holder of the property, being his

successor, but we do not consider that on this account he becomes the holder of the property within the meaning of the Act, so that his heir becomes the heir referred to in section 3 of the Act. The word "heir" in the Act in our opinion always applies to the person who is the holder's heir at the time of the determination of the debts and liabilities as provided in section 8 and to no other heir.

It may be said that the Act must surely contemplate and provide for the event of the death of the holder of the property. But it seems to us that it was unnecessary for it to do so. As soon as the debts of the holder of the property have been determined under section 8, it is immaterial how the property may devolve. The manager continues to manage the property of the original holder or his heir, and when the debts, to pay off which the management has been undertaken, have been paid off, the work of the manager is finished and the property released.

That being so, we conclude that in this case the holder of the property and his heir referred to in section 3 of the Act were Faninder and Bhola, and that the provisions of this section in no way incapacitated the defendant Jagar Nath from contracting. The mortgage bond on which the plaintiffs sue is accordingly not void, and the plaintiffs are entitled to recover.

For these reasons we decree this appeal with all costs.

M. N. R.

Appeal decreed.

[468] *The 1st December, 1899.*

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE WILKINS.

Hurnandun Singh and others.....Defendants, 2nd Party
versus

Jawad Ali (Plaintiff) and another.....Defendant, 1st Party.*

Specific Relief Act (I of 1877), s. 27 (b)—Suit for specific performance of contract to sell land—Person claiming by subsequent title—Notice of prior contract—Transfer of Property Act (IV of 1882), s. 54—Contract for sale—Bainanamah—Legal and equitable rights—Registration Act (III of 1877), ss. 17 (h), 48, 50—Document creating a right to obtain another document—Unregistered document—Admissibility of Evidence.

On the 27th December 1895, S executed an unregistered document bearing a one-anna receipt stamp, in favor of J, agreeing to execute a deed of conveyance of a certain immoveable

* Appeal from Appellate Decree No. 52 of 1898, against the decree of C. M. W. Brett, Esq., District Judge of Bhagulpore, dated the 11th of December 1897, reversing the decree of Nuffer Chunder Rhutta, Subordinate Judge of that District, dated the 30th of April 1897.

property in favor of *J* within a certain time, and acknowledging receipt of earnest money. Subsequently on the 3rd January 1896, *S* executed a registered *Bainanamah* in respect of the same property in favor of *R* and *H*, which was followed by a registered deed of conveyance in their favor, dated the 9th January 1896, and delivery of possession, although *R* and *H* had notice of the previous contract with *J* before the registration of the *bainanamah* and execution of the deed of conveyance in their favor.

Held, that, having regard to s. 54* of the Transfer of Property Act and s. 27 (b) of the Specific Relief Act, in a suit for the specific performance of contract brought by *J*, neither the *batnanamah* nor the deed of conveyance in favor of *R* and *H* could prevail against the prior unregistered contract of *J*.

Held, further, that the unregistered document of the 27th December 1895, came under s. 17, clause (h) of Act III of 1877, and was not inadmissible in evidence for want of registration; and that the registered *bainanamah* of the 3rd January 1896 did not take effect against it, under s. 50 of that Act.

THE plaintiff, Sheik Jawad Ali, brought the present suit against Mussummat Shama, the defendant first party, and Rambudun Singh, Hurnandun Singh and Sheik Sabi Buksh, the defendants second party, to enforce specific performance of an agreement to execute a *kobala* in his favor.

The agreement, which was written on a paper bearing an one anna receipt stamp, was in the following terms:—

"Whereas I the declarant have finally completed the negotiations for the sale of 7 annas 9 gundas 1 cowri 1 krant out of the entire 16 annas [469] of *jagir* Bhawani Singh Havildar, Thana Agarpur, Purgana Bhagulpur, the towzi No. whereof is 1047 and the *sadar jama* of the entire *jagir* is Rs. 6-11, with Sheik Jawad Ali, son of Sheik Mohur, deceased, inhabitant of Mouzah Anandpur, Purgana Bhagulpur, at a price of Rs. 1,200, and have received Rs. 25 by way of earnest money out of the said consideration money, I shall execute the *kobala* for the same within ten days. I have, therefore, put in writing these few words by way of receipt for the earnest money that they may be of service when required. Dated the 25th Pous 1303 Fusli."

This agreement, exhibit (a), it will be seen, was executed on the 27th December 1895. It appears that subsequently, *i.e.*, on the 3rd January 1896, Mussummat Shama executed another *bainanamah* for the sale of the identical property in favour of the defendants second party, Rambudun Singh and Hurnandun Singh, at a price of Rs. 1,260, out of which the receipt of Rs. 20 was acknowledged, and that document was registered later on in the course of the same day. The *bainanamah* was in the following terms:—

"Whereas 28 bighas out of the entire 16 annas of the land, *Jagir* Bhawani Singh Havildar, situate in *mouzah* Sadpur Koila, Thana Agarpur, Pergana Kahlagaon, bearing *towzi* No. 1047 and a *sadar jama* of Rs. 6-11 form the proprietary right of me, the declarant, and the same have all along been in my possession and occupation. At present I have a mind to sell the said lands. I have therefore finally completed the negotiations for the sale of the same, at a price of Rs. 1,260, with Rambudun Singh and Hurnandun Singh, sons of

"Sale" defined.

* [Sec. 54.—"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other

intangible thing, can be made only by a registered instrument. In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

Contract for sale. It does not, of itself, create any interest in or charge on such property.]

Babu Sheopal Singh, deceased, by nationality Rajputs, by occupation zemindars and inhabitants of Sadpur Koila, Pergana Kahlagaon, and Sheik Sabi Buksh, son of Sheik Karim Buksh, deceased, by occupation a zemindar, inhabitant of Anandpur, Pergana Bhagulpur. I have received Rs. 20 out of Rs. 1,260, the fixed price, and have therefore granted this receipt that it may be of service when required."

On the 9th January 1896, a deed of sale of the said property was executed and registered by the said Mussummat Shama in favour of the said defendants. The present suit was instituted by the plaintiff on the 11th January 1896. The plaintiff submitted that prior to the 3rd January 1896, the defendants second party had full knowledge and information of the contract for sale made by the said Mussummat Shama in his favour, and that he gave them notice of the same, and personally warned them against the registration of their *bainanamah* in the presence of the Sub-Registrar. The defendants second party denied all knowledge of the plaintiff's [470] alleged prior contract, and they and the defendant first party disputed the genuineness of the document, dated the 27th December 1895.

The Subordinate Judge dismissed the suit, holding that the document (a) was inadmissible in evidence for want of registration; that the registered *bainanamah* of the said defendants second party must take effect against the plaintiff's alleged oral agreement under section 48 of the Registration Act; and that the plaintiff's whole story was untrue. On appeal, the District Judge held that the document (a) was admissible in evidence as a receipt; that section 48 of the Registration Act did not apply; that the plaintiff's story was true, and that notice was given by the plaintiff of his prior contract to the defendants second party at the time of the registration of the *bainanamah*, and undoubtedly before the execution of the deed of sale of the 9th January 1896. The District Judge accordingly gave the plaintiff a decree, directing the defendant first party to execute a deed of sale in his favour within sixty days.

The defendants second party appealed to the High Court.

The *Advocate General* (Mr. J. T. Woodroffe,) Babu Jogesh Chandra Dey, Babu Lal Mohan Das, and Babu Lalmohan Ganguli, for the Appellants.

Sir Griffith Evans, Dr. Rash Behari Ghose, and Babu Buldeo Narain Singh, for the Respondents.

The judgment of the High Court (Rampini and Wilkins, JJ.) was as follows:—

This is a suit for specific performance of an agreement to sell 28 bighas of land for Rs. 1,200.

The District Judge, reversing the decision of the Subordinate Judge, has found in favour of the plaintiff.

The defendants second party appealed.

The facts as found by the District Judge are (1) that the defendant first party agreed to sell the land to the plaintiff for Rs. 1,200 on the 27th December 1895, and received Rs. 25 and executed a document exhibit (a); (2) the defendant first party then agreed to sell the same land to the defendants second party for Rs. 1,260, took Rs. 20 from them and executed a *bainanamah* on the 3rd January 1896; (3) the plaintiff before the registration [471] of this *bainanamah* gave the defendants second party notice of his contract with the defendant first party; (4) notwithstanding this the defendant first party executed and registered a conveyance in favour of the defendants second party on the 9th January 1896.

On these findings of fact the Judge comes to the following legal conclusions : (1) that the document exhibit (a) is admissible in evidence as a receipt ; (2) that the *binanamah* does not take effect against exhibit (a), as it is not a document relating to immoveable property ; (3) that it conveys no title to the defendants second party ; and (4) that the deed of the 9th January 1899 is of no avail as executed after notice of the plaintiff's contract with the defendant first party.

We have no doubt that the Judge is right in the first of these findings. The document exhibit (a) is clearly admissible in evidence, and supported as it is by the oral evidence it substantiates the defendant first party's agreement to sell the land to the plaintiff. It is not inadmissible for want of registration, as it appears to us to come under section 17, clause (h), Act III of 1877.

The Judge is in our opinion in error in holding that the *bainanamah* of the 3rd January 1896 does not come within the purview of section 48 of the Registration Act. We think it cannot properly be said not to be a document relating to immoveable property. But notwithstanding the fact of its registration it will not defeat the plaintiff's right to obtain specific performance of his agreement : (1) because the plaintiff's contract is not merely an oral agreement ; it is embodied in a document exhibit (a), which is an agreement to sell, but which does not require registration as coming within, not section 17 (c), but section 17 (h) of the Registration Act ; and (2) in consequence of the provisions of section 27 of the Specific Relief Act, clause (h). The title of the defendants second party arose subsequently to the plaintiff's contract, and the defendant second party clearly paid the consideration and took the conveyance of the 9th January 1896 after due notice of the plaintiff's contract had been given them. The *bainanamah* was also probably executed after the [472] defendant second party had had notice of the plaintiff's contract. It is difficult to believe that this was not the case, for the defendants first and second parties were living together, and were evidently acting in collusion all along. But it has been contended that the Judge has not expressly found that the defendants second party had notice of the plaintiff's prior contract before the execution of the *bainanamah*. They certainly had such notice before its registration. But this is immaterial ; for, as pointed out by the learned District Judge, under section 54 of the Transfer of Property Act, the *bainanamah* gave them no legal right to the land, but only an equitable right, and an equitable right cannot under the provisions of section 27 of the Specific Relief Act prevail against the plaintiff's prior contract.

We may add that, in our opinion, the provisions of section 50 of the Registration Act do not defeat the plaintiff's right to relief, as the defendants' *bainanamah* of the 3rd January 1896 appears to us to be a document of the same nature as the plaintiff's exhibit (a), viz., a document merely giving a right to obtain another document creating, declaring, assigning, &c., a right, title and interest in immoveable property. That being so, it is not a document of the kind mentioned in clauses (a), (b), (c) or (d) of section 17, or (a) or (b) of section 18, but one of the nature referred to in section 17, clause (h). That this is so is clear from the fact that the defendants first and second parties thought it necessary to execute and exchange the deed of sale of the 9th January 1896, which is the only deed which conveys a legal title in the land to the defendants second party.

For these reasons we affirm the judgment of the District Judge, and dismiss this appeal with costs.

M. N. R.

Appeal dismissed.

[473] *The 22nd November, 1899.*

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE STEVENS.

Girish Chandra Chowdhry and others.....Defendants Nos. 2 to 6

versus

Kedar Chandra Roy and another.....Plaintiffs.*

Bengal Tenancy Act (VIII of 1885), s. 22—Occupancy, non-transferable right of—Effect of purchase of non-transferable right of occupancy by a co-sharer landlord.

Section 22 of the Bengal Tenancy Act applies only to occupancy-holdings which are transferable. In the case of a non-transferable occupancy-holding, the holding itself, as apart from the right of occupancy, cannot be sold so as to give the transferee a right to retain possession of it.

Jawadul Huq v. Ram Das Saha, (1896) I. L. R., 24 Cal., 143, explained and distinguished.

THE plaintiffs, Kedar Chandra Roy and Indramony Gupta, are the owners of a 12 annas share of a *taluk* in the district of Mymensingh. The defendants Nos. 2 to 6 are the owners of a 2 annas share and the defendants Nos. 7 to 10 are the owners of the remaining 2 annas share of that *taluk*. There was a *jote* in the *taluk*, held under occupancy right by one Chidam Mal, the father of defendants Nos. 11 to 14. The defendants Nos. 2 to 6 brought the said holding to sale in execution of a money decree against the said Chidam Mal, and purchased it themselves in 1893. They then let out a portion of the holding to the defendant No. 1, and brought the remainder under cultivation, as they alleged, by *bargadar*, and were in possession by receiving crops therefrom.

The present suit was instituted by the plaintiffs to obtain *khas* possession of their 12 annas share in the land which comprised the *jote* of Chidam Mal jointly with their co-sharer defendants, on the ground that Chidam Mal having abandoned the *jote*, and his occupancy right, which was not transferable, having been extinguished by the auction sale, the right to hold the land in suit in *khas* possession had reverted to the landlords.

The defendants Nos. 2 to 6, amongst other things, contended that, according to local usage, occupancy rights in the place were [474] saleable in execution of a money decree, and that the plaintiffs were not entitled to a decree.

The Munsif found that in that part of the country occupancy rights were not transferable by custom, so that the auction purchase by the contending defendants gave them no special right to take *khas* possession of the whole of the disputed lands, and accordingly decreed the suit.

* Appeal from Appellate Decree No. 565 of 1898, against the decree of Babu Gopal Chunder Bose, Subordinate Judge of Mymensingh, dated the 2nd of December 1897, affirming the decree of Babu Tej Chunder Mukerjee, Munsif of Mymensingh, dated the 4th of December 1896.

There was an appeal by the defendants Nos. 2 to 6 to the Subordinate Judge, which was dismissed.

The defendants Nos. 2 to 6 appealed to the High Court.

Baboo *Devarka Nath Chakravarti*, for the Appellants.

Baboos *Upendra Nath Mukerjee* and *Gobind Chunder Dey Roy* for the Respondents.

The judgment of the High Court (*Macpherson and Stevens, JJ.*) was as follows :—

The facts of this case, so far as it is necessary to state them for the purposes of this appeal, are shortly these: The plaintiffs and the defendants Nos. 2 to 10 were the joint owners of a *taluk* appertaining to which there was a non-transferable occupancy holding belonging to one Chidam Mal. The defendants Nos. 2 to 6 brought to sale and purchased that holding in execution of a money decree against Chidam Mal and took possession of the land. The plaintiffs brought this suit to get joint possession with the defendants of their 12 annas share in the land. The first Court gave them a decree, which has been confirmed by the Lower Appellate Court.

It is argued on an inference based on section 22 of the Bengal Tenancy Act and the decision of a Division Bench of this Court in the case of *Jawadul Huq v. Ram Das Saha*, (1896) I. L. R., 24 Cal., 143, that the occupancy-right is severable from the tenancy-right and that although the occupancy-right could not be sold, the sale and purchase of the tenancy-right was good, and that the plaintiffs [475] have consequently no right to interfere with the possession of the purchasing defendants.

In this argument we see no force. Section 22 of the Bengal Tenancy Act does not make a non-transferable occupancy-holding transferable when the purchaser happens to be one of the proprietors. That section, read in connection with the other sections of the Act, must be taken to refer to occupancy-holdings which are of a transferable character, and the section enacts that when such a holding is transferred to one of the co-proprietors, the occupancy-right in the land so transferred shall cease to exist. The decision to which we have referred merely held that although by the operation of that section the occupancy-right ceased to exist, there might be a good transfer of the holding. Although under the provisions of section 22 of the Bengal Tenancy Act an occupancy-right may be severable, it is only severable in cases to which that section applies, and cannot be made severable in all cases. Apart from any special provision of law such as is contained in section 22 of the Bengal Tenancy Act and is applicable only to the cases referred to in that section, it does not seem possible on any principle to hold that in the case of a non-transferable occupancy-holding the holding can be sold without the right of occupancy, so as to give the transferee a right to retain possession of it.

The tenant, who was in possession, has left the land. It is now in the possession of the purchasing defendants, and we think that the Subordinate Judge was right in treating the holding as abandoned.

These are the only points which have been argued before us.

The appeal is dismissed with costs.

M. N. R.

Appeal dismissed.

NOTES.

[As regards the effect of transfer of an occupancy holding, see the Full Bench decision in *Daymayi v. Ananda Mohan Roy Chowdhury*, (1914) 42 Cal., 172 F. B. which finally settles the question.

See also (1918) 19 C.I.J., 400; (1909) 10 C.L.J., 608; 13 C.W.N., 937; (1911) 12 I.C., 67 (Cal.); (1911) 13 I.C., 336 (Cal.); (1912) 15 I.C., 524 in all of which this case has been followed.]

[476] *The 9th January, 1900.*

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE WILKINS.

Hosain Ali Khan.....Plaintiff

versus

Hati Charan Shaw.....Defendant.*

Bengal Tenancy Act (VIII of 1885), s. 46, sub-ss. (6) and (9)—Non-occupancy Raiyat—Enhancement of rent—Fair and equitable rent.

Sub-section (9) of s. 46 of the Bengal Tenancy Act is not exhaustive. It was not intended that if there was no land of a similar description and with like advantages in the same village as the land in suit, it should be impossible to enhance the rent of a non-occupancy raiyat upon any other ground.

THE plaintiff, Sir Syed Hosain Ali Khan Bahadur Mahabat Jung, G.C.I.E., Nawab Bahadur of Murshidabad, brought a suit against one Hati Charan Shaw, alleging that the defendant held 109 bighas of land on eight years' settlement from 1295 to 1302, B. S., at the annual rent of Rs. 81-12, at the rate of 12 annas per bigha, within the plaintiff's estate No. 649 in the Towji of the Collectorate of Midnapur; that the defendant had made himself liable to ejectment under section 44 of the Bengal Tenancy Act on the ground of his having failed to pay rent for the year 1302; and that the annual rent of the said *jote* should be properly and justly assessed at Rs. 1,154-8 at Rs. 10, Rs. 7, and Rs. 12-8 per bigha. He accordingly brought the present suit, under the provisions of section 46 of the Bengal Tenancy Act, for the ejectment of the defendant as a non-occupancy raiyat on the ground of his refusal to execute an agreement for enhanced rent tendered to him under that section. He also claimed rent at the old rate for the year 1302, and prayed for the ejectment of the defendant for his non-payment of that rent.

The defendant alleged, amongst other things, that at the most he might be asked to pay fairly and equitably rent of Rs. 95-6, at the rate of 14 annas per bigha.

It appeared from the pleadings that, according to the plaintiff, [477] the land in suit was a *chur*—reformation in a lake,—and there was no land of similar nature and quality in the village, and that the plaintiff claimed the enhanced rates at one-fourth of the value of the actual present produce of the different portions of the land in dispute.

The Subordinate Judge was of opinion that assessment of rent based on such a principle would be against the directions contained in sub-section (9) of section 46 of the Bengal Tenancy Act, and accordingly refused to record the evidence which the plaintiff tendered on the point. He accordingly held that the defendant should be liable to pay enhanced rent at 14 annas per bigha from

* Appeal from Appellate Decree No. 759 of 1898, against the decree of H. R. H. Coxe, Esq., District Judge of Midnapur, dated the 4th of January 1898, affirming the decree of Babu Prosunno Coomar Ghose, Subordinate Judge of that District, dated the 8th of March 1897.

1303, B. S., and decreed the claim for rent for 1302, B. S., etc., and directed that, unless the decretal sum be paid within three weeks, the defendant should be liable to be ejected.

There was an appeal to the District Judge preferred by the plaintiff, and the appeal was dismissed.

The plaintiff appealed to the High Court.

Messrs. *Cotton and Buckland* and Moulvie *Serajul Islam* for the Appellant.

Baboo Bidu Bhusan Ganguli, for the Respondent.

The judgment of the High Court (**Rampini and Wilkins, JJ.**) was as follows:—

This is a suit brought under the provisions of Chapter VI of the Bengal Tenancy Act. The plaintiff's claim is a three-fold one. *First*, he seeks to enhance the rent of the defendant, who is a non-occupancy raiyat; *secondly*, he claims arrears of rent at the old rate; and, *thirdly*, he asks for ejectment of the defendant, if the defendant refuses to pay enhanced rent, or if he fails to pay the arrears of rent within the period that may be fixed by the Court for him to pay them.

The Subordinate Judge has given the plaintiff a decree for arrears of rent at the old rate for the year 1302, and has ordered the defendant to be ejected, if he does not pay within three weeks. And he has further given the plaintiff a decree for rent in the future [478] at the rate of 14 annas per bigha which is 2 annas more than the rate at which the defendant has hitherto been paying.

The plaintiff was not satisfied, however; and appealed to the District Judge, who affirmed the decree of the Court of First Instance.

The plaintiff now appeals to this Court; and his contention is that the lower Courts have misunderstood the provisions of sub-section 9 of section 46 of the Bengal Tenancy Act. They have apparently been under the impression that the provisions of this sub-section are exhaustive, and that when it is therein prescribed that the Court "shall have regard to the rents generally paid by raiyats for land of a similar description and with like advantages in the same village," this means that it must have regard to such rents only; that this is the only way in which a Court can carry out the provisions of sub-section 6 of section 46; and that as in this case the plaintiff admits that there is no land in the village of a similar description and with like advantages to those of the subject of the present suit, therefore the defendant's rent cannot be enhanced at all.

We are of opinion that in this respect both the lower Courts have misunderstood the provisions of section 46 of the Tenancy Act. It is laid down in sub-section 6 of section 46 that "if a raiyat refuses to execute the agreement tendered by him under this section, and the landlord thereupon institutes a suit to eject him, the Court shall determine what rent is fair and equitable for the holding."

Sub-section 6 does not prescribe in what way the Court is to determine what is a fair and equitable rent for the holding, but it only restricts the Court in finding what is a fair and equitable rent in one way, that is to say, by the provisions of sub-section 9 of section 46 already cited.

Now, section 46 nowhere says that, if there be no lands of a similar description and with similar advantages in the same village, the Court is to stay its hand and refuse to carry out the provisions of sub-section 6. It only prescribes that, if there be such lands, then the Court must regard the rents generally paid by raiyats for them, and we do not think that it was intended that [479] if there be no such lands, then it should be impossible to enhance the rent of non-occupancy raiyats in any way.

Under these circumstances we think that the case must go back to the Lower Appellate Court and to the Court of First Instance to receive the evidence which the plaintiff tenders, and which he proposes to give to show what will be a fair and equitable rent for the holding in this case, which, according to the plaintiff, should be calculated at the rate of one-fourth of the value of the actual present produce of the land.

We do not say, and we must not be understood as saying, that such is the proper way to estimate what is a fair and equitable rent to be paid by the defendant. It is for the Court of First Instance and of first appeal to determine what is a fair and equitable rent. We can give no instructions or assistance with reference to how they are to determine this rent, because the law is silent on this point. We can only say that in our opinion sub-section 9 is not exhaustive, and that the provisions of sub-section 6 must be carried out by them to the best of their ability.

We set aside the decree of the Lower Appellate Court and remand the case to that Court to be determined in accordance with these instructions. Costs will abide the result.

M. N. R.

Appeal decreed and case remanded.

[27 Cal. 479]

The 1st and 6th December, 1899.

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE WILKINS.

Rajnarain Mitter, Receiver to the Paikpara Estate.....Plaintiff
versus

Ekadasi Bag.....Defendant.*

Bengal Tenancy Act (VIII of 1885), s. 188—Joint landlords—Suit for apportionment of rent and for splitting a jama—Frame of suit—Parties—arrears of rent.

Section 188 of the Bengal Tenancy Act does not prohibit joint landlords from ceasing to be joint, or preclude them from suing for their shares of the rent separately, when they have ceased, or wish to cease, to be joint landlords; provided that the suits are so framed as to free the tenant from all further liability to any one of them.

[480] When, therefore, the plaintiffs, who are joint landlords, have in suits separately instituted by them against the defendant tenant, asked for apportionment of rent and for recovery of rents due on such apportionment, and all the parties interested have been made parties to the suits, there is no reason why the plaintiffs should not have the rent

* Appeal from Appellate Decree No. 174 of 1898, against the decree of Babu Prasanno Kumar Ghose, Subordinate Judge of Midnapur, dated the 1st of November 1897, modifying the decree of Babu Hem Chunder Mukerjee, Munsif of Tamlukh, dated the 20th of January 1897.

apportioned ; and the apportionment may take place in respect both of the arrears alleged to be due and the future rent.

IN one of these two suits, Rajnarain Mitter, Receiver of the Paikpara Estate, sued one Ekadasi Bag, to recover Rs. 55-14-5 as arrears of rent. He stated that *taluk* Gopalpur and *nij* Gopalpur, &c., recorded as *mahal* No. 2637 in the Towji of the Collectorate of Midnapur, are the zemindaris of Kumar Sarat Chandra Singh and others, the *sebars* of deity Radha Ballab Jew ; and that by a decree made in 1893 by the Calcutta High Court, in suit No. 41 of 1889, all *mal* lands of the said *mahal* were set apart for the service of the said deity, and were in the hands of the plaintiff, as Receiver of the said estate. The plaintiff then went on to say that—

“ 5. The defendant was in possession of 45 bighas 4 cottas 9 chittaks 4 gundas of *jote* land in all in Mouzah Gopalpur appertaining to *taluk* Gopalpur at a yearly rent of Rs. 146 13 annas 18 gundas 1 cowri, besides cess. Formerly the defendant paid rent at the above rate and has been receiving *dakhilas* all along from the plaintiff's agent.

“ 6. That out of the said 45 bighas 4 cottas 9 chittaks 4 gundas of land, 5 bighas 7 cottas 2 chittaks 10 gundas bearing a rent of Rs. 16-6-18 gundas was the *nij jota* of Kumar Sarat Chandra Singh, and as the said *jami jama* became his property by the decision in the said suit, the defendant is liable to pay to the plaintiff a yearly rent of Rs. 131-7 annas 1 cowri, besides cess in respect of the *mal* land of 39 bighas 17 cottas 6 chittaks 14 gundas mentioned in the schedule below, being the balance of the said land of 45 bighas 4 cottas 9 chittaks 4 gundas. A notice was given to the defendant to pay to the plaintiff the rent of the said land of 39 bighas 17 cottas 6 chittaks 14 gundas separately.”

The plaintiff, therefore, prayed that a decree be made against the defendant for the sum still due on account of the rent of the said *mal* land, and “ that an order be made declaring that the defendant is in possession of 39 bighas 17 cottas 6 chittaks 14 gundas of *ryoti jota* land appertaining to *mal* land at a rent of Rs. 131-7-0-1 cowri.” Kumar Sarat Chandra Singh was made a defendant to the suit.

In the other suit, Kumar Sarat Chandra Singh sued the same [481] defendant in similar terms for rent due on account of the *nij jota*, making Rajnarain Mitter, the said Receiver, a defendant.

In both the suits, the defendant, amongst other things, pleaded that as in each case the plaintiff had split the said *jote* and brought a suit for rent of a portion thereof, such a suit could not legally proceed, and that he would sustain a serious loss, if the suit was thus brought by splitting one *jote*.

The Munsif allowed the defendant's plea ; but finding that he admitted some arrears as due on account of his *jama*, he gave a decree for those arrears to the Receiver plaintiff and dismissed the other suit.

On appeal, the Subordinate Judge dismissed both the suits.

Both the plaintiffs appealed to the High Court, and the case came on for hearing on 1st December 1899.

Mr. O'Kincaly, Babu Mohan Chand Mitter and Babu Nalini Nath Sen, for the Appellant.

Babu Lal Mohan Das and Babu Sarat Chunder Dutt, for the Respondent.

CUR. ADV. VULT.

DEC. 6, 1899. The judgment of the High Court (Rampini and Wilkins JJ.) was as follows :—

These are two analogous rent suits.

In one the plaintiff is Mr. Mitter, Receiver, appointed by this Court to the Paikpara estate. Ekadasi Bag is the principal defendant, and Sarat Chandra

Singh is *proforma* defendant. In the other, Sarat Chandra Singh is the plaintiff, Ekadasi Bag, the principal, and Mr. Mitter, the *proforma* defendant.

The facts are that the defendant Ekadasi is a tenant of the Paikpara estate, Mr. Mitter is the Receiver and Kumar Sarat Chandra Singh, a transferee of a share in the estate. Formerly, it is said, Ekadasi held two *jamas*, one of 5 bighas odd, and the rent of which was Rs. 16 odd, and the other of 39 bighas odd, the rent of which was Rs. 131 odd. The *jamas* were consolidated and the defendant paid an annual rent of Rs. 146 odd to the co-sharers [482] jointly. Now, the estate has been partitioned by the High Court, and the *jamas* allotted to the different shares. The *jama* of Rs. 131 has fallen to the share of which Mr. Mitter is the Receiver, while the *jama* of Rs. 16 odd has fallen to the share of which Kumar Sarat Chandra Singh is the transferee.

Mr. Mitter and Kumar Sarat Chandra Singh now bring these two suits after notice to the defendant for arrears of rent due up to Baisakh 1303 and seek to collect from the defendant the rents due to them separately.

The Munsif held that the plaintiffs cannot recover, as there has been no decree for apportionment, but he gave Mr. Mitter a decree for the amount of rent admitted by the defendant to be due to the whole estate.

The Subordinate Judge dismissed both suits entirely, holding "that the suits were not suits for apportionment of rents, but were only for splitting the defendant's *jama* into two for convenience of the plaintiffs."

Mr. O'Kinealy for the Plaintiffs urges that there is no difference between a suit for apportionment of rent and one for splitting a *jama*; that the plaintiffs are entitled to have the rent apportioned or the *jamas* split, if they make all the parties interested parties to the suits, as has been done in these cases, and consequently that the plaintiffs are entitled to have the suits remanded for trial.

Babu Lal Mohan Das for the Respondent maintains that the defendant's rent cannot be apportioned in these suits; that even if this can be done, the plaintiffs are not entitled to an apportionment of the arrears due as the decrees for apportionment, if the plaintiffs obtain them, can only affect the future, and not the past. Finally, he contends that under section 188, the plaintiffs, until they obtain decrees for apportionment, must collect the rent jointly.

It would appear to us that there is no reason why these suits should be dismissed. The plaintiffs have from the first asked for the apportionment of the defendant's rent.

All parties interested have been made parties to the suits. There [483] is no valid reason that we can see why the plaintiffs should not now have the defendant's rent apportioned.

Then, we are also of opinion that apportionment may take place of the sum due for arrears, as well as with regard to the future. As Mr. O'Kinealy puts it, the apportionment may take place with regard to the future, as well as of all the defendant's present obligation.

And in the two cases—*Sreenath Chunder Chowdhry v. Mohesh Chunder Bundopadhyaya*, (1878) 1 C.L.R., 453, and *Ishwar Chunder Dutt v. Ram Krishna Dass*, (1880) I. L. R., 5 Cal., 902, it would seem to us that arrears of rent, as well as apportionment of future rent, were sued for.

These cases are no doubt of date anterior to the passing of the Tenancy Act; but section 188 would seem to us to present no difficulty. It lays down that joint landlords can only sue for the rent collectively or by common agent. But it does not prescribe that the relation of joint landlords is to endure for ever. It does not prohibit joint landlords from ceasing to be joint, or preclude them from suing for their shares of the rent separately, when they

have ceased, or wish to cease, to be joint landlords. When a defendant is subject to a joint liability, it would without doubt be unjust to allow him to be sued by one of his joint creditors, who could not release him from his liability to his other creditors. But there would seem to us to be no reason why the creditors should not be allowed to sever their mutual relations, and sue their debtor separately for their shares of the debt, provided this be done in such a manner as to free the debtor from all further liability to any of them. This is being done in these suits. Mr. Mitter sues for the share of the rent due to the share of the estate of which he is a Receiver, and Kumar Sarat Chandra Singh is a party. If Mr. Mitter gets a decree, Sarat Chandra Singh can never sue the defendant for more than his own share of the rent; for any decree which Mr. Mitter may obtain will bind him as regards the amount of rent decreed, as well as the tenant defendant. *Mutatis mutandis*, the same will [484] be the effect of any decree which Kumar Sarat Chandra Singh may obtain in his suit.

For these reasons we decree these appeals and remand the suits to the Lower Appellate Court, who will remand them to the Court of First Instance for trial, and for apportionment of the defendant's rent in respect both of the arrears alleged to be due and the future. This order will carry costs of these appeals.

M. N. R.

Appeals decreed and cases remanded.

NOTES.

[The case of 27 Cal., 479 does not lay down that there must be a division of the lands before a co-sharer can maintain a separate suit for his share of the rent; it is enough if there is an arrangement for separate collection without a division of the lands amongst the co-sharers :—(1912) 16 C.W.N., 774.]

[27 Cal. 484]

The 15th January, 1900.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Shyama Charan Mitter.....Judgment-debtor

versus

Debendra Nath Mukerjee.....Decree-holder.*

*Second appeal—Execution of rent decree valued at less than Rs. 100—
Bengal Tenancy Act (VIII of 1885), s. 153—Civil Procedure
Code (Act XIV of 1882), s. 647.*

Where the original suit is a suit for rent valued at less than Rs. 100 and the decree or order made in it does not decide a question relating to title to land or some interest in land as between parties having conflicting claims thereto, or a question of a right to enhance or

* Appeal from Appellate Order No. 137 of 1899, against the order of J. Pratt, Esq., District Judge of 24-Pergunnahs, dated the 22nd of February 1899, affirming the order of Babu Charu Chunder Mitter, Munsif of Diamond Harbour, dated the 18th of December 1898.

vary the rent of a tenant, or a question of the amount of rent annually payable by a tenant, no second appeal will lie in respect of an order made in execution proceedings relating thereto.

ONE Dabendra Nath Mukhapadhyaya on the 16th July 1894 obtained a decree for arrears of rent against one Shyama Charan Mitter. The amount claimed in the suit for recovery of rent was less than Rs. 100. On the 15th July 1897 the decree-holder applied in the Baruipore Munsif's Court for the execution of the said decree, but it was transferred to the Court of the Munsif of Diamond Harbour on the 27th July 1897. The judgment-debtor objected to the execution of the decree on the ground that it was barred by limitation. The Court of First Instance holding that the application of the 15th July 1897 was a step in aid of the execution of the decree, over-ruled the objection. On appeal the learned District Judge confirmed the decision of the first Court. Against this decision the judgment-debtor appealed to the High Court.

[485] Dr. *Asutosh Mookerjee* and *Babu Jnanendro Nath Bose* for the Appellant.

Babu Umakali Mookerjee for the Respondent.

The judgment of the High Court (**Banerjee and Stevens, JJ.**) was as follows:—

This appeal arises out of an application for the execution of a decree for arrears of rent passed in a suit for recovery of rent, the amount claimed in the suit being less than Rs. 100.

The judgment-debtor objected to the execution proceeding. His objection was over-ruled by the Munsif, who heard the case in the first instance. There was an appeal preferred against the Munsif's decision by the judgment-debtor, and that appeal has been dismissed by the District Judge. And against the order of the District Judge the present appeal has been preferred by the judgment-debtor.

At the hearing of the appeal a preliminary objection is taken by the learned Vakil for the decree-holder respondent, that this appeal is barred by section 153 of the Bengal Tenancy Act. That section enacts that "an appeal shall not lie from any decree or order passed, whether in the first instance or on appeal in any suit instituted by a landlord for the recovery of rent where" (we refer only to so much of the section as bears upon the present case) "the decree or order is passed by a District Judge, * * * * * and the amount claimed in the suit does not exceed one hundred rupees * * * * * unless * * * the decree or order has decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto, or a question of a right to enhance or vary the rent of a tenant or a question of the amount of rent annually payable by a tenant."

It is admitted by the learned Vakil for the appellant that the amount claimed in the suit for the recovery of rent did not exceed Rs. 100; and it is admitted also that the decree or order appealed against has not decided any of the questions referred to in the section—a decision upon which gives an appeal, notwithstanding that the amount claimed does not exceed **[486]** Rs. 100. But the ground upon which he contends that the appeal is not barred is that a case like the present does not come within the language of the section, or in other words, that an order passed in a proceeding in execution of a decree for rent is not a "decree or order passed in any suit instituted by a landlord for the recovery of rent" within the meaning of section 153. On the other hand, the learned Vakil for the respondent contends that such an order does come within the meaning of those words, because, by virtue of the

explanation of section 647 * of the Code of Civil Procedure, an application for the execution of a decree is a proceeding in the suit in which the decree was passed.

The decision of the question raised in this case, therefore, resolves itself into the determination of the question, whether the term "suit" in section 153 of the Bengal Tenancy Act is used in a narrow sense as being terminated by the decree made by the first Court, or in a broad sense as including not only the stages of a suit down to its termination by the decree of the first Court, but also its appellate stage, and also proceedings in execution of the decree made in the suit, the contention on behalf of the appellant being that it is used in the restricted sense, and that on behalf of the respondent being that it is used in its more comprehensive sense.

In determining this question we think that the section itself ought in the first instance to be referred to in order to ascertain if it throws any light upon the question. And referring to the section we find that it evidently uses the term "suit" not in its narrow sense, for it speaks of "any order or decree passed in the first instance or on appeal in any suit," thereby indicating that a decree or order passed on appeal is a decree or order passed in a suit. Starting with this indication afforded by the section itself that the term "suit" is not used in its narrow sense, have we anything to indicate that it is used nevertheless in a narrow sense so far as to exclude proceedings in execution? We must say that neither the language of the section, nor its aim and intention, so far as we can gather the same from the section, would furnish any ground for imposing such a limitation on the meaning of the term "suit." Then from section 647 of the Code of Civil Procedure it appears that applications for execution of decrees [487] are proceedings in suits. It was argued for the appellant that *that* section does not say that they are to be regarded as proceedings in the suits in which the decrees were made. If they are not proceedings in the suits in which the decrees are made, it is difficult to see what other suits they are proceedings in. It was suggested that they are proceedings in suits in the sense of the proceedings being themselves treated as suits. We do not consider that view correct.

Then looking to the reason of the thing can we say that there is any reason in favour of the limitation which the learned vakil for the appellant contends for? If section 153, with the evident object of preventing protracted litigation in cases of small value not affecting any permanent interests, bars an appeal from a decree or order passed in a suit for recovery of rent valued at an amount not exceeding Rs. 100, when such decree does not decide any of the questions referred to in the section, can there be any reason why nevertheless the Legislature should have intended to allow an appeal against an order made in a proceeding for the enforcement of such a decree? We are of opinion that this question must be answered in the negative. There is another argument in favour of the view we take, which is furnished by the rule laid down by this Court, and also the High Court at Allahabad, with reference to a class of cases analogous to the present—we mean cases of orders made in execution of decrees passed in suits of the nature cognizable by Courts of Small

* [Sec. 647 :—The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals.

The High Court may from time to time make rules to provide for the admission, in such proceedings, of affidavits as evidence of the matters to which such affidavits respectively relate; and such rules, on being published in the local official Gazette, shall have the force of law.]

Causes. Such orders have been held to be non-appealable by virtue of the provisions of section 586 of the present Code of Civil Procedure. We may add that the same view was taken under the old Code of Civil Procedure, when section 27 of Act XXIII of 1861 was the law on the point. The cases in which the abovementioned rule has been laid down are: *Lala Kandha Pershad v. Lala Lal Behary Lal*, (1898) I. L. R., 25 Cal., 872; *Anund Chunder Roy v. Sidhy Gopal Misser*, (1867) 8 W. R., 112; and *Din Dayal v. Patrakhan*, (1896) I.L.R., 18 All., 481. In these cases upon the construction of a provision of the Statute Book expressed in language somewhat similar to that of section [488] 153, it was held that a second appeal was barred not only against the decree made in a suit of the Small Cause Court class, but also against an order made in proceedings taken in execution of such a decree. We may say in this case what Mr. Justice LOUIS JACKSON said in the case of *Anund Chunder Roy v. Sidhy Gopal Misser*, (1867) 8 W. R., 112, just referred to, that though we admire the ingenuity which has distinguished the argument of the learned vakil for the appellants, Dr. *Ashutosh Mukerjee*, we feel no doubt that the view we take is the correct one.

The result is that the preliminary objection must be allowed to prevail, and this appeal dismissed with costs.

S C. G.

Appeal dismissed.

NOTES.

[I. This was followed, as regards appealability, in (1900) 28 Cal., 116; (1905) 30 Bom., 118; 7 Bom. L. R., 641; (1912) 18 I.C., 245 (Oudh).

See also (1902) 1 C.L.J., 454; 9 C.W.N., 725 (n).

II. The term 'suit' includes the appellate stage; it even includes the execution proceedings based on the final decree made in the suit:—(1914) 19 C.L.J., 310.]

[27 Cal. 488]

The 31st January, 1900.

PRESENT:

MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Amar Chundra Banerjee.....One of the Judgment-debtors
versus
Guru Prosunno Mukerjee.....Decree-holder.*

Civil Procedure Code (Act XIV of 1882), ss. 228, 232 and 578—Jurisdiction of a Court where a decree has been transferred for execution to substitute the name of the transferee of the decree—Whether an order passed without jurisdiction can be cured by the provisions of s. 578 of the Civil Procedure Code.

An application by the transferee of a decree for execution after substitution of his name can be entertained only by the Court which passed the decree, and the Court to which the decree has been transferred has no jurisdiction to entertain it.

Sheo Narain Singh v. Hurbuns Lal, (1870) 14 W. R., 65; *Nakoda Ismail v. Kassam*, (1872) 9 Bom. H. C., 46; and *Kadir Bakhsh v. Ilahi*, (1879) I. L. R., 2 All., 283, referred to.

In a case where a decree has been transferred to another Court for execution, and that Court orders the execution to proceed after substitution of the name of the transferee of the

* Appeal from Order No. 223 of 1899, against the order of F. F. Handley, Esq., District Judge of 24-Pergunnahs, dated the 24th of March 1899, affirming the order of Babu Shoshi Bhushan Chowdhry, Munsif of Alipur, dated the 14th of January 1899.

decree, the said order is one passed without jurisdiction, and can be set aside on appeal, notwithstanding the provisions of s. 578* of the Civil Procedure Code.

[489] *Sham Lal Pal v. Modhu Sudan Sircar*, (1895) I. L. R., 22 Cal., 558, distinguished.

THIS appeal arose out of an application for execution of a decree. The decree was originally passed by the Small Cause Court at Sealdah and was afterwards transferred to the Munsif's Court at Alipore for execution. In that Court execution was allowed to proceed at the instance of one Jogendra Haldar, the assignee of the decree. During the pendency of the said proceeding Jogendra Haldar transferred the decree to one Guru Prosunno Mukerjee, and applications were made both by the transferor and the transferee for allowing the latter to carry on the execution. Thereupon notices were issued upon the judgment-debtors, and they objected to the execution mainly on the ground that the Court to which the decree was transferred for execution, could not entertain the application for execution after substitution of the name of the transferee of the decree. The Court of First Instance overruled this objection, and allowed execution to proceed. On appeal to the District Judge the decision of the First Court was confirmed. Against this decision one of the judgment-debtors appealed to the High Court.

Babu *Umakali Mookerjee* and Babu *Nogendra Nath Mitter* for the Appellant.

Babu *Basant Kumar Bose* and Babu *Horendra Narayan Mookerjee*, for the Respondent.

The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows :—

Banerjee, J.—This appeal arises out of certain proceedings in execution of a decree. The decree was passed by the Small Cause Court at Sealdah, and it was subsequently transferred by that Court for execution to the Munsif's Court at Alipore. After various proceedings taken in the Alipur Munsif's Court, execution was ordered to proceed at the instance of Jogendra Haldar, who was an assignee of the decree. While the proceeding instituted by Jogendra Haldar was going on, the decree was transferred by him to Guru Prosunno Mukerjee, and applications [490] were made to the Munsif's Court at Alipur by him and Guru Prosunno Mukerjee for allowing the latter to carry on the execution case. Thereupon notice was given to the judgment-debtors; they objected to the decree being enforced by the transferee; but the Court overruled their objection, and having found that the alleged transfer of the decree was true, allowed Guru Prosunno Mukerjee's application. Against this order of the Munsif, Amar Chundra Banerjee, one of the judgment-debtors, appealed to the District Judge, but his appeal has been dismissed, and hence this second appeal.

It is contended by the learned Vakil for the appellant, judgment-debtor, that having regard to the provisions of section 232 of the Code of Civil Procedure, the application for execution of the decree by the transferee, Guru Prosunno Mukerjee, could be entertained only by the Court which passed the decree, and that the Court to which the decree had been transferred for execution had no jurisdiction to entertain it. And in support of this contention the cases of *Sheonarain Sinah v. Hurbuns Lall*, (1870) 14 W. R., 65 ;

* [Sec. 578 :—No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal, on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit, or otherwise, not affecting the merits of the case or the jurisdiction of the Court.]

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.

Nakoda Ismail v. Kasam, (1872) 9 B.H.C. Rep., 46; and *Kadir Bakhsh v. Ilahi Bakhsh*, (1879) I. L. R., 2 All., 283, are relied upon.

On the other hand it is argued for the respondent that section 232 is only a permissive provision which does not restrict the operation of section 228 by which the Court executing a decree sent to it has the same powers in executing such decree as if it had been passed by itself; and that even if an application to the Court, which passed the decree, was a necessary preliminary under section 232, the order of the Court below made in the absence of such an application involved only an irregularity not affecting the merits of the case, and that order ought not be set aside merely by reason of such irregularity, having regard to the provisions of section 578 of the Code; and in support of this argument the case of *Sham Lal Pal v. Modhusudan Sirkar*, (1895) I. L. R., 22 Cal., 558, is cited.

The points that arise for determination therefore are—

First, whether the Munsif's Court at Alipur, to which the [491] decree in question had been transferred for execution, had power to entertain the application of Guru Prosunno Mukerjee, the transferee of the decree, to be allowed to enforce the decree; and

Second, whether, even if that Court had no such power, its order directing execution to proceed could be set aside on appeal, having regard to the provisions of section 578.

The determination of the first point depends upon the construction of section 232 of the Code of Civil Procedure. That section runs thus:—"If a decree be transferred by assignment in writing, or by operation of law, from the decree-holder to any other person, the transferee may apply for its execution to the Court which passed it, and if that Court thinks fit the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder," and then there are two provisos to the section. Though the section is not worded as clearly as it might have been, yet reading the section as a whole we think its intention is to make an application by a transferee of a decree for its execution entertainable only by the Court which passed the decree. The section clearly shows that an application by a transferee of a decree for leave to execute it is to be granted, not as a matter of course, but only when the Court which passed the decree thinks fit. A discretion being thus left in that Court to allow or not to allow the execution to proceed at the instance of a transferee of the decree, it would follow that no other Court can entertain an application of the transferee. As for the word "may" occurring in the section on which some stress was laid in the argument for the respondent, the option it implies is an option to apply or not to apply, and not an option to apply to the Court which passed the decree or to some other Court. And as for the general provision in section 228, that the Court executing a decree sent to it for execution has the same powers in executing such decree as if it had been passed by itself, that must be taken subject to the special provision in section 232 that the power of allowing a transferee of the decree to execute it is to be exercised by the Court which passed it.

The correctness of the view we take will be clear also from [492] the fact that the words "the Court" in section 208 of Act VIII of 1859, which corresponded to section 232 of the Civil Procedure Code, 1877, and of the present Code, were held by this Court and by the Bombay High Court, respectively, in the cases of *Sheo Narain Singh v. Hurbuns Lall*, (1870) 14 W. R., 65; *Nakoda Ismail v. Kassam*, (1872) 9 Bom. H. C., 46, to mean the Court which passed the decree, and the qualifying words "which passed the decree" were added to the words "the Court" in section 232 of the subsequent Code of 1877 and of

the present Code. And we may add that the case of *Kadir Bukhsh v. Ilahi*, (1879) I. L. R., 2 All., 283, which was governed by section 232 of Act X of 1877, supports the view we take.

It was argued for the respondent that if a Court executing a decree transferred to it for execution be not held empowered to grant an application by a transferee of the decree to execute the decree, especially when such application is not an application to institute execution proceedings for the first time, but is one only to carry on the proceedings already instituted by the original decree-holder, great inconvenience might be caused to the transferee. That might be so in some cases; but on the other hand, as has been pointed out in the case of *Sheo Narain Singh v. Hurbans Lall*, (1870) 14 W. R., 65, already referred to above, "it would lead to the greatest difficulties, if in one Court one party was recognized as being the holder of and having the control over a decree, and at the same time in another Court another party was recognized as being in that position."

It remains now to consider the second point, namely, whether the omission of the transferee to apply to the Court which passed the decree can be held to be cured by section 578 of the Code. In the view we have taken of section 232, this point also must be decided against the respondent. For when according to that view no Court other than the Court, which passed the decree, can in the exercise of its discretion determine whether a transferee of the decree should be allowed to execute the decree, if any [493] other Court determines that matter and allows the transferee to go on with the execution of the decree, it acts without jurisdiction; and as the omission in question affects the jurisdiction of the Court, section 578 cannot help the respondent.

As for the case of *Sham Lal Pal v. Modhusudan Sircar*, (1895) I. L. R., 22 Cal., 558, that is distinguishable from the present. The question there was as to the meaning and effect of section 234 of the Civil Procedure Code which provides that an application for executing a decree against the legal representative of a deceased judgment-debtor is to be made to the Court, which passed it, but does not, like section 232, leave any discretion in that Court to allow execution or not. As execution must, in such cases, issue as a matter of course, an application to the Court which passed the decree may be regarded as mere matter of form, and its omission was therefore held, in the case cited, to be cured by section 578 of the Code of Civil Procedure.

The result then is that this appeal must be allowed, and the orders of the Courts below set aside with costs.

Stevens, J.—I entirely concur in the judgment which has just been delivered by my learned colleague so far as it relates to the matters immediately before us, that is, the construction and effect of section 232 of the Code of Civil Procedure. I desire only to add, as reference has been made to the case of *Sham Lal Pal v. Modhusudan Sircar*, (1895) I. L. R., 22 Cal., 558, that I should prefer not to express any opinion as to the construction of section 234.

S. C. G.

Appeal allowed.

NOTES.

[Only the Court which passed the decree can entertain the application for execution of a decree by a transferee:—(1901) 12 M. L. J., 24; (1903) 25 All., 443 at 445; (1905) 28 Mad., 466 at 472; (1905) 1 C. L. J., 315 at 318; (1909) 9 C. L. J., 443; 13 C. W. N., 538.]

[27 Cal. 493]

The 14th December, 1899.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Durga Charan Sarkar.....Plaintiff

versus

Jotindra Mohan Tagore and others.....Defendants.*

*Parties—Joinder of parties—Dismissal of Suit for non-joinder of parties—
Necessary party—Civil Procedure Code (Act XIV of 1882) ss. 28, 32,
295 and 315—English Judicature Act, 1875,
order XVI, Rules 11 and 48.*

[494] On a suit brought by the plaintiff for the establishment of his right to and confirmation of possession to certain immoveable property, and for a declaration that it was not liable to attachment and sale in execution of certain decrees held by defendants 1 to 4 against defendants 5 to 7, the defence mainly was that it was not maintainable in the absence of certain persons, who, like the defendants 1 to 4 had obtained decrees against defendants 5 to 7 and had attached the property in dispute, and the plaintiff preferred claims against the said attachments, but they were rejected upon adjudication

Held, that, inasmuch as the absent decree-holders had applied for attachment and sale of the property in dispute in execution of their decrees and had successfully resisted the claim of the plaintiff, the plaintiff had a right to some relief against them (the absent decree-holders) in respect of the matter involved in the suit, and as their presence was necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, the absent decree-holders were necessary parties to it, and the plaintiff not having brought them on the record as defendants, the suit was not maintainable.

Mahomed Badsha v. Nicol, Fleming and others, (1878) I. L. R., 4 Cal., 355, distinguished.

THIS appeal arose out of an action brought by the plaintiff for confirmation of possession to certain immoveable property by establishment of his title thereto, and for a declaration that the said property was not liable to attachment and sale in execution of certain decrees. The allegation of the plaintiff was that he had purchased the property in dispute from the defendants Nos. 5 to 7 by a registered *Kobala* executed by them on the 25th October 1891; that the defendant No. 1 Maharajah Sir Jotindra Mohun Tagore had a decree for rent in respect of some other properties belonging to the vendors defendants Nos. 5 to 7, and in execution thereof the disputed property was attached; that on the 13th January 1893 he preferred a claim which was rejected; that he then brought the present suit in the Court of the Munsif of Faridpore, and prayed for an injunction to stop the sale, but that was disallowed; that on the 21st February the Munsif returned the plaint to be filed in the proper Court, he having considered the value of the property to be more than Rs. 1,000, and it was filed before the Subordinate Judge on the same date; that in the meantime the property had been sold in execution of the decree of the defendant No. 1 and purchased by defendants Nos. 8 and 9 who were then made parties. [495] The defence (for the purposes of this report) mainly was that the suit was not maintainable inasmuch as certain decree-holders were not made parties defendants to the suit. It appeared that the

* Appeal from Appellate Decree No. 482 of 1898, against the decree of B. C. Mitter, Esq., District Judge of Faridpur, dated the 2nd of December 1897, modifying the decree of Babu Mohim Chunder Ghose, Subordinate Judge of that District, dated the 22nd of November 1894.

vendors (defendants Nos. 5 to 7) had several debts and several creditors. Some of them were satisfied out of the consideration money alleged to have been kept in deposit with the plaintiff. These decree-holders were not concerned in the present suit. But there were other decree-holders, who were satisfied out of the proceeds of the auction sale, brought about by the defendant No. 1 the Maharajah. The claims preferred by the plaintiff against the attachments taken out by the aforesaid decree-holders were rejected on the 4th January 1893. They were not made parties to the present suit. The Court of the First Instance dismissed the plaintiff's suit holding that these decree-holders were necessary parties to the suit. On appeal to the District Judge the decision of the first Court was confirmed. Against this decision the plaintiff appealed to the High Court.

Dr. Rash Behary Ghose and Babu Baikunt Nath Dass, for the Appellant.

Babu Nil Madhub Bose, Babu Sharada Churn Mitter, Moulvi Serajul Islam and Babu Shib Chunder Palit, for the Respondents.

The **judgment** of the High Court (**Banerjee and Stevens, JJ.**), was as follows:—

This appeal arises out of a suit brought by the plaintiff-appellant for establishment of his right to and confirmation of his possession of certain immoveable property, and for a declaration that it was not liable to attachment and sale in execution of certain decrees held by defendants Nos. 1 to 4 against defendants Nos. 5 to 7. Subsequently, upon the property in suit being sold in execution of the decree held by defendant No. 1 and purchased at auction by two persons Radha Rani Chowdhurani and Jagut Gowri Chowdhurani, they were added as defendants Nos. 8 and 9. The defence, so far as it is necessary to be considered for the purposes of the present appeal, was that the suit could not proceed in the absence of certain persons, who, like the defendants Nos. 1 to 4, had obtained decrees against defendants Nos. 5 to 7, and had attached the property in dispute, and on attachment at [496] whose instance claims had been preferred by the plaintiff and had been rejected upon adjudication.

The first Court allowed that objection, but it also went into the merits of the case and dismissed the suit as well on the preliminary objection as on the merits. On appeal the Lower Appellate Court has affirmed the decree of the first Court without going fully into the merits of the case, it being of opinion that the objection as to defect of parties was fatal to the plaintiff's case.

In second appeal it is contended on behalf of the plaintiff that the Courts below were wrong in holding, that the decree-holders other than those at whose instance the property was brought to sale were necessary parties to the suit. It is argued that, as those other decree-holders did not proceed to bring the property in dispute to sale, no right to any relief existed as against them in respect of the matter of the present suit, that section 28 of the Code of Civil Procedure therefore by implication shows that they could not have been joined as defendants in the present suit, and if they could not have been joined as defendants their absence could not amount to a defect in the form of the suit. It is also argued that even the decree-holder at whose instance the property in dispute was brought to sale was only a proper but not a necessary party to the suit; and in support of this argument the case of the *Bank of Hindustan, China and Japan v. Premchand Rai Chand*, (1868), 5 Bom., H.C., 83, is cited. It has been further urged that the mere fact of a person having a remote interest in the subject matter of the suit, would not be a sufficient ground for holding that he is a necessary party; nor would the fact of any of the defendants being entitled to be indemnified by a third party in the event of the suit succeeding make such third party a necessary party to it, and in support of

this last contention the case of *Mahomed Badsha v. Nicol, Fleming and others*, (1878) 1. L. R., 4 Cal., 355, is relied upon. On the other hand it is argued for the respondents that, although the other decree-holders, whose absence from the record has given rise to the objection on the ground of defect of parties, did not actually cause the sale of the property in dispute in execution of their decrees, yet they, like the decree-holder defendant No. 1, applied [497] for attachment and sale of the property in execution of their decrees, and successfully resisted the claim of the present plaintiff to the attached property, and they abstained from bringing the property to sale only because the law, section 295 of the Code of Civil Procedure, entitled them to share in the proceeds realised by the sale brought about by defendant No. 1 rateably with him, and the other decree-holders who had taken out execution against defendants Nos. 5 to 7; and that being so, it is contended, those decree-holders cannot be said to be persons against whom no right to any relief existed in respect of the subject-matter of this suit. It is further argued for the respondents that, as by section 315 of the Code of Civil Procedure, the auction-purchaser defendant is entitled to a refund of the purchase-money from any person to whom the same may have been paid, and as a part of that money has been paid to the absent decree-holders, he will be prejudiced, if the suit is allowed to proceed in the absence of those decree-holders.

After considering the arguments of both sides we are of opinion that the view taken by the Courts below that the absent decree-holders are necessary parties to this suit is correct. The Code of Civil Procedure does not contain any express provision as to who should be considered necessary parties, and what would be the effect of the omission of a plaintiff to bring on the record all necessary parties. Section 34, however, by implication shows that an objection for want of parties is a valid objection to a suit or proceeding; and sections 28 and 32 by implication show who are to be deemed necessary parties. Reading sections 28 and 32 together we think that in order that a party may be considered a necessary party defendant, two conditions must be satisfied, *first*, that there must be a right to some relief against him in respect of the matter involved in the suit; and *second*, that his presence should be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. Now let us see whether those conditions are satisfied as regards the absent decree-holders. As they had applied for attachment and sale of the property now in dispute in execution of their decrees, and had successfully resisted the claim of the present plaintiff under section 278 of the [498] Code of Civil Procedure, it is clear that the plaintiff, if his suit is well founded, has the right to ask for a declaration as against them that the property in dispute is not liable to sale in execution of their decrees, and that the order disallowing his claim was wrongly made. Indeed, we find that there is a prayer in the present plaint, namely, prayer (K) which is to the effect that the entire *taluk*, that is the property in dispute, may be held and declared as not fit to be attached and sold in execution of the decrees of any of the principal defendants. If there was a right to claim that relief as against the principal defendants there was an equal right to claim the same relief as against the absent decree-holders. The first condition, therefore, is, in our opinion, quite satisfied.

Is the second condition also satisfied? We are of opinion that it is. For in order to enable the Court to adjudicate upon and settle effectually and completely all the questions involved in the suit, it is, we think, necessary that all the decree-holders, who had taken out execution against the judgment-debtors and caused attachment of the property now in dispute and who have obtained

satisfaction rateably out of the proceeds realized by the sale of that property, under section 295 of the Code of Civil Procedure, ought to be before the Court. They are all interested in seeing that the question as to the proprietary right in the property in dispute is correctly determined, and they all run the risk, in the event of the present suit succeeding, of being made liable under section 315 of the Code of Civil Procedure to repay to the auction-purchaser defendant the purchase-money which has been rateably received by them. They are, in our opinion, necessary parties for this double reason. They are interested in the result of the suit, and two of the defendants, namely, defendants Nos. 8 and 9, the auction-purchasers are interested in having them before the Court as their absence will certainly cause inconvenience, and may possibly cause injury to them so far as the enforcement of their right to the refund of the purchase-money goes. If this suit succeeds, the auction-purchaser defendants would, under section 315 of the Code of Civil Procedure, be entitled to receive back the purchase-money from the persons to whom it has been paid; some of those persons are the absent decree-holders; and, if this suit proceeds in their absence, the decree made in it will be no evidence against them. So that the auction-purchasers will be put to the inconvenience of having the matter readjudicated in their presence with the possibility of a different result being arrived at, and with a consequent possible risk of injury to them. It was argued that, if that were so, the same reason might have held good in the case of *Mahomed Badsha v. Nicol, Fleming and others*, (1878) I.L.R., 4 Cal., 355; but the Court in that case was of a different opinion. We think that *that* case is clearly distinguishable from the present. There, as here, the defendant, it is true, was entitled to be indemnified by certain other parties; but those other parties in that case, unlike the absent decree-holders in this case, had no interest in the subject-matter of the suit, nor had the plaintiff any right to any relief as against them, whereas in the present suit the plaintiff, as has been said above, has a right to some relief as against the absent decree-holders.

It is argued that our Code of Civil Procedure embodies only rule 11 of order XVI of the rules made under the Judicature Act, but does not incorporate rule 48 of order XVI known as the third party procedure, and that, therefore, the mere fact of some of the parties to the suit being entitled to be indemnified by certain third parties cannot make those third parties necessary parties, nor has the Court any power to make them parties. We are of opinion that this contention is incorrect. The absent decree-holders are not merely parties against whom the auction-purchaser defendants are entitled to claim some indemnity. They are persons who have an interest in this suit, and they are persons against whom a right to relief exists in the plaintiff, if the suit is well-founded. As for the case of the *Bank of Hindustan, China and Japan v. Prem Chand Rai Chand*, (1868) 5 Bom. H. C., 83, no doubt it was there held that the decree-holder who brought the property then in dispute to sale was a proper party, but no question was raised in that case as to whether he was a necessary party or not.

We may add that the view we take is in accordance with that expressed in Story's Equity Pleadings, paragraph 138, where [500] the learned author observes: "In the next place an interest of the absent parties in the subject-matter *ex directo*, which may be injuriously affected, is not indispensable to the operation of the general rule, for, if the defendants actually before the Court may be subjected to undue inconvenience, or to danger of loss, or to future litigation, or to a liability under the decree more extensive and direct, than if the absent parties were before the Court, that of itself will, in many cases, as

we shall presently see, furnish a sufficient ground to enforce the rule of making the absent persons parties." In the present case not only are the auction-purchaser defendants likely to be subjected to inconvenience, and possible injury, by reason of the absence of the other decree-holders, but what is more, they themselves have an interest in the subject-matter of the suit.

It was faintly urged that the Lower Appellate Court was wrong in holding that the absent decree-holders cannot be made parties now as the relief against them is barred by limitation, and the ground upon which the argument was based was that as the decrees of the absent decree-holders have been satisfied, it was unnecessary to bring any suit to have the order made in the claim case against them set aside. But this argument overlooks the fact that the satisfaction of the decree which is made the basis of the contention, is sought to be rendered nugatory by the act of the plaintiff in bringing the present suit.

We are, therefore, of opinion that the Courts below were right in holding that the suit was not maintainable by reason of the plaintiff not having made the absent decree-holders parties to it.

The appeal consequently fails and must be dismissed with costs.

S. C. G.

Appeal dismissed.

NOTES.

[All those who attached the same properties under which the property was sold are not necessary parties :—(1910) 12 I.C., 866. Claimants as heirs to share in the dower are necessary parties :—(1907) 6 C.L.J., 588 : 12 C.W.N., 84.

See also (1914) 26 M.L.J., 537 where the subject is fully discussed.]

[501] CRIMINAL REVISION.

The 15th January, 1900.

PRESENT :

MR. JUSTICE PRINSEP, MR. JUSTICE STEVENS
AND MR. JUSTICE STANLEY.

Pandita *alias* Rahmatulla Pramanik.....Petitioner
versus

Rahimulla Akundo.....Opposite Party.*

Summary trial—Dispute as to possession of land—Bonâ fide belief as to title—Cutting and carrying away crops sown by another—Facts constituting theft—Dishonest intention—Indian Penal Code (Act XLV of 1860), ss. 24 and 379—Code of Criminal Procedure (Act V of 1898), ss. 429 and 439.

An accused person alleged and claimed that certain paddy was grown upon his *jote*, and that he cut and removed it as a matter of right, and in an assertion of a *bonâ fide* claim to the land, it was admitted by the complainant, who also claimed the paddy and the land, that there had been a boundary dispute between his landlord and the landlord of the accused. The accused was convicted in a summary trial of the theft of the paddy.

* Criminal Revision No. 724 of 1899, made against the order passed by Mahammed Abdullah, Deputy Magistrate of Bogra, dated the 9th of September 1899.

Held, per PRINSEP, J : That 'if the complainant's *bargadars* had grown the crops as found and nevertheless the accused cut and carried them off there could be no *bona fide* belief that he was entitled to do so to justify his action in regard to the complainant. With the fact found that possession was with the complainant by the growing by him of the crops cut by the accused, the accused was without justification in thus taking the law into his hands, even if he was entitled to hold the lands, because he was not in actual possession of them. His Lordship refused to interfere.

Per STEVENS, J : The findings of the lower Court taken as a whole amounted to a finding that the accused acted *malà fide*, and the mere fact that he brought some witnesses to speak to his long possession of the land and the cultivation of the crops by him could not be taken as showing that a *bona fide* dispute as to title existed between the complainant and himself. To constitute theft it is sufficient if property is removed against his wish, from the custody of a person who has an apparent title or even a color of right to such property. In the present case the complainant had an apparent title as tenant of the land, together with long possession, and he had on the strength of that apparent title and long possession raised the crops which the accused removed. The application should be dismissed. *Queen-Empress v. Gangaram Santram*, (1884) I. L. R., 9 Bom., 135, referred to.

[502] *Per STANLEY, J., contra.*—That the evidence as well for the prosecution as for the defence conclusively established that there was a *bona fide* dispute as to the title to the land upon which the paddy was sown. Once this was shown the criminal charge failed. The fact, if it be the fact, that the paddy was sown by the complainant, would not give him the property in the crop if it were sown on the land of the accused. If the land was the land of the accused it was an act of trespass on the part of the complainant to sow it with paddy, and the complainant had no right to complain if the accused resented his act of aggression by cutting and removing the crop.

A dishonest intent is a necessary ingredient in the offence of theft. No such intention has been found on the part of the accused. That the conviction and sentence should be set aside.

In this case the accused was convicted in a summary trial of theft of paddy under section 379 of the Penal Code, and sentenced to two months' rigorous imprisonment. It appeared that a long-standing boundary dispute existed between two *zemindars* of adjoining estates and the plot of land on and from which the paddy was cut and removed was claimed by either *zemindar*. The complainant alleged that he was in actual possession of the disputed land, and that the crops which stood on the same were grown by his *bargadars*; that the accused went with a large body of men to the complainant's land and cut the crops which he had raised. The complainant, however, admitted that there had been a boundary dispute between his landlord and the landlord of the accused. The accused alleged and claimed that the paddy in question was grown upon his *jote*, and that it was cut and removed as a matter of right, and in an assertion of a *bona fide* claim to the land. Upon the case coming up on revision before a Divisional Bench of the High Court the learned Judges differed in their opinion, and the case was referred to a third Judge under s. 439 read with s. 429 of the Code of Criminal Procedure.

Baboo Sarat Chandra Ray Chowdhry for the Petitioner. This is a case in which the Criminal Court ought not to have interfered, but should have left the complainant to his civil remedy. The accused alleged that the paddy was grown upon his *jote*, and he cut and removed it as a matter of right and in an assertion of a *bona fide* claim. It is admitted by the complainant that there was a boundary dispute between his landlord and the landlord of the accused. The evidence adduced on both sides establishes that there was a *bona fide* dispute as to the title to [503] the land upon which the paddy was sown; that being established, the criminal charge must necessarily fail. It also appears from the

evidence that the land upon which the paddy was grown was near the boundary. If the land belonged to the accused the complainant had no right to sow paddy upon it, nor has he any right to complain, if the accused cut and removed the crop. To convict the accused of theft it must be found that there was dishonest intention on his part, and there is no such finding in this case.

The rule I submit should be made absolute.

The following judgments were delivered by PRINSEP, STEVENS and STANLEY, JJ. :—

Prinsep, JJ.—A rule has been granted to consider whether the conviction and sentence passed on the petitioner in a summary trial for theft should not be set aside. The sole question for consideration is whether the Magistrate has found facts constituting theft, or whether the petitioner is not guilty of that offence because he cut and carried off the crop, under a *bona fide* belief that he was entitled to it, that is to say, whether he acted dishonestly within the terms of section 24 of the Penal Code.

The Magistrate has found that the "complainant was in actual possession of the disputed land, and that the crops which stood on the same were grown by the *bargadars*." He adds : "And the accused was by no means justified in cutting them away. The mere setting up of a claim to the land which has not been clearly proved by reliable evidence is not sufficient to exonerate him from the liability of theft." I understand from this that the Magistrate has found that the claim is not *bona fide* because he has not proved it to be so by reliable evidence to rebut the finding that the crop was grown by the complainant. I do not understand that he has tried or attempted to try any question of title. He had previously found possession with the complainant. If his *bargadars* had grown the crops as found and nevertheless the accused cut and carried them off there could, in my opinion, be no *bona fide* belief that he was entitled to do so to justify his action in regard to the complaint, the cutting and removing of the crop grown by another, whatever may be the claim in respect of title set up by the accused.

[504] I think that we are bound to discourage such acts which amount to the taking of the law into his own hands by a person, who being out of possession, is bound to establish his title in the proper way, that is in the Civil Court.

The Magistrate then proceeds thus : "There has apparently been a dispute of boundary between the two *zemindars*. I mean the *zemindar* of the complainant and the accused, and the accused appears to have taken advantage of the same and attempted to dispossess the complainant from the land in the manner alleged by the prosecution." By this I understand that possession being with the complainant the accused has attempted to interfere with it by this boundary dispute. With the fact found that possession was with the complainant by the growing by him of the crops cut by the accused, the accused was without the shadow of a justification in thus taking the law into his hands—even if he was entitled to hold the lands—because he was not in actual possession of them. I would not interfere.

Stanley, J.—In this case Pandita Pramanik has been convicted in a summary trial by the Deputy Magistrate of Bogra of the theft of paddy under section 379 of the Indian Penal Code, and sentenced to two months' rigorous imprisonment. It appears that a long-standing boundary dispute existed between two *zemindars* of adjoining estates, and the plot of land on and from

* [Sec. 24 :—Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly."]

which the paddy was cut and removed was claimed by either *zemindar*. The accused alleged and claimed that the paddy in question was grown upon his *jote* and his case is that it was cut and removed as a matter of right and in assertion of a *bona fide* claim to the land. The complainant admits that there has been a boundary dispute between his landlord and the landlords of the accused, as do also his witnesses. Johar Mamood Pramanik and Bocha Beparis also both depose to their knowledge of the *disputed plots*. For the defence Dhona Pramanik deposed that "the disputed land has been in accused's possession since the time of his forefathers," and that "both the plots belong to accused," and "that accused grew crops on them and reaped them this year." Masiruddin Pramanik deposed that "the disputed paddy and *jote* plots belong to Pandita Pramanik (the accused), and that he saw the accused grow and reap crops off them." To the same effect is [505] the evidence of Nozi Akundo. It being clear from the evidence that the land from which the paddy was removed was in dispute between the parties, it appears to me that unless the Deputy Magistrate was satisfied that the claim of the accused was not *bona fide* he ought not to have adjudicated upon the question of title, much less to have convicted the accused. Instead of leaving the complainant to his civil remedy, the Deputy Magistrate investigated the title to the land and had both oral and documentary evidence produced. He appears to consider that in a case like the present one unless a claimant to land can clearly prove his title by reliable evidence a *bona fide* claim will not avail him if he be charged with theft. In his judgment he says: "The mere setting up of a claim to the land *which has not been clearly proved by reliable evidence is not sufficient to exonerate him (the accused) from the liability of theft.*"

In this the learned Deputy Magistrate was in my opinion entirely in error. He has not ventured to find that there was any dishonest intention on the part of the accused in reaping the paddy. A dishonest intent is a necessary ingredient in the offence of theft. The evidence as well for the prosecution as for the defence conclusively, as it appears to me, establishes that there was a *bona fide* dispute as to the title to the land upon which the paddy was sown. Once this was shown the criminal charge in my opinion failed. The fact, if it be the fact, that the paddy was sown by the complainant would not give him the property in the crop, if it was sown on the land of the accused. If the land was the land of the accused it was an act of trespass on the part of the complainant to sow it with paddy, and the complainant has no right to complain if the accused resented his act of aggression by cutting and removing the crops.

For the foregoing reasons I am of opinion that the conviction and sentence ought to be set aside.

Stevens, J.—This is an application for revision under section 439 of the Code of Criminal Procedure. The learned Judges who composed the Court of Revision before which the case came for hearing were equally divided in opinion, and it has therefore been referred to me for disposal in accordance with the provisions of that section read with section 429 of the Code.

[506] The applicant has been convicted of theft under section 379 of the Indian Penal Code. The case against him is that taking advantage of a boundary dispute that had arisen between his *zemindars* and the *zemindar* of the complainant, he went with a large body of men to the complainant's land and cut the crops which the complainant had raised. The defence was that the land in question was a part of the applicant's holding and that the crops upon it had been raised, not by the complainant, but by the applicant. The Deputy

Magistrate who tried the case was satisfied, as he says, by "both oral and documentary evidence" that in fact the land was in the possession of the complainant and that the crops had been raised by his *bargadars*. He held that the applicant was "by no means justified" in cutting the crops and he accordingly convicted him of theft.

The question is whether there is a sufficient finding of dishonest intention on the part of the applicant to support the conviction.

It has been urged before me for the applicant,—and the same view commended itself to one of the learned Judges who originally heard the case—that the Deputy Magistrate has in fact arrogated to himself the functions of a Civil Court and adjudicated upon the question of title much as a Civil Court might have done instead of limiting his decision on that point to the question whether or not the claim set up by the applicant was a *bonâ fide* claim.

There is one sentence in the judgment, which, if it stood alone, would no doubt go to support this view. The Deputy Magistrate says: "The mere setting up of a claim, which has not been clearly proved by reliable evidence, is not sufficient to exonerate him from the liability of theft." I think, however, that the judgment must be taken as a whole and with reference to the case set up by each party. The complainant's case was one of long possession on his part as a tenant, actual cultivation of the crops on his behalf by his *bargadars*, and removal of those crops by the applicant in force. The case set up by the applicant was long possession by himself as tenant under another person, actual cultivation of the crops and reaping them as a matter of right. It is obvious that of these two cases one must be essentially false, if the other is true. The Deputy Magistrate found the case of the complainant to be true on the evidence, oral and documentary, before him and the view which he took was that [507] the applicant had taken advantage of the fact that a boundary dispute existed between the two sets of *zemindars* under whom the parties respectively claim, in order to make an attempt to dispossess the complainant. It appears to me that these findings, taken as a whole, amount in truth to a finding that the applicant acted *mala fide*, and I do not think that the mere fact that he brought some witnesses to speak to his long possession of the land and the cultivation of the crops by him can be taken as showing that a *bonâ fide* dispute as to title existed between the complainant and himself. The evidence of the one set of witnesses or of the other must be untrue, and the Deputy Magistrate had to decide which of the two sets was to be believed.

Very high ground has been taken in the argument before me on behalf of the applicant. I understand the learned vakil to have gone so far as to contend that assuming the complainant to have been in long possession of the land and to have raised the crops, yet, if the applicant thought that he himself had any title in the land, he did not commit theft, because the complainant would have no right to sow crops on land which did not belong to him.

In the first place it seems to me that in order to judge of the *bonâ fides* of the applicant's claim, we must take it as he himself sets it forth, and that it would be going rather far, when it is found to be false as regards the possession of the land and the raising of the crops, to assume that it is honest as regards the title. Further I would refer to the case of *Queen-Empress v. Ganqaram Santaram*, (1884) I. L. R., 9 Bom., 135, in which it is laid down that to constitute theft, it is sufficient if property is removed, against his wish, from the custody of a person who has an apparent title or even a colour of right to such property. In the present case the complainant had an apparent title as tenant of the land together with long possession, and he had on the

strength of that apparent title and long possession raised the crops which the applicant removed.

On the whole I think, that the findings of the Deputy Magistrate are sufficient to sustain the conviction, and that this application should be dismissed.

The application is dismissed accordingly.

D. S.

Rule discharged.

[508] FULL BENCH.

The 5th January and 1st February, 1900.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, MR. JUSTICE
MACPHERSON, MR. JUSTICE BANERJEE, MR. JUSTICE HILL,
AND MR. JUSTICE RAMPINI.

Khedu Mahto.....Plaintiff

versus

Budhun Mahto.....Defendant.*

*Second Appeal—Suit for arrears of rent—Chota Nagpore Landlord and
Tenant Procedure Act (Bengal Act I of 1879), ss. 37, 38, 47,
49—56, 62—67, 76, 98, 135, 137, 144—Civil Procedure
Code (XIV of 1882), ss. 3, 4, 584.*

No second appeal lies in a suit for arrears of rent brought under the provisions of the Chota Nagpore Landlord and Tenant Procedure Act (Bengal Act I of 1879).

The cases of *Ramjan Khan v. Raman Chamar*, (1882) 11 C. L. R., 480, and *Prag Nath Sah Deo v. Mura Munda*, (1896) 1. L. R., 24 Cal., 249, so far as they held that a second appeal did lie in cases of this nature arising under Bengal Act I of 1879, were wrongly decided.

THIS case was referred to a Full Bench by RAMPINI and WILKINS, JJ., on the 5th January 1900, with the following opinion :—

This is a second appeal in a suit for arrears of rent coming from the district of Hazaribagh, in which the provisions of Act I of 1879, B.C., are prevalent.

A preliminary objection is taken that no second appeal lies, and the case of *Mul Chand Sahu v. Hukum Singh*, (1898) 2 C. W. N., ccciv, is relied on. In this case it is laid down that in a suit such as the present no second appeal lies. We have referred to the judgment in this case, as also to the judgment of O'KINEALY, J., sitting alone, in review, and dated the 31st August 1898, and

* Reference to the Full Bench in Appeal from Appellate Decree No. 773 of 1898,

we find that they fully support the report of the case given in 2 Calcutta Weekly Notes, ccxiv.

On the other hand, in the case of *Priag Nath Sah Deo v. Mura Munda*, (1896) I. L. R., 24 Cal., 249, it has been held that in such a suit a second [509] appeal lies. In this case, also one for arrears of rent, it is said: "It was at first objected that no second appeal lay to this Court, but this objection was overruled years ago. We think, therefore, that the objection fails."

The judgment then goes on to deal with the contention of the appellant in that case that the appeal from the Deputy Collector lay to the Deputy Commissioner, and not to the Judicial Commissioner. This plea was overruled and the appeal was dismissed.

We can find no other express authority for the view taken in this case that a second appeal lies to the High Court in such cases.

The case of *Ramjan Khan v. Raman Chamar*, (1882) 11 C. L. R., 480, which has been cited before us, is a suit not for arrears of rent, but for ejectment. It is, however, a suit under Act I of 1879, B.C., and in this case it was held that an appeal, that is, a second appeal, lay to the High Court. The decision in this case proceeded on the ground that an appeal in such a suit was not barred by section 137 of the Act. But it seems to have been overlooked by the learned Judges, who decided that case, that there is no provision in the Act expressly giving a second appeal from the decision in appeal of the Deputy Commissioner or Judicial Commissioner in cases under the Act in which an appeal lies to them. In the case of *Mul Chand Sahu v. Hukum Singh*, (1898) 2 C. W. N., ccxiv, or rather in the judgment of O'KINEALY, J., in review in that case, it has been pointed out that the provisions of section 584 of the Civil Procedure Code, do not give a right of second appeal in cases under Act I of 1879, B.C., because the Act is a complete Code in itself and the provisions of the Civil Procedure Code are therefore not applicable to cases arising under it. There, therefore, appears to be a direct conflict of rulings between the cases of *Mul Chand Sahu v. Hukum Singh* (1898) 2 C. W. N., ccxiv, on the one hand, and those of *Ramjan Khan v. Raman Chamar*, (1882), 11 C. L. R., 480, and *Priag Nath Sah Deo v. Mura Munda*, (1896) I. L. R., 24 Cal., 249, on the other. We are of opinion that for the reasons given in the case of *Mulchand Sahu v. Hukum Singh*, (1898) 2 C. W. N., ccxiv, the decision in that case is correct, and [510] that the decisions in the other cases referred to are erroneous. We, therefore, refer this appeal to a Full Bench, and the questions we would propound for their decision are -

First.—Whether a second appeal lies in this case?

Second.—Whether the cases of *Ramjan Khan v. Raman Chamar*, (1882) 11 C. L. R., 480, and *Priag Nath Sah Deo v. Mura Munda*, (1896) I. L. R., 24 Cal., 249, so far as they are authorities for holding that a second appeal lies to this Court in cases arising under Act I of 1879, B.C., have been rightly decided.

Babu Saroda Charan Mitra for the Appellant.

Babu Jogesh Chundra De for the Respondent.

Cur. adv. vult.

FEB. 1, 1900. **Maclean, C.J.**—It is, I think, reasonably clear that the question referred to us ought to be, and must be, answered in the negative. It is urged by the appellant that a second appeal lies under section 584 of the Code of Civil Procedure. It is true an appeal lies under that section "unless otherwise provided by this Code or by any other law," and by section 4 of the same Code nothing contained in that Code shall be deemed to affect "any law heretofore or hereafter passed under the Indian Councils Act, 1861, by a Governor

or a Lieutenant-Governor in Council, prescribing a special procedure for suits between landholders and their tenants." The Chota Nagpore Landlord and Tenant Procedure Act (Bengal Act I of 1879) is concededly covered by section 4 of the Code, and the question we have to decide is whether, upon the construction of that Act, a second appeal lies. The sections, upon which the question turns, are sections 37 and 144.

Section 37 provides that "all suits for arrears of rent," and this was a suit for arrears of rent, "shall be cognizable by the Deputy Commissioners, and shall be instituted and tried under the [511] provisions of this Act and shall not be cognizable in any other Court, except in the way of appeal as provided in this Act."

This language is clear and precise, and no question can properly arise as to its construction. We must then ascertain what is the provision for appeal in the Act? This takes us at once to section 144.

Section 144 runs as follows: "In all suits other than those in which, when tried and decided by a Deputy Commissioner, the judgment of the Deputy Commissioner is declared to be final," which is a case coming under section 137, "or when tried and decided by a Deputy Collector an appeal is allowed to the Deputy Commissioner, an appeal from the judgment of the Deputy Commissioner or Deputy Collector shall lie to the Judicial Commissioner of the Division, unless the amount or value in dispute exceed five thousand rupees, in which case the appeal shall lie to the High Court."

This language indicates with sufficient clearness to what tribunal the appeal is to lie. There is no suggestion of any appeal to this Court, save in cases when the amount or value in dispute is over Rs. 5,000. When the Act specially allows an appeal in a certain class of case to the High Court the inference is irresistible that it was only in that class of case that such an appeal was to lie: *expressio unius est exclusio alterius*. Reading sections 37 and 144 together, and no difficulty of construction arises, it is to my mind perfectly clear that no appeal to the High Court, save in the stipulated case, was intended or provided for. And I may add that when the Code of Civil Procedure was intended to apply, the Act so expressly states. There is nothing about section 584 applying.

This really disposes of the question.

We have, however, been referred to three or four cases, in which it is alleged that a different view has been taken. In a recent but unreported case, however, decided in May 1898, the case of *Mul Chand Sahu v. Hukum Singh* (Appeal from Appellate Decree No. 194 of 1897) it was held, on review, that there was no second appeal, nor do I think the authorities would justify us in saying, as the appellant suggests, that a practice has grown up of allowing an appeal to this Court [512] in these cases. How far such a practice would be sustainable if it contravened an Act of the Legislature is open to grave doubt. But be that as it may, in none of these cases is any reference made to the provisions of section 37 of Bengal Act I of 1879; and I do not think I am doing any injustice to the learned Judges who decided those cases in saying that except, perhaps, in the case of *Ramjan Khan v. Raman Chamar*, (1882) 11 C. L. R., 480, which was a different case from the present, the point we have now to decide was not seriously brought to their attention.

In my opinion a second appeal does not lie, and the authorities referred to in the second question submitted to us, so far as they are authorities for holding that a second appeal does lie, must be taken to have been wrongly decided.

The appeal must be dismissed with costs here, and in the referring Court.

Macpherson, J.—I am of the same opinion. It is conceded that a second appeal will not lie to this Court unless the provisions of section 584 of the Code of Civil Procedure are applicable to the case. But the provisions of section 4 of that Code seem to me to bar the application of section 584. It cannot, I think, be said, having regard to the provisions of sections 37, 135, 137 and 144 of Bengal Act I of 1879, that that Act does not prescribe a special procedure as regards appeals in suits between landlords and tenants in the Chota Nagpore District. I therefore agree in thinking that no second appeal lies in this case.

Banerjee, J.—I am of the same opinion. The only provision of the law under which a second appeal could in this case lie would be section 584 of the Code of Civil Procedure. But that provision must be taken subject to the limitation contained in the section itself, which is in these words, namely, "unless when otherwise provided by this Code, or by any other law," and subject also to section 4 of the Code, which enacts that nothing contained in the Code except as provided in the second paragraph of section 3 "shall be deemed to affect any law passed under the Indian Contract Act, 1861, by a Lieutenant-Governor in Council," I am quoting only so much of the provision as bears upon this case, [513] "prescribing a special procedure for suits between landholders and their tenants or agents." The question then is reduced to this, namely, whether there is any special procedure prescribed by Bengal Act I of 1879 for suits between landlords and their tenants. And a special procedure, we find, is prescribed by that Act for suits between landlords and their tenants. It is argued that the effect of section 4 of the Code of Civil Procedure is to exclude only that portion of the Code which affects any law relating to procedure prescribed in Bengal Act I of 1879; and that as this last mentioned Act makes no provision for a second appeal, the application of section 584 of the Code will not affect any procedure prescribed in that Act.

But is that so? As has been pointed out in the judgment just delivered by the learned Chief Justice, if section 144 of Bengal Act I of 1879 stood alone, there might have been some ground for that contention; but that section, read with the concluding part of section 37 of the Act, makes it clear that if section 584 of the Code of Civil Procedure is to have application to this case, it will, to that extent, affect the provisions of section 37.

Hill, J.—I wish only to say that upon reconsideration of this question, I am clearly of opinion that no second appeal lies in a case of this kind. I was a party to the decision in the case of *Priag Nath Sah Deo v. Mura Munda*, (1896) I. L. R., 24 Cal., 249, but the view taken in that case proceeded almost entirely upon what was conceived to be an established course of practice supported by a decision in an unreported case decided by Mr. Justice TOTTENHAM and Mr. Justice AGNEW in May 1885, in second appeals Nos. 621 to 625 of 1884. That case, however, does not now appear to me on a reconsideration of the question and after hearing what has been addressed to us to-day, to have been correctly decided. I entirely agree with what has fallen from the learned Chief Justice and Mr. Justice MACPHERSON as to the construction of Bengal Act I of 1879 and the effect upon the question now before us of section 4 of the Code of Civil Procedure.

Rampini, J.—I also consider that no second appeal lies in this case. I would only add to what has been said by the learned [514] Chief Justice and my learned brothers that Bengal Act I of 1879 seems to me to contain internal evidence that the provisions of the Code of Civil Procedure are not applicable to cases arising under that Act, and that therefore section 584 of the

Code of Civil Procedure does not apply. I would refer to sections 47, 49 to 56 and 62 to 67 of the Act which lay down certain procedure for the trial of cases arising under the Act. These sections would be superfluous if the provisions of the Code of Civil Procedure applied in their entirety to cases arising under Bengal Act I of 1879.

I would also refer to sections 38, 76 and 98 of the Act, which make certain provisions of the Code of Civil Procedure expressly applicable. These would be absolutely unnecessary if the provisions of the whole Code applied to cases under this Act. And I may also in support of this view point to the title of the Act which is described as an "Act to amend the *procedure* in suits between laudlords and tenants in Chota Nagpore." Upon these grounds I am clearly of opinion that the provisions of the Code of Civil Procedure do not apply to cases under Bengal Act I of 1879.

Moreover, as has already been pointed out by several of my learned brothers, section 4 of the Code of Civil Procedure expressly excludes the Code from applying to cases between landholders and their tenants. For these reasons I think that no second appeal lies in this case, and that the cases of *Ramjan Khan v. Raman Chamar*, (1882) 11 C. L. R., 480, and of *Priag Nath Sah Deo v. Mura Munda*, (1896) I. L. R., 24 Cal., 249, so far as they hold that a second appeal lies in cases of this nature arising under Bengal Act I of 1879, have not been rightly decided.

M. N. R.

Appeal dismissed.

NOTES.

[I. As regards appeal, see also (1901) 29 Cal., 532.

II. As regards the value of a practice opposed to the plain construction of the Act, see also (1906) 13 C.W.N., 815.]

[515] PRIVY COUNCIL.

The 14th November and 9th December, 1899.

PRESENT :

LORDS HOBHOUSE, MORRIS, DAVEY AND ROBERTSON,
AND SIR RICHARD COUCH.

Rewa Prasad Sukal.....Defendant

versus

Deo Dutt Ram Sukal.....Plaintiff.

{On appeal from the Court of the Judicial Commissioner, Central Provinces.}

Joint family estate, succession to—Title of member by survivorship—Partition not established by award and record at settlement of widow's estate for life—Land Revenue Act, C P. (XVIII of 1881), s. 87.

Where a Hindu and his widow had successively held the estate in suit as joint-family estate in coparcenary with the appellant or his predecessor—
Held, that the appellant succeeded at the widow's death.

Though the widow was recorded under an award by the Collector in the settlement records as owner of an 8-anna share of the estate for her life-time, that did not operate a separation in title or alter its devolution. Section 87 of the Land Revenue Act, Central Provinces (XVIII of 1881) did not affect the appellant's claim, for the award related solely to the widow's interest.

APPEAL from decree (23rd February 1894) of the Judicial Commissioner, affirming, on second appeal, a decree (3rd July 1893) of the Judicial Assistant Commissioner, affirming a decree (26th April 1892) of the Civil Judge, Jubbulpur.

The plaintiff (now deceased and represented by his heirs, who were minors, through their mother and guardian) claimed, on the 21st October 1892, the possession of ancestral estate, consisting of shares in villages in the Sehora tahsil. He alleged a right thereto by inheritance, on the death, in 1889, of Mussumat Nanhi Bahu, widow of his cousin Sita Ram, the last male holder of the property, who died in 1849, and who was succeeded by the widow for her life estate. He also alleged that Sita Ram, and the parties to this suit, belonged to a divided Hindu family, and that, as shown in the table set forth in the [516] plaint, he the claimant was nearer in degree of relationship to the deceased than the defendant. The table was--

Ujjar Ram.

Guman Ram.	Manbodhram.	Murlidher.
Partab Ram.	Deo Dutt Ram Sukal (Plaintiff).	Sita Ram, died 1849, leaving widow Nanhi Bahu, died 1889.
Madho Prasad.		
wa Prasad Sukal (defendant, appellant).		

The defence was that the branch of the family to which the defendant belonged, viz., that of Partab Ram, had remained joint in estate with Sita Ram, and on his death with his widow. The claimant's share in the family estate had been divided off to him many years before. On the death of Sita Ram his share had been awarded to his widow at settlement by consent for her life only; on her death the defendant's title accrued by survivorship.

The issues raised the principal questions: (1) whether the disputed share had remained joint estate as stated, or was separate; and (2) what was the effect of the award made at the settlement of 1863, and the entry in the record; this latter question being taken in connection with section 87 of the Central Provinces Land Revenue Act, XVIII of 1881.

On this appeal the question related only to the second of the above questions, and to whether or not the share claimed was to be dealt with as undivided family estate in regard to it.

The Civil Judge found that the share was undivided estate in the hands of Sita Ram, but disposed of the claim in regard to the estate taken by the widow for her life. His decree was for the plaintiff.

The Judicial Assistant Commissioner on appeal affirmed the finding that the share was undivided estate when in the possession of Sita Ram and his widow. But he was of opinion that the settlement award of 1863, at the time when distinct proprietary rights were for the first time conferred, created a widow's separate estate; that the inheritance would in regard to this belong to her husband's heirs, and not pass by survivorship. He therefore dismissed the appeal.

[517] On second appeal, the Judicial Commissioner, bound as he was by the conclusive finding which was in fact that Sita Ram and his widow lived joint in estate with the line of Partab, nevertheless decreed the claim. He held that in virtue of the proceedings in the revenue department in 1863, and by the effect of section 87 above mentioned, a new estate had been created in favour of the widow, and that this had descended to the nearest collateral, who was entitled as the reversionary heir on the widow's death. According to this view the plaintiff was entitled, and the appeal was dismissed. From this decision the defendant now appealed.

Mr. *J. D. Mayne* for the appellant. The findings of fact, by the Original Court and the Court of First Appeal, were conclusive in favour of the defendant that the branch of the family to which he belonged had continued to have a right in the joint estate with Sita Ram and after his death with his widow, as members of an undivided Hindu family. Neither the award at settlement, nor the settlement record in favour of the widow, that she had an estate for life, had any operation in the way of partition, nor did they alter the status of the family, or affect the devolution of the share. The Judicial Commissioner's judgment erred in concluding that the question of inheritance was governed by the title and possession of the widow for life under the award of 1863, taken in connection with section 87 of Act XVIII of 1881. The mere fact of an arrangement having been made that certain shares in villages, those shares having belonged to her husband as his share in joint family property should be her estate for life, would not be a holding by her inconsistent with the family being still undivided in estate. Section 87 did not relate to a case such as this, but, by its own terms, had a different application, as the question of the reversion and of what should become of it, had never been under the "consideration of the Settlement Officer." Reference was made to *Munnal Chaudhri v. Gajraj Singh*, (1889) I. L. R., 17 Cal., 246. On this appeal it could not be disputed that the appellant and Sita Ram were joint in estate, and that after his death this appellant continued so long as she lived to be a member of a joint family holding the [518] property in question as part of the joint estate. And there was nothing in the Revenue Proceedings in 1863, or in Act XVIII of 1881, to annul the rights of survivorship which accrued to the appellant.

The respondent did not appear.

Cur. adv. vult.

DEC. 9TH. The judgment of their Lordships was delivered by—

Lord Robertson.—This appeal was heard *ex parte*; but the disputed questions are not complicated and are ultimately confined to a narrow issue by findings in fact which bind this Board. On that issue the grounds of the judgments appealed against are explained with sufficient fulness to allow of their validity being tested with some certainty.

The dispute arose on the death of Nanhi Bahu, widow of Sita Ram, in 1889. From 1863 her name had stood, and it stood at her death, recorded in the Settlement Record as owner, for her lifetime, of eight-anna shares of the zemindari of certain villages, which had been possessed by her husband Sita Ram. The present dispute relates to those shares. The primary theory of the case of the plaintiff (the original respondent in this appeal) was that Sita Ram's estate was divided estate; and, if this had been the fact, the plaintiff, as his nearest heir, would admittedly prevail. The defendant (now the appellant) on the other hand, maintained, and he has proved, that the estate of Sita Ram was undivided estate enjoyed by Sita Ram jointly with those from whom the appellant derives. There had, it is true, been a partition, in 1824, but this was only between the branch of the family now represented by the plaintiff on the one hand and the

rest of the family on the other; the plaintiff's branch dropped out of the community, but the community remained. The findings of the Judicial Assistant Commissioner, Jubbulpore, which are conclusive of the facts in the case, expressly assert that Sita Ram was at his death in shamlat with Partab Singh, who is now represented by the appellant; and carrying the matter a step further and to the latest date with which this suit is concerned, he finds that Nanhi Bahu was at her death in shamlat with the appellant.

Dislodged by these findings from his original position, the [519] plaintiff relied on the terms of the award of the Deputy Collector in 1863, by which Nanhi Bahu's name was put on the Record; and the Judges in the Courts below have held that that award had the effect of making the shares enjoyed by Nanhi Bahu separate estate to which her husband's heir must succeed. This result is supposed to be brought about by the 87th Section of the Central Provinces Land Revenue Act, XVIII of 1881.

Before examining the statute and the award itself, it is well to realise the antecedent facts which are held to be thus affected by them. In 1863 when the proceedings were taken which resulted in the award, the parties to them belonged to an undivided family and the estate was undivided estate. The death of Sita Ram necessitated some mutation of names for the purpose of revenue; it did not necessitate a partition. His widow's right was to maintenance, but the satisfaction of that right by the assigning to her the enjoyment for her lifetime of a share of the estate is not an unnatural or unaccustomed mode of dealing with property that is undivided and is intended to remain undivided. This is pointed out with clearness and emphasis by the Judicial Assistant Commissioner. "The circumstance," he says, speaking of the mutation of names, "does not seem to me to be of the slightest importance in deciding this question, in view of the well known practice of members of an undivided family in this part of the country of recording proprietary rights in villages in the shares to which each member of the family would be entitled, if he separated and at the death of each member continuing to enter his share in the name of that member's heirs although they still continued in shamlat." This view of the matter does not require modification even where, as in the present case, the right recorded is one of zemindari, while the original interest was stated to be a patti right.

The next question is, what is the effect of the 87th section of the Land Revenue Act? What the section says is this: It declares in regard to awards granted before its date (such as that before their Lordships) that every claim shall be barred which, after consideration, has been expressly decided to be invalid or inferior to the claims of the person in whose favour the award is made. This provision is clear and needs no explanation. In [520] order to be barred, a claim must have been considered,—that is made, or tabled as the subject of consideration, and expressly decided.

It has now to be seen what was proposed to the Collector for his consideration and what was done by him in relation to the estate now in dispute. The mover in the application to the Collector was Partab Singh, whose rights are now in the appellant and whose acts are therefore binding on the appellant. Partab Singh proposed and the Collector ordered *inter alia* that eight anna shares should be awarded to Nanhi Bahu "for her lifetime." He did not propose, and therefore the Collector had no occasion to consider anything as to the reversion of those shares after the death of Nanhi Bahu. In particular, the Collector did not consider, because he had no occasion to consider, the appellant's right to possession after Nanhi Bahu's death. Accordingly, viewing

the question for the moment apart from the statute, the award does not touch the present dispute.

When the 87th section is fairly examined, it is apparent that while it gives to such awards the effect of judicial decrees it ascribes to them no adventitious force which would not belong to a decree pronounced *in pari materia*. To be barred by such an award, a claim must have been decided by the officer making the award to be invalid or inferior to the claim of the person in whose favour it is made. The claim of Partab Singh or of any one else to the reversion did not enter the question whether Nanhi Bahu should have the estate for her lifetime; she being the person in whose favour for her lifetime the only award of those eight annas was made, the claim of no reversioner had any relation to hers, whether of inferiority or invalidity.

The claim which is brought under consideration by the present appellant was therefore not "expressly decided after consideration" and is not barred by section 87. The result is that the law governing the question is the ordinary Hindu law, applying to undivided estates; and that law supports the appellant's claim.

Their Lordships will therefore humbly advise Her Majesty that the judgments appealed against ought to be reversed, and that the respondents ought to pay the costs in all three Courts and to repay costs that may already have been paid them or the original [521] plaintiff by the appellant. The respondents must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. T. L. Wilson & Co.

C. B.

NOTES.

[See also (1902) 16 C.P.L.R., 3; (1900) 13 C.P.L.R., 81; (1908) 11 O.C., 381.]

[27 Cal. 521]

The 9th November and 9th December, 1899.

PRESENT :

THE LORD CHANCELLOR, LORDS HOBHOUSE, MORRIS, DAVEY,
AND ROBERTSON AND SIR RICHARD COUCH.

Shama Charn Kundu.....Appellant

versus

Khettromoni Dasi.....Respondent.

[On appeal from the High Court at Fort William in Bengal.]

Probate—Evidence.

Probate is rightly granted where the Judge believes the witnesses who speak to the execution of the will and the disposing mind of the Testator.

The rule in *Tyrrell v. Painton*, (1894) P., 151, requiring proof that the testator actually knew and approved the contents of the will does not apply unless surrounding circumstances excite suspicion.

APPEAL from a decree (29th July 1895) of the High Court, reversing a decree (25th June 1894) of the District Court of Howrah.

The appellant petitioned the District Court on the 20th January 1893, for probate under Act V of 1881, of the will of the late Modhu Sudan Kundu, who died at Howrah on the 9th October 1892, at the river side. The petitioner was said to be his adopted son. The latter and three others were appointed executors. The deceased had no natural son, but left a widow and two daughters. Also two nephews survived him, a third having died shortly before the testator. On the 4th October he had executed a will that differed but little from that now in question.

The widow Nistarini Dasi opposed the grant of probate at first, entering a caveat. But she afterwards withdrew her opposition. Thereupon one of the daughters Khettromoni Dasi, now respondent, filed objection to the grant of probate, asking to be made a party. This was rejected and an order was made as in a non-contentious case for probate to issue.

On an application by Khettromoni to the High Court, this order was set aside, it being held that this fell within their [522] authority under section 622, Civil Procedure. The case was sent back to be tried as a contentious one. The judgment is reported in *Khettromoni Dasi v. Shama Charn Kundu*, (1894) I. L. R., 21 Cal., 539.

The following questions were then tried by a District Judge who had succeeded the one whose order had been set aside: Whether the deceased executed the will propounded, and whether at the time he was of sound and disposing mind.

This Judge found that Modhu Sudan, though in a very weak state, knew full well what he was doing. The instructions were his own, not communicated or suggested from without. The provisions of the will gave no indications other than that they were drawn up by a man in full possession of his senses. The issue of probate to Shama Charn of the will propounded, except of the last paragraph, was therefore granted. The reason for the exception of the last paragraph appears from what is stated in their Lordships' judgment. The paragraph mentioned Bhut Nath as dead, giving the share to be dealt with as the testator wished in case he should die, being unaware of his death.

On Khettromoni's appeal to the High Court, a Division Bench (PETHERAM, C.J., and BEVERLEY, J.), reversed the decision of the District Judge. In their judgment they expressed themselves unable to find that the deceased, when at the ghat where he died, was in such a state of mind as to have been able either to have dictated the will, or to have given a conscious assent to any of its provisions, although it might have been that he was not in a wholly unconscious state.

Having these doubts, they said, *in regard* to the evidence required to establish a will in such a case: "The most recent case on the subject that has been brought to our notice is that of *Tyrrell v. Painton*, (1894) P., 151, in which LINDLEY, L.J., remarked as follows:—

" 'In *Barry v. Batlin* (2 Moore's P. C., 480) PARKE, B., delivering the opinion of the Judicial Committee, said: 'The rules of law, [523] according to which cases of this nature are to be decided, do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two. The

first, that the onus probandi lies in every case upon the party propounding a will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court and calls upon it to be vigilant and zealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.' The same principle was laid down and acted upon in *Fulton v. Andrew*, (1875) L.R., 7 H.L., 448, and *Brown v. Fisher*, (1890) 63 L. T., 465. The rule in *Barry v. Batlin*, *Fulton v. Andrew* and *Brown v. Fisher* is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and whenever such circumstances exist and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document; and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will."

The Judges continuing said:—"In the present case, the question whether or not the petitioner Shama Charn Kundu benefits largely by the will, depends on whether or not he is the legally adopted son of the testator, an allegation which is disputed and which has not yet been judicially decided. But putting that question aside, there are undoubtedly circumstances in this case which excite the suspicion of the Court, and following the principle laid down in the case first cited, we think it was for the [524] petitioner to remove that suspicion and that because the petitioner had given formal evidence of the execution, the burthen was not shifted to the object or to prove mental or physical incapacity. The facts alleged in this case are that the testator died of cholera on the day on which he is said to have executed this will, after five days' illness of that disease; that at least three days before, his life had been despaired of by his medical advisers, and that two days before he had been carried down to the bank of the river as being in a moribund condition; that nevertheless, he on the Sunday morning, without any draft or any assistance, dictated the will set up, a lengthy and abstruse document requiring no ordinary mental effort: that the discrepancy between the second and ninth paragraphs of the will present a difficulty which has not been satisfactorily explained. All these circumstances, we think, do create an amount of grave suspicion which it was the duty of the petitioner to remove, and which, in our opinion, he has not succeeded in removing."

The decision of the District Judge was reversed and probate refused.

The promovent appealed.

Nov. 9th. Mr. J. D. Mayne, for the Appellant. The High Court has had no sufficient ground for reversing the order that probate should issue. The question, when the evidence had been given on both sides, was whether the will was the genuine will of the deceased, not so much in regard to where burden of proof had been as a question of the weight of the evidence taken altogether. That evidence was, in a great degree, the testimony of witnesses, but included inference from probabilities, and these were in favour of the promovent's case. He referred to the fact of the will of the 4th October having been executed substantially to the same effect as the will in dispute. If Shama Charn was the adopted son of the deceased, a fact which had not been effectively contested,

the will would have been contrary to his interest, as he would have inherited the whole estate instead of receiving legacies among other persons; and, moreover, it was difficult to see what object could have been attained by the fabrication of a will nearly identical in terms with the former one.

[525] Mr. C. W. Arathoon, for the Respondent, contended that the judgment of the High Court refusing probate was right. His argument, reviewing the evidence, was that the appellant had failed to prove the execution of the will by the testator with a disposing and competent mind; his extreme state of illness being considered, and the discrepancies in the testimony of the witnesses. Whether Shama Charn had been adopted or not had not been tried as a question in issue; his adoption had been denied and was far from having been established.

Mr. J. D. Mayne was not heard in reply.

Cur. adv. vult.

DEC. 9th. Their Lordships' judgment was delivered by—

Sir Richard Couch.—The principal question in this appeal is, whether probate of the will of Modhu Sudan Kundu, who died on the 9th October 1892, ought to be granted. The appellant was the applicant for the probate, and in his petition for it, presented to the District Judge on the 20th January 1893, he stated that he was the adopted son of Modhu Sudan and one of the executors mentioned in the will. He also stated that another will had been executed by Modhu Sudan on the 4th October 1892, which was revoked by the later will and was filed in Court. The application was opposed by Nistarini Dasi, the widow of Modhu Sudan, in a petition put in on the 31st January 1893, in which she denied the genuineness of the second will, refused to admit the first will, and also asserted that Shama Charn, the appellant, was not the adopted son of the deceased. On the 23rd February, Nistarini presented a petition withdrawing her objections. Thereupon, on the 27th February 1893, the respondent, who is one of the daughters of the deceased, filed a petition of objection denying the genuineness of the will, asserting that Shama Charn was not the adopted son, and that the withdrawal by Nistarini was the result of collusion, and praying to be made a party to the suit. The District Judge having refused to do this the will was proved in common form, and probate granted. The respondent appealed to the High Court which set aside the decision of the District Judge and remanded the matter in order that she might have an opportunity of contesting the case, and that the will might be proved in solemn form. On the 25th June 1894, the District [526] Judge decided in favour of the will; he found that it was executed by Modhu Sudan and that he was then of sound and disposing mind. As to the adoption of Shama Charn he said:—

“I have mentioned that an allegation was made by the objector denying that Shama Charn was the adopted son of Modhu Sudan, in order to show that it was not probable the deceased should have executed such a will. Evidence was given that Shama Charn was treated by Modhu Sudan as an adopted son, was spoken of as an adopted son by Modhu Sudan when giving evidence. Not a particle of testimony to support the objector's allegation was given. Though two sons-in-law, a cousin, and a servant of Modhu Sudan were examined, not one of them was asked a single question whether Modhu Sudan had adopted Shama Charn. The alleged improbability therefore fails.”

• The evidence in the record fully supports this opinion.

On the 29th July 1895 the High Court on the appeal of Khettromoni reversed the decree of the District Judge and ordered the application for probate to be dismissed.

The first witness examined in support of the will was Sri Narain Babu the writer of it. His evidence was that Tincowri Banerji, another witness, was sitting near Modhu Sudan and repeated what he had said, although the witness could hear it himself; that at the time of the will being written out Modhu said: "There are Rs. 6,000 due to me on a mortgage. Of this sum Rs. 2,000 are to be given to Kedar Nath, Prio Nath, and Bhut Nath each;" that just then some one came in and said that Bhut Nath was dead, and some one asked what was to be done with the Rs. 2,000 allotted to Bhut Nath. Modhu Sudan said "Let Rs. 1,000 be given to his widow and Rs. 1,000 to his mother." The witness said he made provision accordingly in the will; he forgot whether it had already been written in the will, that Bhut Nath was to get Rs. 2,000 or whether this had only been mentioned by Modhu Sudan, he could not say without looking at the will. Now the second paragraph of the will contains a gift of Rs. 2,000 to Bhut Nath and the ninth the gifts of Rs. 1,000 each to his mother and widow. Tincowri Banerji deposed that Sri Narain wrote the will and he asked questions and Modhu Sudan "made known the terms of the will" that he said Rs. 6,000 would be given to his three nephews, this was written, and then the document was read over and [527] Modhu Sudan signed it and after him the witnesses. Some one said "Let the will remain in Tincowri's keeping," and so it was given to him and he took it. He went on to say that afterwards Kedar said to him "What is written in the will is false." He said "How is that?" Kedar said "My brother is dead, and he has been given Rs. 2,000" (Bhut Nath having shortly before died of cholera). Tincowri said "He did not know of your brother's death. If you wish I will enquire from Modhu Sudan to whom he wishes that Rs. 2,000 to be given." Then three or four of them went and said "Your nephew is very ill, if he dies to whom should his money be given?" He thought for a long time, perhaps a quarter of an hour, and said, "Let Rs. 1,000 be given to his wife and Rs. 1,000 to his mother." Then this was inserted in the will. This was after the will had been executed. There was a space and the provision was inserted. There was no signature of the testator or the "witnesses." The District Judge who had the will before him was satisfied with this evidence and accordingly excluded this addition to the will from the probate. No doubt there is a discrepancy between the evidence on this point of Sri Narain and that of Tincowri. But Sri Narain may have forgotten the exact circumstances under which the ninth paragraph was inserted or may have been over zealous in his desire to support the whole will. At any rate the District Judge accepted Tincowri's version, and on that basis their Lordships cannot agree with the learned Judges of the High Court who thought that the discrepancy between the second and ninth paragraphs had not been satisfactorily explained and that it was a circumstance to excite suspicion. Peary Mohun, one of the attesting witnesses, deposed to the execution of the will and said that Modhu Sudan was all the time in his senses. Kedar Nath Kundu, a pleader, one of the nephews of the testator to whom the Rs. 6,000 were given, who was present during part of the time when as he said "Sri Narain was writing and Tincowri was asking Modhu and then telling Sri Narain what to write" added that "Modhu Sudan was in his senses. He seemed to understand everything that was said to him and he was able to give replies." The District Judge says in his judgment that it was clear to him that Kedar Nath was an unwilling witness. In his evidence he [528] appears to have been dissatisfied with what he took under the will and being one of the executors was unwilling to join in the application for probate.

The case of the respondent against the will was that no will was executed. The effect of the evidence of the six witnesses called in support of it is that

during the morning when the will was said to have been executed Modhu Sudan was in an unconscious state, unable to sign a will and that no will was made. The District Judge, who saw the witnesses, has found that the will was executed by the deceased and that he was of sound disposing mind when he executed it.

The judgment of the High Court reversing this decision appears in the conclusion of it to be founded upon what is said by LINDBLEY, L.J., in *Tyrrel v. Painton*, (1894) P., 151, that whenever circumstances exist which excite the suspicion of the Court and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document. In this case, the suspicion, if there was one, would be that on the morning, when the will was said to have been made, the deceased was in an unconscious state and unable either to sign the will or to understand what he was doing, that is, that the witnesses in support of the will were not telling the truth. If they were their Lordships do not see anything to excite suspicion. The question was simply which set of witnesses should be believed. The District Judge saw them and the remarks in his judgment show that he observed their demeanour. The High Court had not that advantage. In their Lordships' opinion the probate was rightly granted and the decree for it should not have been reversed. It is not necessary to decide the other questions raised in the appellant's case. Their Lordships will, therefore, humbly advise Her Majesty to reverse the decree of the High Court and order the appeal to be dismissed with costs. The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. *Barrow and Rogers*.

Solicitors for the Respondent: Messrs. *T. L. Wilson & Co.*

C. B.

NOTES.

[See also (1904) 7 Bom. L.R., 92; (1905) 7 Bom. L.R., 175; (1909) 10 C.L.J., 263; (1913) 40 Cal., 555.]

[529] APPELLATE CIVIL.

The 7th December, 1899.

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE WILKINS.

Robert Watson & Co., Ld.....Petitioners

versus

Ambica Dasi and others.....Opposite Party.*

*Civil Procedure Code (XIV of 1862), ss. 556, 558—Second Appeal —
Order refusing to re-admit Appeal—Dismissal of Appeal for
default—Pleader asking for time to go on with a case.*

The provisions of ss. 556 and 558 of the Civil Procedure Code do not apply, when the pleader for the appellant not merely informs the Court that he has no instructions, but makes an application for postponement, which is refused, and the appeal is thereupon dismissed.

A second appeal does not, therefore, lie in such a case from an order of the First Appellate Court refusing to re-admit an appeal under the provisions of s. 558 of the Code of Civil Procedure.

CERTAIN appeals were preferred in the Court of the District Judge of Midnapore against the decision of the Deputy Collector regarding assessment of rent of the appellant's *mehal*. When the appeals came on for hearing before the District Judge, on the 25th March 1898, the appellant's pleader said that he had received no instructions, and he asked for two hours' time. The District Judge declined to allow time and dismissed the appeals, on the ground that, as the case was a complicated one and involved the consideration of the interests of various classes of tenants, it was quite impossible to get it up in that time, and the result would be that the Judge "would have to work out the whole case with little, if any, assistance."

The appellants then applied for restoration of the appeals under section 558 of the Code of Civil Procedure. That application was refused on the 18th of April 1898. The appellants then appealed to the High Court from the said order of the District Judge refusing to re-admit the appeals.

Babus Jogesh Chandra Roy and Surendra Nath Ghosal for the Appellants.

Babus Lal Mohan Das and Sarat Chunder Dutt for the Respondents.

[530] The judgment of the High Court (Ramnipi and Wilkins, JJ.) was as follows :—

This is an appeal from an order of the District Judge of Midnapur, dated the 18th of April 1898, refusing to re-admit an appeal under the provisions of section 558 of the Code of Civil Procedure. The facts of the case are these : This case, after several postponements, was called on for hearing before the District Judge on the 25th of March 1898, and on that date the pleader for the appellant said that he had received no instructions. He then proceeded to ask for two hours' time, as the case was a complicated one and involved considerations of interest to various classes of tenants. The application was refused, and the District Judge accordingly dismissed the appeal. The appellant then applied, under section 558, for the re-admission of the appeal which, as has been said before, was rejected. The learned pleader for the appellant urges that

* Appeal from Order No. 251 of 1898, against the order of H. R. H. Coxe, Esq., District Judge of Midnapur, dated the 18th of April 1898.

the District Judge was wrong in refusing to give the pleader, who appeared before him, two hours' postponement as asked for. He says that no doubt the District Judge had a discretion to allow this or to refuse it, and that he has improperly exercised his discretion; and he further calls attention to an affidavit of the mooktear of the plaintiff, showing that he had gone away on some business, and was not able to instruct the pleader. Furthermore it was pointed out to us that the orders passed in this case were not brought to the notice of the pleaders for the appellant, and they were not made to sign those orders. We need not say much about these matters, but we must remark in passing that we cannot admit the justness of the last criticism. It is not the duty of the officers of the Court to call upon the pleaders to sign the orders issued, or to inform them of the nature of the orders passed. It is for the pleaders to be present at the proceedings, and to make themselves acquainted with the orders passed. But we need not discuss these matters, because a preliminary objection has been raised by the learned pleader for the respondent to the effect that the appellant has mistaken his remedy, and that his remedy should have been, not by an appeal from the order of the 18th April 1898, but by a second appeal from the order of the 25th March 1898; inasmuch as the case was not decided *ex parte*, under the [531] provisions of section 556 of the Code of Civil Procedure, but was decided after the appellant's pleader had put in an appearance and had moved for the adjournment of the case.

We must admit the force of this contention. It would seem that had the pleader for the appellant merely informed the Court that he had no instructions and refrained from taking any steps in the case, the provisions of sections 556 and 558 would have been applicable. But in this case he did more. He made an application for postponement, and it is his grievance in this case that the postponement was not granted. We think that sections 556 and 558 do not apply; and in this connection we may cite the case of *Shibendra Narain Chowdhuri v. Kinoo Ram Dass*, (1886) I. L. R., 12 Cal., 605. In this case it will be observed that the pleader, though present, was not prepared to go on, but he made no further application in the case; and so the provisions of sections 556 and 558 were held to be applicable. In another case, that of *Ram Chandra Pandurang Naik v. Madhav Purushottam Naik*, (1891) I. L. R., 16 Bom., 23, the same distinction was made. In this case, it is said that if the pleader for the appellant had stated that he had received no instructions, the Court could have held that there was no proper appearance. But that was not the case. The pleader for the appellant asked for an adjournment for certain reasons, and on this ground it was held that sections 556 and 558 did not apply. Following this ruling, we consider that the contention of the pleader for the respondent in this case must prevail.

The appeal is dismissed with costs—ONE GOLD MOHUR.

This decision will also govern appeal No. 252 of 1898, which is also dismissed with costs—ONE GOLD MOHUR.

M. N. R.

Appeal dismissed.

NOTES.

[This was dissented from in (1904) 8 C.W.N., 621, and was overruled in (1907) 34 Cal., 403; 11 C.W.N., 329; 5 C.L.J., 247.]

[532] The 27th April, 1900.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE HARINGTON.

Madhu Lal Ahir Gayawal.....Plaintiff

versus

Sahai Pande Dhama.....Defendant.*

*Malicious Prosecution—Suit for Damages for Malicious Prosecution—Malice—
Dishonest Motive—Effect of bringing a charge of 'Assault' for 'Criminal
Intimidation'—Damages—Reasonable and Probable Cause—
Penal Code (Act XLV of 1860), ss. 351, 352, 503.*

Where, in a suit for damages for malicious prosecution on a charge of assault which was dismissed, it appeared from the facts as found by the lower Courts that there was 'Criminal Intimidation' on the part of the plaintiff although he was not charged with that offence by the defendant—

Held, that the plaintiff would not be entitled to any damages, as no malice or dishonest motive could be imputed to the defendant in bringing the charge of 'assault.'

ONE Durga Dutt Singh, a wealthy zemindar of Modhubani, went on pilgrimage to Gya, and thence he proceeded to the shrine on the Ramsila Hill, accompanied by the plaintiff and his retainers. The plaintiff belongs to a class of priests called *Gayawals* who officiate at the religious ceremonies performed by pilgrims at certain places within Gya proper. And the defendant belongs to a class of priests known as *Dhamis*, who officiate at the ceremonies performed at Ramsila Hill and certain other places. Durga Dutt made some gifts or offerings at the Ramsila Hill, one half of which was claimed by the plaintiff in accordance with an alleged custom. The defendant repudiated his claim altogether, and took away the whole of the gifts. There was an altercation between the parties regarding the apportionment of these offerings, which ended in a criminal prosecution instituted by the defendant charging the plaintiff with assault. An information was also given by the defendant to the police soon after the occurrence. The plaintiff was in due course tried for assault under section 352 of the Penal Code and acquitted by the Criminal Court. Upon that he brought this suit for damages for false and malicious prosecution. The [533] Munsif gave judgment for the plaintiff holding that the charge of assault was false and malicious, and that there was no reasonable and probable cause for such a charge though there was criminal intimidation on the part of the plaintiff.

On appeal the District Judge reversed the decision of the Munsif and dismissed the plaintiff's suit in the following terms :—

"The Munsif finds that the plaintiff criminally intimidated the hill priest, but that he did not assault him as alleged. This is putting the cart before the horse.

"The offence of criminal intimidation is a very much graver one than that of common assault, and in a case of this kind where the defendant was compelled to retire, owing to the intimidation, it includes that change of motion which amounts to assault. There was certainly a nasty row on the hill that day, so nasty that the Behari gentleman whose offerings were the bone of contention, discreetly retired from the scene altogether, leaving the disputants to fight it out. It is absurd to suppose that the hill priest had a large follow.

* Appeal from Appellate Decree No. 713 of 1898, against the decree of H. Holmwood, Esq., District Judge of Gya, dated the 22nd of December 1897, reversing the decree of Moulvie Abdul Bari, Munsif of Gya, dated the 23rd of June 1897.

ing, while the *Gayawal* had none. The *Dhamis* are single men who take it in turn to officiate at the hill temples, while the *Gayawals* always have *piyadas* and other followers, and one *lathial* is admitted in the evidence. There seems to me to have been every reason for bringing a case of assault against the plaintiff, and the appeal must be decreed and plaintiff's case dismissed with costs in both Courts."

Against this order the plaintiff appealed to the High Court.

Babu *Umakali Mukerji* and Babu *Srish Chunder Chowdhuri* for the Appellant. The District Judge was wrong in finding that there was a reasonable cause for the criminal prosecution. The defendant brought a false charge of assault against my client and that was dismissed. The Munsif found there was criminal intimidation on the part of the plaintiff, but that was nobody's case. What the Munsif probably meant by "criminal intimidation" was that there was some sort of pressure put upon the defendant, and not as defined in the Penal Code, s. 503. [GHOSE, J.—Under what section of the Penal Code was your client prosecuted?] Under section 352. In criminal intimidation (s. 503) a 'threat to injure' would be a necessary element, but in this case there was none. [HARINGTON, J.—Can you say that the defendant had not the honest belief that he had a reasonable and probable cause for this prosecution, when the circumstances of criminal intimidation existed?] The learned District Judge has [534] not dealt with the case in that way, there being nothing to that effect in his judgment. [GHOSE, J.—Would not "cause alarm" in s. 503 of the Indian Penal Code include assault? Threat to injure might have been by gesture or preparation.] "Criminal intimidation" does not include "assault" which is a distinct offence as defined by s. 351 of the Penal Code. If "criminal intimidation" had really been committed by my client, the defendant's legal advisers would have brought that charge against him; and, besides, there is no evidence of threat or intimidation. "Change of motion" mentioned by the District Judge in his judgment is not a necessary element to constitute intimidation. The information to the police followed by a charge of assault shows malice on the part of the defendant.

Babu *Jogesh Chunder De* for the Respondent was not called upon.

The judgment of the Court (GHOSE and HARINGTON, JJ.) was delivered by—

Ghose, J.—This appeal arises out of a suit for damages for malicious prosecution of the plaintiff in a criminal court for assault.

The prosecution, upon the facts found by the Judge, seems to have been the outcome of a quarrel between the plaintiff and the defendant about certain offerings which a pilgrim to Gya had made. It would appear that in the course of that quarrel there was a disturbance, and it went so far as to compel the pilgrim and his party to retire from the place, leaving the plaintiff and the defendant and their partisans to fight out the dispute. The defendant subsequently brought a complaint against the plaintiff for assault under section 352 of the Penal Code. That complaint, however, was not substantiated, and it was accordingly dismissed.

The Court of First Instance found that there was criminal intimidation offered by the plaintiff to the defendant, though there was no actual assault; and the Munsif, being of opinion that there was no justifiable cause for the institution of the complaint by the defendant, gave the plaintiff a decree for damages.

On appeal, the District Judge apparently accepts the finding [535] of the Munsif that there was criminal intimidation on the part of the plaintiff; and having regard to that fact, as also to the other facts to which we have already referred, has come to the conclusion that there was "every reason for bringing

a case of assault against the plaintiff," and therefore the latter is not entitled to any damages.

It will be observed that the charge of criminal intimidation as defined in section 503* of the Penal Code is a graver charge than that of simple assault as defined in section 351 of that Code. In many cases of the kind, a charge of assault may be taken to be included in a charge of criminal intimidation; and if the fact be, as it seems to have been found by both the Munsif and the District Judge, that there was good cause for bringing a charge of criminal intimidation and if the defendant had brought such a charge, it would be almost impossible to say that there was any malice or dishonest motive on the part of the defendant in bringing a charge of assault against the plaintiff.

In this view of the matter, we think that the judgment of the learned Judge should not be interfered with in this appeal; and we accordingly dismiss the appeal with costs.

B. D. B.

Appeal dismissed.

[27 Cal. 535]

The 13th December, 1899.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

William Sheriff.....Defendant

versus

Jogemaya Dasi and others.....Plaintiffs.

Bengal Tenancy Act (VIII of 1885), ss. 15 and 16—Arrears of rent, suit for—

Suit by a putnidar on the death of the last owner against the durputnidar,

without complying with the provisions of s. 15 of the Bengal

Tenancy Act, whether maintainable—Holder of a tenure.

In a suit for arrears of rent for the years 1299 B.S. to Falgoon 1302 B.S. brought by putnidars on the death of the last owner on the 14th Aghran 1302 B.S., the defence of the durputnidar mainly was that the plaintiffs not having complied with the provisions of s. 15 of the Bengal Tenancy Act, the suit was not maintainable.

* [Sec. 503 :—Whoever threatens another with any injury to his person, reputation, or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested is within this section.]

† Appeal from Appellate Decree No. 480 of 1898, against the decree of G. K. Deb, Esq., District Judge of Nadhia, dated the 13th of January 1898 modifying the decree of Babu Ananta Ram Ghose, Subordinate Judge of that District, dated the 3rd of December 1896,

[536] *Held* that as the plaintiffs did not claim the rent, which fell due during the lifetime of the last owner, as the holder of the tenure, but claimed it either as the representative of the holder of the tenure for the time being or as representative of their father, the rent became an increment to the estate of the father, and therefore the suit was maintainable—*Nogendra Nath Bose v. Satadul Bashini Bose*, (1899) 3 C. W. N., 294, referred to.

THIS appeal arose out of an action for arrears of rent with interest for 1299 B.S. to Falgoun 1302 B.S., brought by the plaintiffs, *putnidars* of a certain *taluk* against one Mr. Sheriff for self and as attorney on behalf of certain other persons, who were *durputnidars*. The allegations of the plaintiffs were that on the death of their father, their mother succeeded to all the properties left by him, and on their mother's death, on the 14th of Aghran 1302 B.S., they, as daughters and heirs of their father, succeeded to the said properties; that the defendants took a *durputni* settlement of certain *putni mehals* owned and held by their father at an annual rent of Rs. 747; that the defendant paid rent up to the year 1298 B.S. but did not pay any rent since the year 1299 B.S., and hence the suit. The defence of the defendant, Mr. Sheriff, mainly was that the suit could not proceed, inasmuch as neither the mother of the plaintiffs nor they had complied with the provisions of section 15 of the Bengal Tenancy Act. The Court of First Instance dismissed the suit on the ground that inasmuch as the provisions of section 15 of the Bengal Tenancy Act had not been complied with, it was not maintainable. On appeal the learned District Judge allowed a portion of the plaintiffs' claim, namely, rent for the period which fell due during their mother's lifetime, but disallowed the claim, so far as the rent for 1299 B.S. was concerned, holding it barred by limitation. Against this decision the defendant appealed, and the plaintiffs preferred a cross-appeal to the High Court.

Babu Srinath Dass (with him Babu Brojo Lall Chuckerbutty) for the Appellant.

Babu Saroda Churn Mittra (with him Babu Shiva Prosanna Bhattacharjee) for the Respondents.

[537] The judgment of the High Court (Banerjee and Stevens, JJ.) was as follows :—

This appeal arises out of a suit brought by the plaintiff-respondents, who are *putnidars* of a certain share in a *zemindari* to recover arrears of rent due from the defendants in respect of *durputni* held by them under the plaintiffs.

The defence, so far as it is necessary to be considered for the purposes of the present appeal, was to the effect that, as neither the plaintiffs nor their predecessor, their mother, Nistarini Dasi, had complied with the requirements of section 15 of the Bengal Tenancy Act, they were debarred by section 16 of that Act from maintaining this suit.

The first Court gave effect to the defendant's objection and dismissed the suit. On appeal by the plaintiffs the Lower Appellate Court has given them a decree in respect of a part of their claim, namely, that portion of it which relates to the rent that fell due during the lifetime of the plaintiffs' mother, except the rent for 1299, which was held to be barred by limitation. Against this decree the defendants have appealed, and the plaintiffs have preferred a cross-appeal.

The contention of the defendant in his appeal is that the Lower Appellate Court is wrong in holding that the claim for the rent that fell due during the plaintiffs' mother's lifetime was not barred by section 16 of the Bengal Tenancy Act. In the cross-appeal it is urged that the Lower Appellate Court is wrong in holding that the claim for the rent for 1299 was barred by limitation, and a

further ground is urged on behalf of the plaintiffs, namely, that the decree of the Lower Appellate Court has, without any reason, omitted to allow interest upon the arrears decreed.

In support of the appeal of the defendant it is argued that as the plaintiffs' mother, who succeeded her husband, but who did not comply with the requirements of section 15 of the Bengal Tenancy Act, could not, by reason of the provisions of section 16 of that Act, have maintained a suit for rent if she had brought such a suit in her lifetime, the plaintiffs, who claimed as her representatives, ought to have been held to be similarly barred. We are of opinion [538] that this contention ought not to succeed. Section 16 of the Bengal Tenancy Act is a penal provision, and should be strictly construed. What that section says is that a person becoming entitled to a permanent tenure by succession shall not be entitled to recover by suit (we refer to so much of the section as bears upon the present question), any rent payable to him as the holder of the tenure until the Collector has received the notice and fees referred to in the last foregoing section. Now can it be said that the plaintiffs are claiming the rent that fell due during their mother's time as the holders of the tenure? We think not. They are claiming that rent as the representatives of the holder of the tenure for the time being, or as the representatives of their father, entitled to the rent which accrued due during his widow's lifetime, but which was not recovered by her, and which, therefore, became part of their father's estate. But upon neither view can it be said strictly that they are entitled to this rent as the holders of the tenure. If that is so, section 16 of the Bengal Tenancy Act cannot bar their claim so far as that portion of it is concerned. The view we take is in accordance with that taken by this Court in the case of *Noyendra Nath Bose v. Satadul Bashini Bose*, (1899) 3 C. W. N., 294, upon the construction of a somewhat similar provision of the law, namely, section 78 of Act VII of 1876, Bengal Council. It is true that the name of the predecessor in interest in that case had been registered under Act VII of 1876, whereas in this case the name of the lady, Nistarini Dasi, was not registered, but that does not make any difference so far as the determination of the present question goes. Moreover upon the view that the plaintiffs are entitled to the rent that accrued due during their mother's lifetime not merely as their mother's heirs, but as reversionary heirs entitled to whatever became an increment to the estate of their father, the fact of the non-registration of Nistarini's name or of non-compliance by her with the requirements of section 15 of the Bengal Tenancy Act would be wholly immaterial.

It was argued that it would be anomalous to hold that although, if Nistarini Dasi had brought a suit for this rent she could not have maintained it, the plaintiffs may never-[539]theless maintain this suit notwithstanding that neither her name nor the names of the plaintiffs have been registered. Perhaps that may appear somewhat anomalous, but the opposite view would result in a greater anomaly and indeed in hardship and injustice; for it may so happen that a son succeeding his father may not comply with the requirements of section 15 of the Bengal Tenancy Act immediately, but may expect to do so at any time within three years, that is before his claim for rent is barred, and then he may die suddenly; and then if section 16 is to apply to the claim of his heir or successor for rent, which accrued due during his lifetime, that claim would be irrecoverably lost, as his heir or successor could not possibly satisfy the requirements of section 15 so far as he was concerned.

We are therefore of opinion that the Lower Appellate Court was right in decreeing the portion of the claim that relates to the rent which fell due during the plaintiffs' mother's lifetime.

Turning now to the cross appeal, we find that the first ground, namely, that relating to limitation is based upon a misconception of facts. This is conceded by the learned vakil for the respondents.

As to the second ground, namely, that the decree has without reason omitted to award interest, we think that the respondent's contention is sound.

The decree of the Lower Appellate Court will, therefore, be modified by allowing interest at the rate of twelve per cent. per annum upon the amount decreed up to the date of the decree, and interest at the rate of six per cent. per annum from the date of the decree until realization.

The appeal is dismissed, and the cross-appeal decreed in part with costs.

Appeal dismissed and cross-appeal decreed in part.

S. C. G.

[540] *The 19th and 20th December, 1899.*

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE WILKINS.

Fakera Pasban.....Defendant No. 4

versus

Bibi Azimunnissa.....Plaintiff.*

Limitation—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3—Limitation Act (XV of 1877), s. 22—Civil Procedure Code (XIV of 1882), s. 32—

Parties—Adding parties to suit—Adding party by a Court of its own motion.

No question of limitation arises and s. 22 of the Limitation Act does not apply, when the Court of its own motion acts under s. 32 † of the Code of Civil Procedure, and orders that the name of any person be added as a defendant.

Grish Chunder Sasmal v. Dwark Nath Linda, (1897) I. L. R., 24 Cal., 640, and *The Oriental Bank Corporation v. Charriol*, (1886) I.L.R., 12 Cal., 642, followed. *Khadir Moideen v. Rama Naik*, (1892) I. L. R., 17 Mad., 12, referred to, and *Imam-ud-din v. Liladhar*, (1892) I. L. R., 14 All., 524, differed from.

* Appeal from Appellate decree No. 1950 of 1898, against the decree of W. H. Vincent, Esq., District Judge of Bhagulpur, dated the 4th of July 1898, affirming the decree of Babu Rajendra Nath Dutt, Munsif of Madhepura, dated the 21st of December 1897.

† [Sec. 32 :—The Court may, on or before the first hearing, upon the application of either party, and on such terms as the Court thinks just, order that the name of any party, whether as plaintiff or as defendant, improperly joined, be struck out ;

and the Court may at any time, either upon or without such application, and on such terms as the Court thinks just, order that any plaintiff be made a defendant or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary

THE plaintiff, Bibi Azimunnissa, instituted a suit on the 5th October 1896, against Babu Raja Ram and Babu Bulak Ram, the defendants 1st party, her landlords, and one Jhonty Dass, the defendant 2nd party, a tenant of the defendants 1st party, for the recovery of possession of a plot of land, on the allegation that the disputed plot was comprised in an ancestral holding which she inherited and held, until she was dispossessed therefrom by the said defendants on the 15th April 1895.

The defendants 1st party put in a written statement in which they alleged that the plaintiff's husband remained in possession of the disputed land, under an *ijara* lease, till 1298 F. S. ; but that since 1299 F. S., they took *khas* possession of the same, and that in 1300 F. S., the said land was settled by them with one Fakera Pasban, who was in possession thereof. They further alleged that the defendant 2nd party was acting in collusion with the plaintiff.

[541] Fakera Pasban was thereupon added as a defendant by the Court of its own motion by an order, dated the 8th September 1897. He put in a written statement supporting the defendants 1st party, but in his deposition he made some contradictory statements as to when and how he came into possession of the disputed land.

On the merits, the Munsif found in favour of the plaintiff. As regards the plea of limitation raised by the defendants, he found that the plaintiff having been dispossessed after Choyt 1302 F. S., and the suit having been brought within two years from the date of dispossession, it was not barred by limitation. It was, however, contended on behalf of the defendant Fakera Pasban that as he had admittedly been made a defendant in the suit more than two years after the date of dispossession alleged in the plaint, the suit *as against him* was barred by limitation. The Munsif overruled this plea on two grounds : (1) That it was not the plaintiff's case that Fakera Pasban had dispossessed her, and further that the Court found that Fakera Pasban had not really been in possession of the disputed land ; (2) and that Fakera having been made a party to the suit, not at the instance of the plaintiff, but rather against her protest, the question of limitation did not arise. *Grish Chunder Sasmal v. Dwarka Nath Bindu*, (1897) I. L. R., 24 Cal., 640. The Munsif, accordingly, decreed the suit.

The landlord-defendants and Fakera Pasban then appealed to the District Judge, and urged that the suit was barred as against Fakera Pasban, and consequently must fail against all the defendants. The District Judge, agreeing with the Munsif, dismissed the appeal, adding, that " as it is found that Fakera is really not a tenant at all, but merely a poon of the zemindar who is put forward to fight a case on behalf of his master, the two years' limitation rule does not apply."

in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

Consent of person added as plaintiff or next friend.

No person shall be added as a plaintiff, or as the next friend of a plaintiff, without his own consent thereto.

Parties to suits instituted or defended under sec. 30.

Any person on whose behalf a suit is instituted or defended under section 30 may apply to the Court to be made a party to such suit.

Defendants added to be served.

All parties whose names are so added as defendants shall be served with a summons in manner hereinafter mentioned, and (subject to the provisions of the Indian Limitation Act, 1877,

Section 22) the proceedings as against them shall be deemed to have begun only on the service of such summons.

The Court may give the conduct of the suit to such plain-

Conduct of suit.

tiff as it deems proper.]

Fakera Pasban appealed to the High Court. The appeal came on for hearing on the 19th December 1899.

Babu *Jogesh Chundra Roy*, for the Appellant, contended that the suit was barred against the defendant-appellant by Article 3, [542] Schedule III, of the Bengal Tenancy Act. As against that defendant, it must be taken to have been instituted when he was made a party. See section 22 of the Limitation Act. The case of *Grish Chunder Sasmal v. Dwarka Nath Dinda*, (1897) I.L.R., 24 Cal., 640, was not correctly decided, as it proceeded upon a mis-conception of the decision in *The Oriental Bank Corporation v. Charriot*, (1886) I.L.R., 12 Cal., 642, which did not decide the question raised. There is no decision in the latter case as to the applicability of section 22 of the Limitation Act; it only decided that the Court could, of its own motion, add any person as a party to the suit, but it did not decide, nor was it necessary to decide, the effect of section 22 on the question of limitation. The question of limitation could not arise in that case. The case of *Imam-ud-din v. Liladhar*, (1892) I. L. R., 14 All., 524, is in my favour.

Moulavi *Mahomed Mustafa Khan*, for the Respondent, contended that Article 3, Schedule III, of the Bengal Tenancy Act, did not apply, as it had been found that the appellant was not a tenant at all, and hence there could not have been any dispossession by him. Besides the party having been added by the Court, no question of limitation could arise. *Grish Chunder Sasmal v. Dwarka Nath Dinda*, (1897) I. L. R., 24 Cal., 640. [RAMPINI, J.—There is a Madras case, *Khadir Moideen v. Rama Naik*, (1892) I. L. R., 17 Mad., 12, which supports the Calcutta ruling]

Babu *Jogesh Chandra Roy*, in reply, contended that *Khadir Moideen v. Rama Naik*, (1892) I. L. R., 17 Mad., 12, was distinguishable from the present case. There the party had already been on the record.

DECEMBER 20TH. The judgment of the High Court (Rampini and Wilkins, JJ.) was as follows :—

This is an appeal from the decision of the District Judge of Bhagulpore, dated the 4th July 1898, in which he affirms the decision of the Munsif of Madhepura giving the plaintiff a decree [543] for possession of certain lands. The plaintiff sues as occupancy *ryot* to recover possession of the land, of which she says she has been dispossessed by the defendants Nos. 1 to 3 who are her landlords. The suit was brought as against these landlords within a period of two years, but a 4th defendant, namely, Fakera Pasban, was added as a party-defendant in the suit by the Court of its own motion, and this party was not added until the 8th of September 1897, when more than two years had expired from the date of the alleged dispossession.

The Courts below have held that the suit is not barred by limitation as against this defendant Fakera Pasban, who was added as a party, as he was alleged to be a tenant of the land. The Lower Appellate Court, however, has found that he was not a tenant of the land but was merely fighting the case on behalf of the defendants Nos. 1 to 3 and in collusion with them. The learned pleader for this defendant Fakera Pasban, who is the appellant in this case, contends that this view of the District Judge is wrong, and that the suit is barred by limitation as against him for two reasons. *First* that the learned Judge was wrong in relying upon the case of *Grish Chunder Sasmal v. Dwarka Nath Dinda*, (1897) I. L. R., 24 Cal., 640, on the authority of which he has held that no question of limitation arises in this case so far as the defendant No. 4 Fakera Pasban is concerned; and *secondly*, he urges that the period of limitation applicable to this defendant is two years as laid down in Article 3 of

Schedule III of the Bengal Tenancy Act. We, however, are unable to admit the correctness of either of these pleas. In the first place we think it has been laid down clearly in the case of *Grish Chunder Sasmal v. Dwarka Nath Dinda*, (1897) I. L. R., 24 Cal., 640, referred to above, that "where the Court acting on information brought to its notice adds a party, who it thinks is necessary for the disposal of the suit, no question of limitation arises."

In coming to this decision the learned Judges have followed the case of *The Oriental Bank Corporation v. Charriol*, (1886) I. L. R., 12 Cal., 642. Furthermore we are fortified in our view that these decisions are correct [544] by the case of *Khadir Moideen v. Rama Naik*, (1892) I. L. R., 17 Mad., 12. The pleader for the appellant, however, cites the case of *Imam-ud-din v. Liladhar*, (1892) I. L. R., 14 All., 524, and he says that the learned Judges, who decided the case of *Grish Chunder Sasmal v. Dwarka Nath Dinda*, (1897) I. L. R., 24 Cal., 640, have gone beyond the ruling laid down in the case of *The Oriental Bank Corporation v. Charriol*, (1886) I. L. R., 12 Cal., 642, inasmuch as that decision was never intended to prescribe that when a Court adds a person as a necessary party to a suit under section 32 of the Code of Civil Procedure, it is free from the restrictions imposed upon it by section 22 of the Limitation Act.

Now, we have considered the case of *The Oriental Bank Corporation v. Charriol*, (1886) I. L. R., 12 Cal., 642, and in our opinion the Judges, who decided that case, *did* intend to lay down such a rule, although the provisions of section 22 of the Limitation Act are not expressly referred to in their judgment in that case. But we think that that was their intention from the reasons given at full length in pages 650 to 652 of the report. And we may add that in the case of *Khadir Moideen v. Rama Naik*, (1892) I. L. R., 17 Mad., 12, the provisions of section 22 of the Limitation Act are referred to and it is there laid down [as we think it was intended to be laid down in the case of *The Oriental Bank Corporation v. Charriol*, (1886) I. L. R., 12 Cal., 642], that section 22 of the Limitation Act does not apply, when the Court of its own motion acts under section 32 of the Code of Civil Procedure, and orders that the defendant be made a plaintiff; and there can be no question that this was the intention of the learned Judges, who decided the case of *Grish Chunder Sasmal v. Dwarka Nath Dinda*, (1897) I. L. R., 24 Cal., 640. For these reasons we must follow the two rulings of this Court above cited, and from which we see no reason whatever to dissent, and in these circumstances we must hold that no question of limitation arises in the present case, and that the judgment of the District Judge is correct on the question of limitation.

That being so, the second plea raised by the learned pleader for [545] the appellant falls to the ground, and it is not necessary for us expressly to deal with it. At the same time we may point out that in this case the plaintiff does not ask for any relief as against Fakera Pasban, the defendant No. 4; that she did not sue him at all, and that it was not at her request that Fakera Pasban was made a party to the suit. Fakera Pasban was added by the Court of its own motion, and it was found that he is not in possession, and is not a tenant of the land, and that being so, it does not appear to us that the suit as instituted is barred by two years' rule of limitation provided by article 3 of Schedule III of the Bengal Tenancy Act, as regards the defendant No. 4 Fakera Pasban. However that may be, it is not necessary for us to decide this question, seeing that the appeal fails on the first of the grounds we have mentioned. We, therefore, dismiss the appeal with costs.

M. N. R.

Appeal dismissed.

NOTES.

[This was overruled in (1907) 36 Cal., 519 : 11 C.W.N., 350 : 5 C.L.J., 242. See also (1906) 33 Cal., 613 ; (1903) 32 Cal., 582 ; (1905) P.R., 57 ; (1903) 28 Bom., 11.]

[27 Cal. 546]

The 27th April, 1900.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Ananda Kumar Naskar.....Defendant

versus

Hari Dass Haldar and another.....Plaintiffs.

Bengal Tenancy Act (VIII of 1885) ss. 15, 16, and 26—Whether an heir of an occupancy raiyat can claim recognition by the landlord on the death of his ancestor who was the recorded tenant—Sale of a jama in execution of a decree for rent obtained against one of the heirs, of the last recorded tenant, from whom the landlord chose to accept rent separately and who was not recorded in the landlord's Sheristha—Effect of such a sale.

An heir of an occupancy raiyat can claim recognition by the landlord on the death of his ancestor who was the recorded tenant.

The plaintiffs sued to recover possession of their share of certain rent-paying lands on the allegation that they were entitled to a one-third share of these lands by inheritance from the last recorded tenant, and another one-third share by purchase from one of his heirs ; that the defendants Nos. 2 and 3 were entitled to the remaining one-third share ; that for some years they and the said defendants have been paying rent to the landlord and obtaining separate rent receipts ; that the defendants Nos. 2 and 3 in collusion with the landlord allowed a decree to be passed against them in respect of [546] the entire *jama*, in execution of which the said lands were sold and purchased by defendant No. 1. The defence of defendant No. 1 *inter alia*, was that as the rent suit brought by the landlord was against the person who was the *Sarbarakar* or Manager of the *jama*, therefore by the sale in execution of the decree obtained in that suit the entire *jama* passed.

Held that, as the landlord was bound to recognize the plaintiffs as tenants in the place of the last recorded tenant, and, also as he chose to accept rent from the plaintiffs, and the defendants Nos. 2 and 3 separately, he had no right to ignore the plaintiffs and proceed only against the defendants. The entire *jama* did not pass by the sale and the plaintiffs' right was not affected thereby.

Nitayi Behari Saha Paramanick v. Hari Govinda Saha, (1899) I. L. R., 26 Cal., 677, distinguished.

THIS appeal arose out of an action for recovery of possession of certain lands on establishment of plaintiffs' title thereto. The allegation of the plaintiffs was that one Satrugan Haldar, Chundra Haldar, and Naba Haldar were members of a joint Hindu family, and they held a *jama* which stood in the name of Satrugan Haldar alone in the landlord's *Sheristha* ;

* Appeal from Appellate Decree No. 2035 of 1898, against the decree of Babu Bulloram Mullick, Subordinate Judge of the 24-Pergunnahs, dated the 16th of June 1898, confirming the decree of Babu Mohini Mohun Dutt, Munsif of Diamond Harbour, dated 20th of September 1897.

that, on partition, each of the brothers held a third share of the said *jama*; that upon the death of Chandra Haldar, the plaintiffs, his sons, succeeded to his one-third share, and they subsequently purchased from Trailucko, the son of Satrugan, his one-third share; that thus having acquired two-thirds share of the said *jama* they were in possession on payment of rent to the landlord for upwards of twelve years; that the defendants Nos. 2 and 3 were in possession of the remaining one-third share of the *jama* except the shares of homestead and tank by purchase from Bhoyaram, son of Naba Haldar; that the said defendants, not being on good terms with the plaintiffs, in collusion with the agent of the landlord allowed a rent decree to be passed against them in respect of the entire *jama* and in execution of the said decree, the *jama* was sold fraudulently, and was purchased by the defendant No. 1; that on the defendant No. 1 taking delivery of possession, the plaintiffs applied under section 335 of the Civil Procedure Code for recovery of possession, but their application was rejected, and hence this suit was brought by them. The defence mainly was that the suit was barred by limitation; that [547] it was bad for non-joinder of parties; that Srinath Haldar, defendant No. 2, was the *Sarbarakar* of the *jama*, that there was no *jama* which stood in the name of Satrugan Haldar; that the rent decree obtained by the landlord against defendant No. 2 was not a fraudulent one, and by the sale, in execution of which the defendant No. 1 purchased, the entire *jama* passed. The Court of First Instance decreed the suit of the plaintiffs, holding that by the execution sale the plaintiffs' rights were not affected. On appeal the Subordinate Judge confirmed the decision of the First Court. Against this decision the defendant No. 1 appealed to the High Court.

Dr. Ashutosh Mookerjee for the Appellant.—The Court below was wrong in holding that the plaintiff's rights were not affected by the execution sale. The landlord was not bound to recognize the plaintiffs as tenants of the *jama*; they being the heirs of the last recorded tenant, and purchasers also of a certain share of the *jama* from one of the heirs, were bound to register their names in the *seristha* of the landlord on the death of the recorded tenant; they having failed to do so the landlord chose to bring the suit for arrears of rent against defendant No. 2, who was the *Sarbarakar* of the *jama*, and obtained a decree. In execution of this decree the *jama* was sold and was purchased by the defendant No. 1. The whole tenure passed by this sale, and not merely the right, title and interest of the judgment-debtor. See the case of *Nitayi Behari Saha Paramanick v. Hari Govinda Saha*, (1899) I.L.R., 26 Cal., 677. The *jama* being an occupancy holding, neither the heir of the last recorded tenant nor the transferee from an occupancy raiyat can compel the landlord to register his name, and to recognize him as a tenant. See *Ambika Proshad v. Chowdhry Keshri Saha*, (1897) I. L. R., 24 Cal., 642, *Kuldip Singh v. Gillanders Arbuthnot & Co.*, (1899) I. L. R., 26 Cal., 615.

Babu Nil Madhob Bose (with him Babu Shib Chundra Palit) for the Respondent, was not called upon.

The judgment of the High Court (Banerjee and Stevens, JJ.) was as follows:—

[548] Banerjee, J.—This appeal arises out of a suit brought by plaintiffs-respondents to recover possession of a two-thirds share of certain rent-paying lands on the allegation that the plaintiffs were entitled to a one-third share by inheritance from the last recorded tenant, and to another one-third share by purchase from one of his heirs; that the defendants Nos. 2 and 3 were entitled to the remaining one-third share; that the plaintiffs and the defendants Nos. 2 and 3 had been paying rent to the landlords and obtaining

separate rent receipts for some years; that subsequently, misunderstandings having arisen between the plaintiffs and the defendants Nos. 2 and 3, these latter colluded with the landlords, and caused a rent suit in respect of the entire *jama* to be brought against them and allowed a decree to pass, in execution of which the lands were sold and purchased by the defendant No. 1.

The defendant No. 1 denied the plaintiffs' right, and contended that the rent suit was brought by the landlords against the person who was the *Sar-barakar*, or manager, of the *jama*, and in execution of the decree obtained in that suit, the lands were sold and purchased in good faith by the defendant No. 1. The Courts below have held that the execution sale did not affect the rights of the plaintiffs, and they have accordingly given the plaintiffs a decree. In second appeal it is contended, on behalf of the defendant No. 1, *firstly*, that the suit could not proceed in the absence of the landlords; and *secondly*, that the Courts below were wrong in holding that the sale in execution of the rent decree obtained by the landlords could not pass the whole tenure, but passed merely the right, title, and interest of the judgment-debtor.

As to the first point, we think it sufficient to say that as the plaintiffs seek to recover possession of their share of the lands in dispute upon establishment of their right, and have made the persons in possession of the land, who claimed title to the land as against the plaintiffs, parties to the suit, there could be no objection to the suit proceeding, merely because the landlords, at whose instance the defendant No. 1 made his purchase, had not been added as parties.

In support of the second contention it is argued that the [549] landlords were not bound to recognize the plaintiffs as the persons entitled to the *jama*, because it is an occupancy holding, and in respect of an occupancy holding, neither the heir of the last tenant, nor the transferee from an occupancy raiyat, can compel the landlord to recognise him and register his name; and the cases of *Ambika Pershad v. Chowdhry Keshri Sahai*, (1897) I. L. R., 24 Cal., 642, and *Kuldip Singh v. Gillanders Arbuthnot & Co.*, (1899) I. L. R., 26 Cal., 615, are relied upon.

We are of opinion that this contention is not sound. In the first place, the argument assumes that the *jama* is an occupancy holding, and not a tenure, as it has been described in the sale certificate, which is the document upon which the defendant No. 1 must rely. If it is a tenure, the learned vakil for the appellant very properly concedes that an heir as well as a transferee, even though of a part, would be entitled to compel the landlord to recognize him under sections 15 and 17 of the Bengal Tenancy Act.

We are of opinion that no objection having been raised by the defence as to the plaintiffs not being entitled to claim any recognition by reason of the *jama* being an occupancy holding, and the defendant's own title deeds showing that it is a tenure and not an occupancy holding, the question sought to be raised before us does not arise. But even if it could be said that the *jama* was an occupancy holding, we do not think that the contention is correct so far as it relates to the right of an heir of an occupancy raiyat to claim recognition by the landlord. Such a contention would, in our opinion, be opposed to the provisions of section 26 of the Tenancy Act, by which the right of occupancy is expressly declared to be heritable. And if the plaintiffs, granting that the *jama* was only an occupancy holding, were entitled to claim recognition as heirs of the last recorded tenant, the landlords, in bringing the rent suit in question ignoring them, acted in excess of their right, and the decree obtained

in such a suit and the sale held in execution thereof cannot affect the right of the plaintiffs.

[550] But there is something more in the facts found by the Court below, which would go to show that the decree and the sale in execution thereof cannot be held to have the effect that is sought to be attached to them. It is found that upon the death of the last recorded tenant none of his heirs had his name recorded in the landlord's office; and that they held the land and went on paying the rent, and obtaining separate rent receipts for some years until recently, when for reasons best known to the landlords a rent suit was brought against two of them only who represented a one-third interest of the original recorded tenant. The question is whether after having chosen to accept rent from the plaintiffs and the defendants Nos. 2 and 3, the landlords had a right to ignore the former and proceed only against the latter. We are of opinion that the landlords had no such right.

Some reliance was placed upon the case of *Nitayi Behari Saha Paramanick v. Hari Govinda Saha*, (1899) I. L. R., 26 Cal., 677, as showing that the execution sale in this case ought to be held to have passed the entire tenure; but that case is clearly distinguishable from the present, as there the rent suit was brought against the registered tenant, though he was not the sole heir of the original tenant, and the facts found were that "the position of affairs for many years was for the defendants Nos. 3 and 4 to sue the defendant No. 1 alone for the rent and for defendant No. 1 to realize from the plaintiffs the amount payable by them."

We are of opinion that, upon the facts found, the view taken by the Courts below in this case was right, and the decree appealed from must be confirmed and this appeal dismissed with costs.

S. C. G.

Appeal dismissed.

NOTES.

[If persons who are interested in the tenure at the date of the institution of the suit for rent are not joined as parties defendants, the decree can operate only as a decree for money :— (1911) 13 C.L.J., 613 : 16 C.W.N., 64. See also (1909) 37 Cal., 75.]

[551] ORIGINAL CIVIL.

The 13th and 20th March, 1900.

PRESENT :

MR. JUSTICE AMEER ALI.

Amrita Lal Mitter

versus

Manick Lal Mullick and others.*

*Hindu Law—Widow's right to a share in lieu of maintenance on a partition—
Right of a purchaser from one of the sons.*

A Hindu mother is entitled under the law to be maintained out of the joint family property, and if anything is done affecting that right, as for instance by the sale of any particular share by any of her sons, her right to a share comes into existence.

* Original Civil Suit No. 799 of 1899.

A purchaser from one of the sons has the same rights and takes it subject to the same liabilities as those of the person from whom he purchased.

Jogendra Chunder Ghose v. Fulkumari Dassi (ante p. 77) followed.

ONE Chooni Lal Mullick died in the year 1892, leaving four sons Manick Lal, Gopessur, Johur Lal and Amrita Lal and a widow Nitomoni Dassee. The only property left by him was the house and premises No. 3/2 Gopal Chunder's Lane. The plaintiff is the purchaser of the share of Johur Lal and the Ghose defendants are the purchasers of the share of Gopessur. The plaintiff brought this suit for a partition of the said house and premises, and contended that he was entitled to a one-fourth share, though the widow of Chooni Lal was alive. The same contention was raised by the Ghose defendants. Nitomoni Dassi, the widow of Chooni Lal Mullick, was made a party defendant.

MARCH 13th : Mr. B. C. Mitter for the plaintiff.—A mother's right to a share equal to that of each of her sons arises from the date of the partition suit, she has no pre-existing vested rights, it is given to her in lieu of maintenance, *Sorolah Dassee v. Bhoobun Mohun Neoghy*, (1886) I.L.R., 15 Cal., 292, see p. 312. Before a partition is effected the right of the mother is that of maintenance, which is not enforceable against purchasers for value, unless such right has been developed into a specific charge by a decree of the Court, *Bhagabati Dasi v. [552] Kanai Lal Mitter*, (1872) 8 B.L. R., 225; *Jugger Nath Samunt v. Odhuranee Narain Koomaree*, (1873) 20 W.R., 126; *Adhiranee Narain Koomaree v. Shona Malee*, (1873) I. L. R., 1 Cal., 365. Before the mother can succeed she must prove that the purchaser had notice that his vendor was acting in fraud of her rights. *Lakshman Ramchandra Joshi v. Sattyabhama Bai*, (1877) I. L. R., 2 Bom., 494. It may be said what is the remedy of the mother? Her right attaches to the purchase-money, which takes the place of the property sold. Mayne's Hindu Law, 5th Ed., p. 515. The case *Jogendra Chunder Ghose v. Fulkumari Dassi* (ante p. 77) will be cited against me, but that case is distinguishable. There the property was purchased *pendente lite* and s. 52 of the Transfer of Property Act applied. It was purchased after the partition suit had been instituted, i.e., after the mother's right to a share had sprung up. Moreover, the point decided, is an *obiter dictum*.

Mr. B. Chakravarti on behalf of the Ghose defendants supported the argument of Mr. Mitter.

Mr. H. D. Bose on behalf of Nitomoni Dassee, widow of Chooni Lal, defendant. — The property in dispute is the only joint family property, and as soon as it ceases to exist as joint property the right of the mother to a share in lieu of maintenance arises. *Barahi Debi v. Debkamuni Debi*, (1892) I.L.R., 20 Cal., 682. The case of *Jogendra Chunder Ghose v. Fulkumari Dassi* (ante p. 77) fully supports my contention, and the point decided there is not an *obiter dictum*.

Cur. Adv. Vult.

MARCH 20th : Ameer Ali, J.—This is a suit for partition. The plaintiff is a purchaser from one of the sons of Chooni Lal Mullick, who died in 1892, leaving four sons, Manick Lal Mullick, Gopessur Mullick, Johur Lal Mullick and Amrita Lal Mullick and a widow Sreemutty Nitomoni Dassee. He left a house No. 3/2, Gopal Chunder's Lane, the partition of which is sought in this suit, and it appears on the evidence that this is the only property he left. The share of Johur Lal Mullick has come to the [553] plaintiff Amrita Lal Mitter by virtue of a sale under a mortgage decree. The sale certificate has been put in. The share of Gopessur has come into the hands of the Ghose defendants under a sale certificate, which also has been put in. The plaintiff seeks to have a partition of the property, and his contention

is that he is entitled to a one-fourth share, in spite of the fact that the widow of Chooni Lall Mulick is alive, and is entitled under the law to a share of the ancestral property upon a partition of the same among the sons of the original holders. The question has been argued with considerable ingenuity on behalf of the plaintiff and the Ghose defendants, and it has been suggested that the right of a mother to obtain a share upon partition comes into existence when the partition takes place among the sons ; when a share is conveyed by the son to a purchaser the right of the mother does not follow that share. That, in substance, I understand to be the argument. But it is further contended that only in case of fraud on the part of a son, of which the purchaser has cognizance, any question relating to the share of the mother can arise. The effect of acceding to this contention would be to reduce the provision of the law, by which the mother becomes entitled to a share, to a nullity. Two cases were cited :—*Jugger Nath Samunt v. Odhiranee Narain Koomaree*, (1873) 20 W. R., 126, *Sorolah Dossee v. Bhootun Mohun Neoghy*, (1886) I. L. R., 15 Cal., 292, in support of the contention. The passages to which I have been referred in those judgments, and which I am afraid have been somewhat strained to give colour to the argument must, in my opinion, be read with the facts with which the learned Judges were there dealing.

The case really in point is that of *Jogenādra Chunder Ghose v. Fulkumari Dassi*, ante p. 77. Both Mr. B. C. Mitter and Mr. Chakravarti tried to argue that the views expressed by BANERJEE, J., were mere *obiter dicta*. In my opinion, the dictum of a judge of his learning and intimate knowledge of Hindu law would have considerable weight even if it went beyond the requirements of the case itself, but I think the views expressed by the Chief Justice and BANERJEE, J., are decisive on the point [554] and not merely *obiter dicta*. The learned Chief Justice points out that there were two points in the case :—

- (1) Whether or not the purchaser from a Hindu son stands in the same position as the son himself.
- (2) Whether in that particular case a transfer having been made after a partition suit, the purchaser was not bound.

The Chief Justice, as well as BANERJEE, J., held on both these points against the very contention in this case. They first dealt with the general principle and then with the facts. The second point does not arise in the case before me. I have to deal with the first point only. I may say I have given the case my best consideration. I can only express my entire concurrence with the view of the law taken in *Jogenādra Chunder Ghose v. Fulkumari Dassi*. To put it shortly in the language used by the learned Chief Justice, the position of a purchaser from a son is exactly that of a son himself. He has the same rights and takes it subject to the same liabilities as those of the person from whom he purchased. And as a mother is entitled under the law to be maintained out of the joint family property, if anything is done affecting that right, for instance by the sale of any particular share by any of her sons, her right comes into existence.

That being my view, I hold the plaintiff is entitled to a one-fifth share as purchaser from Johur Lall Mulick and the Ghose defendants to a one-fifth as purchasers of Gopessur's share, Manick and Amrito to a one-fifth each and Nitomoni to the remaining one-fifth for her life ; after her death the sons and purchasers would be entitled to her share. I make a declaration to that effect and the usual decree for partition.

I do not think I will make any order as to costs.

Attorney for the Plaintiff : Babu Amar Nath Ghose.

Attorney for the Ghose Defendants: Mr. A. C. Bose.

Attorney for the Mother: Babu Charoo Chunder Bose.

[555] *The 27th & 28th February, & the 2nd, 5th, 6th, 7th & 23rd March, 1900.*

PRESENT:

MR. JUSTICE AMBER ALI.

Mokhoda Dassee

versus

Nundo Lall Haldar..... ..and others.*

Jurisdiction—Cause of action—Suit for maintenance—Letters Patent, 1855, clause 12—Hindu Law—Right of maintenance of a sonless widowed daughter in indigent circumstances out of properties inherited by the father's heirs.

The plaintiff's father left various properties partly within and partly outside Calcutta. The plaintiff instituted this suit, as an indigent sonless widowed daughter, against the defendants for the recovery of her maintenance out of the estate inherited by them from her father, and prayed that her maintenance might be declared a charge upon the property situated within the limits of Calcutta.

Some of the defendants lived within and some outside Calcutta. Leave was obtained under clause 12 of the Letters Patent. It was held that under the abovementioned circumstances the High Court had jurisdiction to try the action.

A sonless widowed daughter in indigent circumstances is not entitled to separate maintenance out of the estate of her father in the hands of his heirs. The right would depend upon the fact, whether the widowed sonless daughter was at the time of her father's death maintained by him as a dependant member of his family with others whom he was legally or morally bound to maintain. The position of a sonless widowed daughter is not the same as that of a disqualified owner or disqualified heir.

Bai Mangal v. Bai Rukhini, (1898) I. L. R., 23 Bom., 291, referred to.

ONE Sambhu Chunder Haldar died many years ago, leaving three sons, named Jatadhari Haldar, Radhanath Haldar, and Dharmo Das Haldar. Thereafter, and in 1852, Dharmo Das Haldar died intestate leaving his widow Bidhumukhi Dassee, and the plaintiff, an unmarried daughter, him surviving. A few years after her father's death the plaintiff was given away in marriage to Digambur Dutt by her paternal uncles. Digambur Dutt in or about the year 1879 predeceased his father Dino Nath Dutt (who was in fairly good circumstances during his life time) leaving him surviving the plaintiff, a sonless widow and four daughters, some of whom were then married, others unmarried. In 1868 Radhanath Haldar filed a suit in the Calcutta High Court for the [556] partition of the properties left by Sambhu Chunder Haldar. In the partition effected the said Bidhumukhi Dassee got the following property as representing her husband—(a) 70-1 Clive Street in Calcutta; (b) Land at

* Original Civil Suit No. 600 of 1897.

Sulkea and Liloah outside Calcutta. Bidhumukhi Dassee died in 1891, leaving Mokhoda Dassee, the plaintiff, as her daughter. The plaintiff was then a sonless widow. After the death of Bidhumukhi Dassee, Radhanath Haldar brought a suit against the plaintiff, in which a decree was passed in his favour declaring him to be entitled to the property left by Dharma Das Haldar and directing possession to be given to him thereof. In the decree that was passed leave was reserved to the plaintiff to bring a suit for her maintenance out of the estate of her father. Evidence was given in this case which went to shew that Mokhoda Dassee since her marriage, and before the death of her husband, used generally to live with her husband at her father-in-law's house: and occasionally she used to live with her mother, the said Bidhumukhi Dassee. But after her husband's death she used to live permanently with her mother, the said Bidhumukhi Dassee. There was also evidence given to show that at the time of the marriage of the plaintiff her father-in-law was in fairly good circumstances. Radhanath Haldar died in 1895, leaving him surviving Nundo Lall Haldar, Shoshi Bhusan Haldar, Hera Lall Haldar, Nobo Kumar Haldar, Hriday Ram Haldar, his sons, and a grandson named Jotindra Mohun Haldar by a predeceased son Prasad Das Haldar. Mokhoda Dassee, the plaintiff, was in indigent circumstances, and she brought this suit against the sons and the grandson of Radhanath Haldar, the grandson being an infant under the age of eighteen years, for recovery of maintenance from them out of the estate inherited by them from their father. The defendants and their ancestors had a family dwelling-house in the district of Hooghly, and some of the defendants at the time of the suit lived in the family dwelling-house and some of them at Calcutta. Portions of the property inherited by the defendants were situated in Calcutta, and portions outside the limits of Calcutta. The plaintiff prayed in her plaint that her maintenance should be charged on the property situated within the limits of Calcutta, and at the time of the institution of the suit obtained leave to institute her suit in this Court. [557] The defendants mainly raised three contentions, *firstly*, that the High Court had no jurisdiction to try the suits; *secondly* that the plaintiff was not in indigent circumstances; and *thirdly* that, even if the plaintiff was in indigent circumstances, the plaintiff according to the Hindu law was not entitled to get any maintenance.

FEB. 27th, 28th; MAR. 2nd, 5th, 6th, 7th, 8th. Mr. Sinha. (Mr. B. C. Mitter with him) for the minor defendant.—This Court has no jurisdiction to try this suit. Cl. 12 of the Letters Patent enables this Court to try a suit (1) if it is a suit for land when the whole or part of it is situate within the local limits of the jurisdiction of this Court, provided that in the latter case leave to institute the suit has been obtained; (2) in any other case if the whole or part of the cause of action arises within such local limits, provided that in the latter case leave to institute the suit has been obtained; and (3) if the defendants reside or carry on business within the local limits of the jurisdiction of this Court.

This suit is not a suit for land. There is no question of title involved. See *Begram v. Moses*, 1 Hyde, 284; *Delhi and London Bank v. Wardie*, (1876) I. L. R., 1 Cal., 249; *Kellie v. Fraser*, (1877) I. L. R., 2 Cal., 445.

No part of the cause of action arose within the local limits of the jurisdiction of this Court. The fact that the property, out of which maintenance is claimed, is within the jurisdiction, is immaterial; nor do all the defendants reside or carry on business within such jurisdiction. Only some of them do, but it has been held in *Hadjee Ismail v. Hadjee Mahomed*, (1874) 13 B. L. R., 91, that the word "defendants" in cl. 12 means *all* the defendants.

Mr. W. C. Bonnerjee (Mr. B. Chakravarti with him) for all defendants except the minor defendant on the same point.—The whole of the plaintiff's cause of action, if any, arose within the jurisdiction of the Court within the local limits of which the family dwelling house of the defendants is situate. Before the [558] plaintiff can get any maintenance she must go and live as a defendant member of the family of the defendants. Her right is not analogous to that of a creditor whom, no doubt, the debtor has to seek out and pay the debt.

Mr. R. Mitra (Mr. B. M. Chatterjee with him) for the plaintiff, on the whole case.—This is a suit for land. The maintenance claimed is sought to be declared a charge on land situate within the local limits of the jurisdiction of this Court. This involves a change in the title; see *Delhi and London Bank v. Wardie*, (1876) I. L. R., 1 Cal., 95. In any event part of the cause of action arose within the jurisdiction of this Court. Cause of action means the whole bundle of facts which have to be proved before the plaintiff can succeed. Here, before the plaintiff can succeed, she must prove amongst others the following facts:—(1) That her father left property; (2) that that property has been inherited by, and is in the possession of, the defendants; and (3) that portion of that property is situate within the jurisdiction of this Court. Therefore part of the cause of action arises within the jurisdiction of this Court, see *Radha Bibee v. Mucksoodun*, (1874) 21 W. R., 204.

[AMEER ALI, J.—I will deal with the question of jurisdiction after hearing the whole case.]

An indigent sonless widowed daughter is entitled to maintenance from her father's heirs. Mayne's Hindu Law, s. 408, 2 Mac. Hindu Law, s. 118, and Vyavasta Darpana, 1867 Ed. p. 376. The plaintiff is a disqualified heir of her father and as such is entitled to maintenance. Her disqualification is the loss of her son at the time that the succession opened out.

There was a moral liability to maintain the plaintiff on the part of the father, and in his heirs that moral liability has developed into a legal liability, see *Kamini Dassee v. Chandra Pote Mundle*, (1889) I. L. R., 17 Cal., 373.

Mr. W. C. Bonnerjee.—The passage in Mayne's Hindu Law, s. 408, is based on the case mentioned in 2 Mac. Hindu Law, p. 118. The statement of the law there made is not correct. [559] No authority has been cited by the learned author and there is none in the Hindu Law. The argument that the plaintiff is a disqualified heir, and is therefore entitled to maintenance, is not sound. "Disqualified heir" has acquired a special meaning in Hindu Law. Its category is fixed. Women can inherit in Bengal only under special texts, see *Guru Gobind Saha's* case, (1870) 5 B. L. R., 15. The plaintiff was never the heir of her father, and there never was any moral obligation on his part to maintain her after her marriage. A daughter after her marriage ceases to belong to her father's family and is reborn as it were in the husband's family. See *West and Bühler's Hindu Law*, p. 129, *Janki v. Nand Ram*, (1888) I.L.R., 11 All., 194, 209, at page 209. There is no text in her favour in the *Dayabhaga* or in *Manu*.

Mr. B. C. Mitter.—I support the arguments of Mr. Bonnerjee. In construing texts of Hindu Law one has to bear in mind that many of the texts are admonitory and not mandatory. The texts enjoining the head of the family to maintain the dependent members of the family are admonitory in their nature. See *Khetromoni v. Kasinath*, (1868) 2 B.L.R., A.C. 15. The only persons who are entitled to maintenance as of right are (1) the aged parents; (2) chaste wife; and (3) infant child.

Mr. R. Mittra in reply. After the argument of the case was over, Mr. Sinha drew the attention of the Court to *Bai Mangal v. Bai Rukmini*, (1898) I. L. R., 23 Bom., 291.

Cur. Adv. Vult.

MARCH 23rd : **Ameer Ali, J.**—The plaintiff is the daughter of one Dharmo Dass, who died in the year 1852 or 1853. Besides the plaintiff, who was an infant at the time of his death, he left him surviving a widow named Bidhumukhi, and two brothers, Radhanath and Jatadhari. Subsequently upon a partition one-third of the joint estate was allotted to Bidhumukhi as the heiress of her husband. Jatadhari died, it appears, before Bidhumukhi. Bidhumukhi died on the 20th of October 1891, and under a decree in a suit brought by Radhanath Haldar against [560] the plaintiff he obtained possession of Dharmo Das' share which had devolved upon Bidhumukhi. The decree contained a declaration that it was without prejudice to any rights the plaintiff had to maintenance. The plaintiff Mokhoda was married to a man named Digambur Dutt, son of Dino Nath Dutt. Digambur died in his father's lifetime. The plaintiff had by him several daughters, and a son Jogendra. Unfortunately for her that son died during the life time of her mother, and the result was, as I have pointed out, that upon the death of Bidhumukhi the property was held to have passed to the brother of Dharmo Das and not to her, she being a sonless widowed daughter. She now brings this suit against the sons and grandsons of Radhanath Haldar, who has died since the decree, for maintenance out of the share which was of Dharmo Das in his lifetime. I should have thought that the people who took the property of Dharmo Das would have the generosity to make some provision for her, but in this country at times there is great liberality and kindness of feeling ; at other times equally great meanness ; and the defendants have taken their stand on the Hindu Law ; and it is by that law that I must decide this case. Whether it is harsh or otherwise it is not for me to determine.

This is the first case of its kind on this side of India. The only direct authority on the question requiring my determination is the case *Bai Mangal v. Bai Rukmini*, (1898) L. R., 23 Bom., 291, decided in the Bombay High Court which is against the plaintiff. Before dealing with the legal rights of the parties, it is necessary I should state some of the facts on which the question of law turns. The plaintiff states she was married by her uncles and that after her marriage she occasionally lived at her husband's place and occasionally in her ancestral house which is at Sulkea. But as her evidence proceeded it appeared that after the partition her mother Bidhdumukhi left Sulkea, and took up her abode at Jorasanko in her brother's house, and it is probable, as the plaintiff states, that, whilst her husband was alive, she lived occasionally with her mother, and it is more than probable that after her husband's death she lived altogether with her mother.

[561] Dino Nath Dutt, her father-in-law, was, upon the evidence, a man in fairly good circumstances, and possessed of some property which has come into the hands of one of his grandsons, Tulsi Das, who gave his testimony in this case. I have no doubt that Mokhoda is in destitute circumstances ; she is living now in a house belonging to her deceased son-in-law Furna Chunder Daw, who has provided by his will that its rent should be paid out of his estate. The evidence regarding her other means shows that she is at present maintaining herself by borrowing. It was attempted by Mr. Bonnerjee to prove that a will was left by Dino Nath Dutt, under which Mokhoda Dasse was to get Rs. 5 a month for her maintenance, in case she resided in the family dwelling-house, but did not choose to mess with the family.

This attempt was made for the purpose of showing that the plaintiff could not be said to be in destitute circumstances. I was of opinion then, and am of that opinion still, that that evidence is irrelevant. The question, which I have to try, is the *present* indigence of the plaintiff, and the fact that she may possibly be entitled to get something monthly under a will, which has never been propounded, is not relevant to the inquiry before me. Another contention raised on behalf of the defendant was that this case is not within the jurisdiction of this Court, but ought to have been instituted in the Mofussil. I held against that contention, and I now proceed to give my reasons.

The plaintiff's cause of action is based on a variety of circumstances; those circumstances constituted the cause of action giving her the right to sue. Her right is founded upon the fact that her father left various properties partly within and partly outside Calcutta, and that inasmuch as he left certain property which came into the hands of the defendants, she, as an indigent sonless widowed daughter, was entitled to maintenance. Her allegations, and the facts upon which she bases her right to sue, bring the suit strictly, as I understand it, within the meaning of clause 12 of the Charter. I hold that the Court has jurisdiction to try the action.

I now proceed to discuss the law bearing on the subject. As I understand the Hindu Law, the right of a woman to succeed to property is founded upon distinct textual authority. The [562] Hindu Law, like most of the older systems, regulates the devolution of property upon the basis of a spiritual benefit likely to be conferred upon the last owner. It excludes from inheritance or rather disqualifies from inheriting males who are not in a position to confer a spiritual benefit upon the deceased proprietor; and with the exception of one school the other schools of law generally exclude females from inheritance on the same ground. Under the Dayabhaga alone women are entitled to succeed under certain circumstances. Putting aside the case of a widow, the law declares that in case the owner dies without leaving any male issue, the unmarried daughter who is most likely to give birth to a son, or a married daughter, whose husband is alive and who is not past child-bearing, or a daughter with sons, should take the property. I am not prepared to agree with the contention of the learned counsel for the plaintiff, who argued this case with great ability, that the position of a sonless widowed daughter is the same as that of a disqualified owner or disqualified heir. As I understand the Hindu Law, the position of a male who has been disqualified from inheriting by any defect inherent in himself is totally different from the disqualification attached to a female, who does not possess the requisite condition for taking the property. Her right is dependent upon the fact that she has male issue or is likely to have male issue, who can perform those spiritual services considered so necessary in the Hindu system.

But then arises the broad question raised by Mr *Mitter*, and raised very moderately and discussed with considerable ingenuity, whether or not a daughter, in indigent circumstances and not able to get any maintenance from the father-in-law's family, is entitled to look for her maintenance from the share that was of her father's. This brings me to the consideration of the question as to the status of a married daughter in a Hindu family. Again, speaking with reserve, so far as I understand the Hindu Law, marriage, ordinarily speaking, detaches the status of a Hindu girl from the parental family, and attaches it, if I may so use the expression, to the family of the husband or of the husband's father, and it will be seen from the text that this view is not unsupported by the law. So long as the daughter is unmarried, there is a distinct obligation on the [563] father to maintain her, an

obligation of a moral character so far as the father is concerned, which ripens into a legal obligation the moment the property comes into the hands of somebody else, and, if the daughter is unmarried, the law declares her entitled to a certain proportion of the estate for her maintenance. Once married, the obligation which rested upon the father or the father's family seems to cease, and that is not peculiar to the Hindu Law. But, as I said before, this is ordinarily the case. There may be cases, however, where a father maintains the daughter and the daughter's husband in his own house, and does so up to the end of his life. Under those circumstances the fact of his marrying her to a person not possessed of means to maintain his wife would cast upon him the moral obligation of maintaining both her and her husband, and in the case of a widowed daughter of maintaining her and her children. If that moral obligation rested upon him in his lifetime, upon his death the moral obligation would, in my opinion, become a legal obligation on the part of those taking his property.

On this point I would quote the words of Mr. Justice BANERJEE in *Kamini Dasse v. Chandra Pote Mondle*, (1889) I. L. R., 17 Cal., 373, which was the case of a daughter-in-law. That learned Judge says: "In each case it will have to be determined whether having regard to the relationship, the means and various other circumstances of the party claiming maintenance, the late proprietor was, according to the principles of Hindu Law and to the usages and practices of the Hindu people, morally bound to maintain that party." These words indicate exactly the various circumstances which have to be taken into consideration in dealing with each particular case. Speaking with respect I am inclined to think the case in the Bombay High Court went too far. I will explain my reasons later on. I propose first to refer shortly to the authorities on which the learned counsel for the plaintiff relied. His contention was principally based upon the words of Mr. Mayne at the end of para. 408, where it is said as follows: "After marriage, her (meaning the daughter's) maintenance is a charge upon her husband's family, but, if they are unable to support her, she must be provided for by the family of her father."

[564] Mr. Justice RANADE in the Bombay High Court has examined Mr. Mayne's statement of the law and he considers that it is not borne out by the authorities referred to by the learned author. I have also examined those authorities and am inclined to agree with Mr. Justice RANADE that the text which speaks of the maintenance of widowed sonless daughters and other people in the same position seems to be of a monetary character rather than laying down any general legal obligation. Unless therefore I can find that *Mokhoda Dasse* continued after her marriage to be a member of her father's family so as to cast upon him a moral obligation of maintaining her, the law, in my opinion, would preclude her from asking for maintenance out of her father's share.

Mr. Justice RANADE, after examining all the authorities, has broadly laid down in page 295 the law as he understood it. "In fact," he says "all the text writers appear to be in agreement on this point, namely, that it is only the unmarried daughters who have a legal claim for maintenance. The married daughters must seek their maintenance from the husband's family. If this provision fails, and the widowed daughter returns to live with her father or brother, there is a moral and social obligation, but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estate in the hands of his heirs." As I said before I am inclined to add a qualification to this enunciation of the law. In my opinion the right would depend upon the fact whether the widowed sonless daughter was at the time of her father's death

maintained by him as a dependent member of his family with others whom he was legally or morally bound to maintain.

I am sorry upon the evidence I cannot come to that conclusion. The husband does not appear to have lived in the house of Mokhoda's father. Digambur was possessed of sufficient means, and there is no reason to suppose that after Mokhoda's marriage, Bidhumukhi, or the paternal relatives of the plaintiff, undertook the obligation of supporting her. She may have come to the house of her mother and resided there for long periods, but that does not, in my opinion, alter the position or obligation of the husband's family. Tulsi Das is willing to maintain her, if she goes back to the family house. Whether [565] that offer was *bona fide* or not is a different question. There is the offer on his part and I cannot lose sight of that fact.

Again, I find no authority laying down that when a widowed sonless daughter is in indigent circumstances, she is entitled to separate maintenance, without any further cause.

For all these reasons, however much I may pity the plaintiff, I feel bound to dismiss her suit. Considering, however, this is the first case of its kind on this side of India and considering also the surrounding circumstances, I think I ought not to give any costs.

NOTES.

[The subject of conversion of moral into legal obligation is very fully discussed in *Ganapati Iyer's Indian Law Quarterly* Vol., I, (1914) pp. 28-42.]

[27 Cal. 565]

CRIMINAL REVISION.

The 2nd March, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Ram Krishna Biswas.....Petitioner

versus

Mohendra Nath Mozumdar.....Opposite Party.*

Daily payment of fine, order of—Illegality of such order.

An order for payment of a daily fine is illegal inasmuch as it is an adjudication in respect of an offence which has not been committed when such order is passed.

Sagar Dutt, (1868) 1 B. L. R., O.Cr., 41; *W. N. Love*, (1872) 18 W. R. Cr., 44, and *Kristodhone Dutt v. Chairman of the Municipal Commissioners of the Suburbs of Calcutta*, (1876) 25 W. R. Cr., 6, referred to.

In this case the petitioner was found guilty under bye-law 18 of the Nuddia District Board of having made certain constructions on road land in that district subsequent to the passing of the bye-law, which constructions were encroachments within its provisions, and was sentenced to pay a fine Rs. 25 and a further fine of Re. 1 for every day during which the offence was continued and the encroachments not removed.

* Criminal Revision No. 64 of 1900, made against the order passed by Mohesh Chunder Sen, Deputy Magistrate of Krishnagore, dated the 29th of December 1899.

[566] Babu Hem Chunder Chakravarti for the Petitioner.

The judgment of the Court (Prinsep and Stanley, JJ.) was as follows :—

The petitioner has been required under a Rule of the District Board of Nuddia having the force of law and on conviction of an offence within its terms to pay a daily fine of one rupee, until the encroachment constituting the offence shall have been removed.

A rule has been granted to consider the order regarding the daily fine. There are several reported cases of this Court on the subject, and it has been held that an order for payment of a daily fine is illegal, inasmuch as it is an adjudication in respect of an offence which had not been committed when such order was passed. We may refer to the case of *Sagar Dutt*, (1868) 1 B. L. R., O. Cr., 41, as well as to the cases of *W. N. Love*, (1872) 18 W. R. Cr., 44, and of *Kristodhone Dutt v. Chairman of the Municipal Commissioners of the Suburbs of Calcutta*, (1876) 25 W. R. Cr., 6, as authorities for this. We do not propose to follow the case of *Sagar Dutt* in which the order was passed under a special Act in regard to the setting aside of an order of fine for an offence actually committed. The order of the daily fine is set aside and the Rule made absolute.

D. S.

Rule made absolute.

NOTES.

[See also (1903) 7 C.W.N., 853 ; (1902) 24 All., 309.]

[27 Cal. 566]

The 6th March, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Abhi Misser and others.....Petitioners

versus

Lachmi Narain.....Opposite Party.*

*Rioting, acquittal of—Conviction of grievous hurt—Constructive guilt—
Abetment—Penal Code (Act XLV of 1860) ss. 114, 525, with 149.*

Where the accused persons have been acquitted of rioting, they cannot be properly convicted of grievous hurt under s. 325 by the application of s. 149 of the Penal Code, where it has not been found that these persons or any of them were members of an unlawful assembly in [567] prosecution of the common object, of which grievous hurt was caused by any other member of the same assembly, or that the offence was such as each member of that assembly knew to be likely to be committed in prosecution of that object.

The mere presence as an abettor of any person would not, under the terms of s. 114 † of the Penal Code, render him liable for the offence committed.—*Empress v. Chatradhari Goala*, (1897) 2 Cal. W.N., 49, explained.

* Criminal Revision Nos. 9 and 130 of 1900, made against the order passed by A. E. Staley, Esq., Sessions Judge of Tirhut, dated the 13th of January 1900.

† [Sec. 114 :—Whenever any person, who, if absent, would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.]

Abettor present when
offence is committed.

In order to bring a person within s. 114 of the Penal Code, it is necessary first to make out the circumstances which constitute abetment, so that if absent, he would have been liable to be punished as an abettor, and then to show that he was also present when the offence was committed.—*Queen v. Mussamut Niruni*, (1867) 7 W.R., Cr., 49, relied on.

IN this case the accused persons were convicted by the Joint-Magistrate of Tirhut under sections 148, 225, and 353 read with section 149 of the Penal Code, and sentenced to one month's rigorous imprisonment under each of those sections. These offences related to the rescue of one Dhanuk from lawful custody of the police, who, in discharge of their duty, arrested him as they alleged for an offence under section 325 of the Penal Code. The accused were also convicted by the said Joint-Magistrate under section 325 of the Penal Code for having together assaulted the Sub-Inspector and caused him grievous hurt; this was in the pursuit after the escape of Dhanuk. On appeal the Sessions Judge of Tirhut acquitted the accused of all the offences except one. The Sessions Judge referred the matter to the High Court in revision for the enhancement of the sentences so remaining, namely, one month's rigorous imprisonment in reference to each of the accused as he considered the sentence inadequate. It was not clear from the terms of the Sessions Judge's judgment, whether he affirmed the conviction of the offence as under section 325, read with section 149 of the Penal Code, or under section 114, of abetment of an offence under section 325 of the Penal Code. The letter of reference with regard to this point was as follows: "I may notice here that the appellants have been convicted under section 325 with section 149 of the Penal Code, the common object of their assembly not being stated in this charge. It was not, however, [568] in order to make the appellants liable together, necessary to charge the appellants under section 149 of the Penal Code. If they all joined together to beat the Sub-Inspector so as to cause him grievous hurt, all would, by the provisions of section 114 of the Penal Code, be guilty of an offence under section 325 of the Penal Code.—*Empress v. Chatradhari Goala*, (1897) 2 Cal. W. N., 49. Shortly afterwards the accused applied to the High Court, and obtained a rule to consider whether the conviction and sentences could be sustained on the findings of the lower Courts. Both matters were considered simultaneously by the High Court.

Mr. P. L. Roy, with him Babu *Dasarathi Sanyal* and Babu *Buldeo Narain Singh*, for the Petitioners.

Babu *Shrish Chunder Chowdhry* for the Crown.

The judgment of the Court (Prinsep and Stanley, JJ.) was as follows:—The five persons concerned in the matter before us were convicted by the Magistrate of various offences under the Penal Code, and sentenced to separate sentences of one month's rigorous imprisonment for each of such offences. On appeal to the Sessions Judge, all these persons have been acquitted of every offence except one. It is not clear from the terms of the Sessions Judge's judgment, whether he affirmed the conviction of this offence as under section 325 read with section 149 of the Penal Code, or under section 114 of abetment of an offence under section 325. But we are inclined to think that he convicted the persons now before us of the last-mentioned offence. The Sessions Judge, after dealing with the appeals in this manner, referred the matter to this Court in revision for enhancement of the sentences so remaining, that is, of rigorous imprisonment for one month in reference to each of these persons, because he considered that these sentences were inadequate, having regard to the acts of which the accused had been found guilty.

Shortly afterwards these persons applied to us and obtained a rule, the object of which was to consider whether the conviction [569] and sentences could be sustained on the findings of the lower Courts.

Both these matters have been considered by us simultaneously. There can be no doubt that the petitioners having been acquitted of rioting, could not be properly convicted of grievous hurt under section 325 by the application of section 149 of the Penal Code, for it was not found that these persons or any one of them were members of an unlawful assembly in prosecution of the common object, of which grievous hurt was caused by any other member of the same assembly, or that the offence was such as each member of that assembly knew to be likely to be committed in prosecution of that object. So far, therefore, if the conviction be considered to be under section 325 and section 149 of the Penal Code, it is bad. But we are inclined to think, from the concluding terms of the Sessions Judge's judgment, that he intended to convict these persons of abetment, as described in section 114 of the Penal Code, of an offence under section 325, for he quotes as authority for this *Empress v. Chatradhari Goala*, (1897) 2 Cal. W. N., 49. The finding of the Sessions Judge is, that "if the accused all joined together to beat the Sub-Inspector, so as to cause him grievous hurt, all would, by the provisions of section 114 of the Penal Code, be guilty of an offence under section 325." We have referred to the learned Judges who passed the judgment reported in *Empress v. Chatradhari Goala*, (1897) 2 Cal. W. N., 49, on which the Sessions Judge relies, and we are authorized by them to state that it was not intended to declare that the mere presence as an abettor of any person would, under the terms of section 114, render him liable for the offence committed, and it has been explained that in that case it was found that the abetment had been committed before the actual presence of the accused at the commission of the offence abetted. This judgment, therefore, is no authority for the finding of the Sessions Judge. We think that the law has been properly expressed in the case of *Queen v. Mussamut Niruni and another*, (1867) 7 W. R. Cr., 49, in which it was held that to bring a prisoner within section 114 of the [570] Penal Code, it is necessary first to make out the circumstances which constitute abetment, so that 'if absent,' he would have been 'liable to be punished as an abettor'; and then to shew that he was also present when the offence was committed. Under such circumstances, we think that the conviction and sentence passed by the Magistrate and confirmed by the Sessions Judge should be set aside, and it follows that the order under section 106 of the Code of Criminal Procedure requiring them to give security to keep the peace becomes null and void.

D. S.

NOTES.

[See also (1901) 8 C.W.N., 519; (1910) 8 M.L.T., 313.]

[27 Cal. 570]

APPELLATE CIVIL.

The 21st and 22nd December, 1899 and 9th, 10th, 11th and 19th January, 1900.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Ismail Khan Mahomed (Plaintiff)... ..Appellant

versus

Jaigun Bibi (Defendant).....Respondent.*

Landlord and tenant—Suit for ejectment—Notice to quit—Tenancy created by a kabuliyat—Six months' notice requiring the tenant to vacate the holding before the expiry of the last day of the year, whether good—Presumption as to a tenancy being a permanent one—Long possession, transfers of the holding and erection of pucca building, whether sufficient for a presumption that the tenancy is a permanent one—Compensation on ejectment—Transfer of Property Act (IV of 1882), ss. 51 and 108, (clause h).

In a tenancy created by a *kabuliyat* with an annual rent reserved, a six months' notice to quit requiring the tenant to vacate the holding within, instead of on the expiry of the last day of a year of the tenancy, is a good notice in law, inasmuch as there was no appreciable interval between the expiry of the notice and the end of a year of the tenancy.

Page v. More (1850) 15 Q. B., 684, distinguished.

Where a tenancy was created by a *kabuliyat*, which on the face of it contained nothing to imply permanency in the tenure created, which contained no words of inheritance, nor anything to show that the land was taken for residential or building purposes; where though the land passed by successive transfers, there was nothing to show that the landlord had knowledge of them or registered the transferee as tenant; where though there were *pucca* [571] buildings on the land, they had not been in existence for such a length of time as would warrant an inference that the lease was one for building purposes; where there was nothing to show that they were erected under circumstances from which acquiescence of the landlord and the creation of an equitable right in the tenant could be inferred; or that they were erected with the knowledge of the landlord; such facts are not sufficient to warrant an inference that the tenancy was, when first created, intended to be permanent, or was subsequently by implied agreement converted into a permanent one.

To resist ejectment by a tenant on the ground that the tenancy is a permanent one, and that the landlord stood by and permitted him (the tenant) to erect *pucca* buildings on the land in the belief that the said tenancy was a permanent one, it is incumbent on the tenant to show that in erecting the buildings he was acting under an honest belief that he had a permanent right in the land, and the landlord knowing that he (the tenant) was acting under such belief stood by and allowed him to go on with the construction of the buildings.

Lala Beniram v. Kundan Lal, (1899) L. R., 26 I. A., 58; *Ramsden v. Dyson*, (1866) L. R., 1 Eng. Irish App., 129; *Jugmohan Das v. Pallonjee*, (1896) I. L. R., 22 Bom., 1; *De Busche v. Alt*, (1877) L. R., 8 Ch. Div., 286; *Kunhamed v. Narayanan Mussa*, (1888) I. L. R., 12 Mad., 320, referred to.

Where it is proved that the tenancy is not a permanent one, that the tenant erected a *pucca* building on the land without the consent of the landlord, the tenant on eviction is not entitled to any compensation for the building from the landlord.

* Appeal from Original Decree No. 163 of 1898, against the decree of Babu Bulloram Mullick, Subordinate Judge of 24-Pergunnahs, dated the 17th of February 1898.

Dattatraya Rayaji Pai v. Shridhar Narayan Pai, (1892) I. L. R., 17 Bom., 786, *Yeshiwada v. Ram Chandra*, (1893) I. L. R., 18 Bom., 66, distinguished.

THIS appeal arose out of an action for ejectment brought by the plaintiff-lessee of a certain *taluk* against the defendant-tenant. The allegation of the plaintiff was that *taluk* Toujee No. 92 in the District of 24-Pergunnahs was *wakf* property; that the Mutwalli of the said estate on the 5th of November 1895, granted to the plaintiff a lease for a term of ten years; that under the term of the lease, he was entitled to sue the defendant for ejectment on giving proper notice—the defendant was a tenant-at-will; that a notice in writing was given to the defendant on the 20th Aswin 1302 [572] B.S. requiring him to quit the land by the last day of Chait 1302 B.S. and that the defendant did not comply with the said notice. The plaintiff also claimed rent up to 1302 B.S. The defence was that the defendant did not know that the *taluk* No. 92 was *wakf* or endowed property; that the defendant was not a tenant-at-will; that the notice was bad in law; that the land in dispute was part of an ancient *mourasi mocorari* holding of Nizam Mistry, and was purchased by Shadhu Serang in 1256 B.S. from one Golam Kadir, who had obtained the greater part of that holding under a compromise decree against Nizam Mistry's widow; that Shadhu Serang built a *pucca* building on the land, whose heirs, having been in possession of the said land and building, on the 16th Aswin 1271 B.S. sold the same to the defendant's ancestors, who having got possession continued to pay rent at the old fixed rate; that on the 28th Aghran 1275 B.S., there was a partition made between this defendant's father and her uncle's heirs; that this defendant got the land and building in suit on partition and built another *pucca* building on the southern side, and had been holding the said land as a permanent tenure on payment of a fixed rent of Rs. 2-11-8; that according to the local custom of *taluk* Khidirpur all homestead lands were alienable *mourasi mocorari tenures*. It appeared from the evidence that the original holding was one of 14 bighas and 5 cottahs which stood in the name of one Nizam Mistry, but there was no evidence to show as to the nature of the tenancy in its inception. Shadhu Serang having purchased a portion of the holding from one Golam Kadir by a conveyance, dated the 17th Pous 1256 B.S., which also did not show the nature of tenancy, obtained a settlement of the land in dispute at a rent of Rs. 2-11 0 from the landlord, and executed a *kabuliat* on the 19th Chait 1257 which was in the following terms:—

"In mouzah Kidderpore, Pergunnah Kismat Magura, within your jurisdiction, out of 4 bighas and 5 cottahs of land of late Nizam Mistry, his widow Bibi Begum having, on the strength of the decree No. 4088 and decree in terms of *solanamah* in appeal No. 34, received 12 cottahs of land. Golam Kadir has obtained the remaining 3 bighas and 13 cottahs of land (the rent of which is Company's Rs. 14-3-1), and he is in possession of it. Out of this, in respect of 14 cottahs of rent-paying land, the fixtures and structures upon which have been purchased by me on measurement of the area thereof, according to the relinquishment given under the signature of my vendor the [573] said Golam Kadir the 17th Pous 1256 B. S., and to the petition made by me under my signature of 31st Sravan of the said year, I take a settlement on a *jama* of Rs. 2-11-8 a year on payment of the rent into your *sarkar* by proper instalments regularly every year, and on keeping the boundaries intact as before I shall continue to hold and enjoy without any anxiety; I shall not be able to raise any objection on the ground of any deficit in the quantity of land on measurement or of any encroachment by the road. To this effect I, of my own free will and on receipt of Pottah, execute this *kabuliat* of the rent-paying land."

It did not appear from the evidence that the buildings, although one of them was built 40 years ago, and the other 25 years ago, were built with the knowledge and consent of the landlord. There was no recognition of the

transfers of the tenure by mutation of the name of the transferees by the landlord except by receipt of rent from them.

The Court below overruled the objection of the defendant as to the notice, but dismissed the suit for ejectment on the ground that the defendant had a permanent right on the land and gave the defendant [*sic*] a decree for arrears of rent only. From this decision the plaintiff appealed to the High Court.

DEC. 21st, 22nd & JAN. 9th, 10th, 11th.—The *Advocate-General* (Moulvi Syed Shamsul Huda, Moulvi Mahomed Sawgat Ali, and Babu Charu Chunder Ghose with him) for the Appellant.—The Court below was wrong in not allowing a decree for ejectment, inasmuch as the defendant is a tenant-at-will. The tenancy was created by a *kabuliyat* which did not show or did not contain any words by which it could be presumed that the tenancy was a permanent one. The fact that there were successive transfers of the holding and that the tenant erected *pucca* buildings on it in the absence of acquiescence or consent on the part of the landlord, are not sufficient to raise such a presumption. The buildings were not erected on the land for such a length of time as would warrant an inference that the lease was created for building purposes. All the time the land in dispute was held by *ijaradars*, and there was nothing to show that the buildings were erected with the knowledge of the landlord. The landlord is not estopped from bringing a suit to eject a tenant simply because the latter erected *pucca* buildings on the land. In order to raise an equitable estoppel against the landlord precluding him from [874] suing for possession, the tenant should show facts sufficient to justify the legal inference that the landlord had by plain implication contracted that the right of tenancy should be changed into a right of permanent occupancy. See *Beniram v. Kundan Lal*, (1899) I. L. R., 21 All., 496 : L. R., 26 I. A., 58. See also the cases of *Ramsden v. Dyson*, (1866) L. R., 1 Eng. & Irish App., 129 ; *Naunihal Bhagat v. Rameshar Bhagat*, (1894) I. L. R., 16 All., 328 ; *Jugmohan Das v. Pallonjee*, (1896) I. L. R., 22 Bom., 1 : *Nabu Mondul v. Chahim Mullick*, (1898) I. L. R., 25 Cal., 896. In this case it may be observed that the lease was granted by a *mutwalli*, who had not the power to grant a permanent lease, and his position is like that of a *Shebayer*. See *Shoojat Ali v. Zumeeruddeen*, (1866) 5 W. R., 158 ; *Prosunno Kumari Debya v. Golab Chand*, (1875) L. R., 2 I. A., 145 ; *Doorga Nath Roy v. Kam Chunder Sen*, (1876) I. L. R., 2 Cal., 341. The landlord's interest having been let out in *ijara* at the time when the buildings were erected, the presumption as to the tenancy being a permanent one could not arise. See *Krishnat Kishore Neogi v. Nur Mohamed Ali*, (1899) 3 C. W. N., 255. The erection of the buildings might be in the nature of an assertion of adverse possession as against the *ijaradar*, but the interest of the landlord could not be affected in any way thereby.

Mr. C. P. Hill (Mr. S. J. Mirza, Babu Romesh Chunder Bose, Dr. Rash Behary Ghose, Babu Umakali Mookerjee, Moulvi Mahomed Mustapha Khan, Babu Bhugoban Chunder Mookerjee, and Babu Nilmoni Mookerjee with him) for the Respondent.—The tenancy was not created by the *kabuliyat* of 1257, but arose from the sub-division of an old tenancy. The erection of *pucca* buildings, successive transfers and long possession of the land are facts sufficient to raise a presumption that the lease was one for building purposes and that the tenancy was a permanent one. A payment of rent from year to year cannot be held to be a presumption against the tenancy being [875] a permanent tenancy. See the cases of *Dhunput Singh v. Gooman Singh*, (1867) 9 W. R., P. C., 3 ; *Robert Watson & Co. v. Mohesh Narayan Roy*, (1875) 24 W. R., 176 ; *Beni Madhub Banerjee v. Jai Krishna Mookerjee*, (1869) 7 B. L. R., 152 ; *Prosunno Coomar Chatterjee v. Jagunnath Bysuck*, (1881) 10 C. L. R.,

25; *Jahooree v. Dear*, (1875) 23 W. R., 399; *Gungadhur v. Ayimuddin*, (1882) I. L. R., 8 Cal., 960. The *kabuliyat* relied upon by the other side did not create a new tenancy; the pottah granted was a confirmatory one, and the incidents of the old tenure existed, the case of *Beniram v. Kundan Lal*, (1899) I. L. R., 21 All., 496 : L. R., 26 I. A., 58, is distinguishable as the lease granted in that case was for a term of years. The landlord, it appeared, was aware of the erection of the buildings, and they having stood by for so long a time they are estopped from pleading that the tenancy was not created for building purposes, and that it was not a permanent one. If the tenancy is held not to be a permanent one, then the tenant on eviction is entitled to compensation. See *Thakur Chunder v. Ramdhone*, (1866) 6 W. R., 228; *Dattatraya Rayaji Pai v. Shridhar Narayan Pai*, (1892) I. L. R., 17 Bom., 736; *Yeshwada v. Ram Chandra*, (1893) I. L. R., 18 Bom., 66.

Dr. *Rush Behary Ghose*, who followed on the same side. The notice to quit is bad in law inasmuch as it required the tenant to quit the land within the last day of a year of the tenancy. See the cases of *Page v. More* (1850) 15 Q. B., 684, *Kishori v. Nund*, (1897) I. L. R., 24 Cal., 720. The land having been let out in *ijarah* made no difference as the landlord was aware of the erection of the buildings, and that the *ijaradar* was but an agent of the landlord.

The *Advocate-General* in reply.

Cur. Adv. Vult.

JAN. 19th. Their Lordships (**Banerjee** and **Stevens, JJ.**) delivered the following judgment :—

[576] This appeal arises out of a suit brought by the plaintiff-appellant, for ejectment of the defendant-respondent from a plot of land, and for arrears of rent, on the allegation, that the plaintiff is lessee of *taluk* No. 99 on the register of 24-Pergunnahs Collectorate under the *mutwali* or manager of the Haghli Inambara, who holds that *taluk* as trustee of the endowment; that the defendant in possession of the plot of land in dispute is a tenant-at-will under the plaintiff; that the plaintiff gave the defendant, as he is entitled by his lease to do, a notice to quit the land in suit; and that the defendant has not complied with the notice.

The defence was that the defendant know nothing of the *taluk* No. 92 being *wakf* or endowed property; that the defendant was not a tenant-at-will; that the notice was bad in law; that the land in dispute was part of an ancient *mourasi mocrari* holding of Nizam Mistry and was purchased by Shadhu Serang in 1256 from Gholam Kudir who had obtained the greater part of that holding under a compromise decree against Nazim Mistry's widow; that Shadhu Serang erected a *pucca* building on the land; that the land with the building has, by successive transfers, come to the hands of the defendant, who has built another *pucca* house on the land and has been holding the same as a permanent tenure on payment of the fixed rent of Rs. 2-11-8; and that by the local custom of *taluk* Kidderpore tenants of homestead lands have permanent rights in the same.

The Court below overruled the objection to the notice, but dismissed the suit for ejectment on the ground that the defendant had a permanent right to the land, and it gave the plaintiff a decree only for arrears of rent.

Against that decree the plaintiff has preferred this appeal and it is contended on his behalf that the Court below was wrong in holding that the defendant has a permanent right in the land. On the other hand the defendant seeks to support the decree of the Court below dismissing the suit, not only on the ground on which it is based, but also on the ground that the notice to

quit was bad in law; and it is further contended on her behalf that even if the notice be good and she be found not to have any permanent right, the plaintiff cannot eject her without [877] giving her sufficient compensation for the value of the buildings standing on the land.

The points, therefore, that arise for determination in this appeal are :

First—Whether the notice to quit is a good notice ;

Second—Whether the tenancy of the defendant is a permanent one ; and

Third—Whether in the event of the first two points being decided against the defendant, she is entitled to any compensation.

On the first point, it is argued for the defendant-respondent, that if her tenancy be not a permanent one, it must at least be a tenancy from year to year, and the notice to quit must, as has been held in *Kishori Mohun Roy v. Nund Kumar Ghoshal*, (1897) I. L. R., 24 Cal., 720, be a six months' notice expiring with the end of a year of the tenancy ; and as the tenancy is said to have been created by the *kabuliyat*, (1st Exhibit III, dated the 19th Chait 1257, and the notice was served on the 23rd of Ashwin 1303 and expired on the last day of Chait of that year, it did not expire with the end of a year of the tenancy, and was therefore a bad notice. We do not consider this argument valid. For though the tenancy was, as appears on the face of Exhibit III, created by that document, and the document is dated the 19th of Chait, rent has all along been paid, as is clear from the rent receipts filed (see in particular Exhibit A for 1300 and Exhibits D and DD for 1257) according to the ordinary Bengali year, so that a year of the tenancy would be the ordinary Bengali year. But then it is contended for the respondent that the notice would still be bad, as it does not expire with the end of the Bengali year but requires the tenant to vacate the holding before the expiry of the last day of Chait which is the last day of the Bengali year ; and in support of this contention the case of *Page v. More*, (1850) 15 Q. B., 684, is cited. We are of opinion that the contention is untenable, and that the case cited is distinguishable from the present. In that case the notice required the tenant to quit on the proper day at noon, so [578] that there was an appreciable interval between the expiry of the notice and the end of a year of the tenancy. Here the notice required the tenant to quit before the expiry of the last day of the Bengali year, that is a year of the tenancy, so that there was no appreciable interval between the expiry of the notice and the end of a year of the tenancy. To say that the notice here is bad because it required the tenant to quit *before* instead of *on* the expiry of the last day of Chait, would be to indulge in subtleties which, as Lord Justice LINDLEY observed in *Sidebotham v. Holland*, (1894) L. R., 1 Q. B., 378, "ought to be and are disregarded as out of place."

The first point must, therefore, be determined in favour of the plaintiff-appellant.

On the second point it is argued for the appellant that the tenancy was created by the *kabuliyat* Exhibit III (1) which contains no words of inheritance, nor anything to show that the land was taken for residential or building purposes from which a permanent tenancy could be presumed ; that though the land has passed by successive transfers, there is nothing to show that the lessor had knowledge of them, or registered the transferee as tenant ; and that though there are *pucca* buildings on the land, they have not been in existence for such a length of time as would warrant an inference that the lease was one for building purposes, nor are they shown to have been erected under circumstances from which acquiescence of the landlord and the creation of any equitable right in the tenant to resist eviction can be inferred. And it is further

argued that the fact of the lessor being, as is shown by the *kabuliyat* itself, a *mulwali* or manager of *wakf* or *endowed* property who has no power to grant any permanent lease, and of the estate being held by *ijaradars*, would prevent the inference of any permanent grant, or the creation of any permanent right by acquiescence. And the cases of *Lala Beniram v. Kundan Lal*, (1899) L. R., 26 I. A., 58; *Krishna Kishor Neogi v. Mir Mohamad Ali*, (1899) 3 C. W. N. 255; *Shoojat Ali v. Zumeeruddeen*, (1866) 5 W. R., 158, and [579] various other cases are cited in support of the argument. On the other hand, it is argued for the respondent that the tenancy was not created by the lease of 1257 but arose from the sub-division of an old tenancy in the name of Nizam Mistri; that from long possession and numerous transfers of the land, and the existence of *pucca* buildings on it, the lease should be presumed to have been one for building purposes and therefore permanent; and that the contention that no such presumption could arise by reason of the limited character of the lessor's right could not be raised in appeal when it was not raised in the first Court, and even if it could be raised, it was not substantiated by evidence. And in support of this argument *Dhanput Singh v. Gooman Singh*, (1867) 9 W. R., P. C., 3; *Robert Watson & Co. v. Mohesh Narayan Roy*, (1875) 24 W. R., 176; *Beni Madhab Banerjee v. Joy Krishna Mukerjee*, (1869) 7 B. L. R., 152; *Prossurno Coomar Chatterjee v. Jagunnath Bysack*, (1881) 10 C. L. R., 25, and several other cases are relied upon.

These being the contentions of the parties, the decision of the second point must depend upon the determination of the following questions:—

(1) Whether the tenancy in this case was created by the lease of the 19th Chait 1257 or arose out of the sub-division of an ancient tenancy and carried with it the incidents of that tenancy.

(2) Whether in either case the length of possession of the tenant, the transfers of the holding, and the erection of *pucca* buildings on it, are circumstances sufficient to warrant the inference that the tenancy was a permanent one, due regard being had to the fact that the estate of the landlord had been let out in *ijara* or farm for many years.

(3) Whether the erection of the *pucca* buildings in question was under circumstances such that the landlord should be presumed to have acquiesced in the same, and should be held to be estopped from disputing the tenant's right to remain on the land.

[580] (4) Whether the inference of a permanent grant or of acquiescence by the landlord, if it could otherwise arise, was negatived by the fact of the lessor being a trustee of an endowment and his right being consequently limited.

Upon the first question this is how the facts, so far as they can be gathered from the evidence, stand. There was a holding of 4 bighas and 5 cottahs of land belonging to Nizam Mistry. When it was created, what its nature was, and how much its rent was, we do not know. One Golam Kadir by a decree based on a compromise obtained 3 bighas and 13 cottahs out of that land at a rent of Rs. 14-3, and out of that land he sold to Sadhu Serang, predecessor in interest of the present defendant, 14 cottahs, the land now in dispute by a conveyance dated the 17th Pous 1256, describing the property sold as a coconut garden with homesteads of tenants. Sadhu Serang applied to the landlord for settlement of the land and he obtained settlement of the 14 cottahs at a rent of Rs. 2-11-8 on the 19th Chait 1257, and executed a *kabuliyat* (Exhibit III) on that date, in which he said that his vendor had made a written relinquishment on the 17th Pous 1256, and he had made a written petition for settlement on the 31st Sraavan of the same year.

These being the facts, it was argued for the respondent, that the intention and effect of the transaction evidenced by the *kabuliyat* of the 19th Chait 1257 was not the creation of a new tenancy, but only the recognition of the sub-division, and transfer of a part of the old tenancy of Nizam Mistry; that the relinquishment of the 17th of Pous 1256 referred to in the *kabuliyat* was the conveyance of that date; and that the *patta* referred to in that document was in the nature of a confirmatory *patta*. We are unable to accept this argument as valid. No doubt confirmatory *patlas*, as remarked by the Privy Council in *Ram Chunder Dutt v. Jogesh Chunder Dutt*, (1873) 19 W. R., 353, are common in this country, and are not inconsistent with the presumption that a prior title existed; but the *patta* taken by Sadhu Serang has not been produced, and judging from the language of the *kabuliyat* (Exhibit III), which must be taken to be the counter-part of the [581] *patta*, we cannot say that the *patta* in this case was in the nature of a confirmatory document only. Nor can we hold that the written relinquishment referred to in the *kabuliyat* was the conveyance to Sadhu Serang. A conveyance and a relinquishment deed are very different documents, and the one could never have been mistaken for the other. The only reference to the old tenure of Nizam Mistry that occurs in the *kabuliyat*, is in the recital, and though the land settled under the *kabuliyat* is part of that tenure, there is nothing to show that the rent for that land was fixed with any reference to the rent of Nizam Mistry's tenure. It is true that the rent fixed for the 14 cottahs bears the same relation to Rs. 14-3, the rent for 3 bighas 13 cottahs obtained by Golam Kadir that the area 14 cottahs bears to 3 bighas 13 cottahs, but there is nothing to show how or when the rent of Rs. 14-3 was fixed. Sadhu Serang clearly states in the *kabuliyat* that he takes a settlement of 14 cottahs of land at a rent of Rs. 2-11-8 according to the relinquishment of the former holder and to his own petition for settlement, and, if he refers to his purchase, he refers to it, not as the purchase of the land but as the purchase of "the fixtures and structures" upon it. We should note here that there is a slight mistranslation in the *kabuliyat* which appears to be somewhat misleading. In the original of the sentence translated as "I shall continue to hold and enjoy without any anxiety," there is nothing corresponding to the words "continue to," and the words corresponding to "without any anxiety" are the usual formal words *param sukhe परम सुखे* that is "with perfect happiness." Reading the *kabuliyat* as a whole and having regard to all the surrounding circumstances we think it created a new tenancy in favour of Sadhu Serang in 1257 or 1851.

The *kabuliyat* on the face of it contains nothing to imply permanency in the tenure created. The usual words *mourasi macorari* do not occur in it, nor is there anything to show that the lease was taken for building or residential purposes. But that does not necessarily make the tenancy a terminable one; as upon the authorities a permanent tenancy may still be inferred from the length of possession by the tenant and his predecessors, from the fact of the tenure having been made the subject of transfer to the knowledge of the landlord, and from the fact of *pucca* [582] buildings having been erected on the land with the knowledge of the landlord. See *Dhunput Singh v. Gooman Singh*, (1867) 9 W. R. P. C., 3, and *Prossunno Coomar Chatterjee v. Jagunnath Bysack*, (1881) 10 C. L. R., 25. This brings us to the consideration of the second of the four questions stated above.

Upon that question this is how the facts stand. The tenure in question had been in the possession of Sadhu Serang and his heirs and their transferees for about forty-six years when this suit was brought, but there has been no mutation of names in the landlord's office, nor any recognition of the

transferees except by receipt of rent from them, the name of Sadlu Serang still continuing as that of the recorded tenant. And there are two *pucca* buildings on the land, one of which was erected about 40 years ago and the other about 25 years ago. This appears from the evidence of the defendant's witness No. 1, which we see no reason to disbelieve. But there is nothing to show that these buildings were erected with the knowledge of the landlord. And it should be borne in mind that the estate of the landlord has been held all this time by a succession of *ijaradars*.

Now, are these facts sufficient to warrant the inference that the tenancy was, when first created, intended to be permanent, or was subsequently by implied agreement converted into a permanent one? We think this question, which we are considering apart from the question of acquiescence and estoppel, ought to be answered in the negative. When the origin of a tenancy and the circumstances attending its creation are not known, evidence of the mode of dealing with the land demised and of the acts and conduct of the parties generally, constitutes the best and indeed the only evidence to prove the nature of the tenancy. If that had been the case, the evidence of the mode of dealing with the property such as we have here, might, perhaps, have been sufficient to raise the presumption of a permanent tenancy. But where, as in this case, we know when and under what circumstances the tenancy was created, evidence such as has been adduced is not sufficient for that purpose. Indeed, the circumstances attending the creation of the tenancy positively militate against any [583] inference that it was intended to be permanent. For, though the first tenant, Sadbu Serang had, before taking the settlement, purchased the land from its former holder under a conveyance (Exhibit B 2) purporting to transfer a permanent interest, in his *kabuliyat* by which he took the settlement he not only omitted to make any stipulation for permanent occupation, but made no mention of his having purchased the land and was content with stating that he had purchased merely the fixtures and structures thereon. This clearly indicates that the landlord was unwilling to create any permanent tenancy, and the tenant agreed to accept a non-permanent lease. The lease therefore was clearly not intended to be a permanent one at its inception. Can it then be inferred from the acts and conduct of the parties that it was by implied agreement subsequently converted into a permanent lease? We think not. If it is unlikely that the tenant would have spent money in erecting *pucca* buildings on the land, and the landlord would have allowed the buildings to remain on the land so long without objection, unless there was such an implied agreement, it is at least as unlikely that the landlord, who had been so cautious as not to allow the insertion of a single word in the *kabuliyat* which might imply permanency, would without any apparent reason come to such an agreement subsequently. Moreover there is nothing to show that the buildings were erected with the knowledge of the landlord: and the fact of their having been allowed to remain on the land without objection is explained by the circumstances that the estate of the landlord has been all along let out in *ijara*. We may add that the fact of the tenure in question having been the subject of several transfers has not much material bearing upon the present question, as there is no dispute about its transferability so long as the tenancy is not determined, the point in dispute being whether it is permanent.

We have not thought it necessary to discuss in detail the various cases cited on both sides, most of which have been considered by Mr. Justice RAMPINI in the case of *Nahu Mondul v. Cholim Mullick*, (1898) 25 Cal., 896, because the general principle laid down in, or deducible from, all of them is substantially

the same, and is [584] stated in terms most favourable to the tenant in two cases to which we have referred above, namely, *Dhumput Singh v. Gooman Singh*, (1881) 10 C. L. R., 25, and *Prossunno Coomar Chatterjee v. Jagun nath Bysack*, (1898) I. L. R., 25 Cal., 896; and the result of the application of that principle in each case must depend upon the facts of that case. Applying the principle laid down in those cases to the facts of this case, the conclusion we come to is that the mode in which the property has been dealt with and the acts and conduct of the parties generally, are not sufficient to warrant the inference, that the tenancy in question was intended to be permanent at its inception or was converted into a permanent one subsequently. The only case which requires special notice is *Dunne v. Nobo Krishna Mukerji*, (1889) I.L.R., 17 Cal., 144. The facts of that case were very different from those of the present case. There there was nothing to show under what circumstances and conditions the tenure was created; and there was evidence to show that the tenure had been held at a uniform rent for nearly one hundred years; and in that state of facts the Court held that a presumption arose that the tenure was a permanent one.

We come next to the question of acquiescence and estoppel. Although the tenancy might not have been a permanent one by agreement, express or implied, yet, if the landlord stood by and permitted the tenant to spend money in erecting *pucca* buildings on it in the belief that it was permanent, he would be estopped from denying the permanent right of the tenant. But to avail himself of the plea of acquiescence and estoppel, it is necessary for the tenant defendant to show, that in spending money in erecting the buildings, he was acting under an honest belief that he had a permanent right in the land, and the landlord knowing that he was acting under such belief stood by and allowed him to go on with the construction of the building. See *Lala Beniram v. Kundan Lall*, (1899) L. R., 26 I. A., 58, see also *Ramsden v. Dyson*, (1866) L. R., 1 Eng. & Irish App., 129 and *Jugmohan Das v. Pallonjee* (1896) I. L. R., 22 Bom., 1.

[585] Now in dealing with the question whether the facts of the case warrant an inference in favour of a permanent grant, we have already indicated our reasons for thinking that the tenant Sadhu Serang, by whom the first building was created, could not have had any good ground for believing that the tenancy was a permanent one. But supposing that he and his successors in interest might have acted under any such belief, there is nothing to show that the landlord knew that they were so acting, or even that he knew of the creation of the buildings while they were being constructed. And it is clearly not enough to show that the landlord became aware of the existence of the buildings after they had been erected and then allowed them to remain. See *De Bussche v. Alt*, (1877) L. R., 8 Ch. D., 286, and *Kunhammed v. Narayan Mussadan*, (1888) I. L. R., 12 Mad., 320. The plea of acquiescence and estoppel must therefore fail.

In the view we have taken upon the second and third questions stated above, it becomes unnecessary to consider the fourth question. If it had been necessary to consider that question, we should have felt some difficulty in answering it in the affirmative upon the materials placed before us, seeing that one of the plaintiff's own documents (Exhibit VI), shows that his lessor holds certain properties as *towlaat kharij*, that is, outside the endowment, and seeing also that the lease in his favour is itself in excess of the power of a *mutwali* of *wakf* property to grant. (See Amir Ali's Mahomedan Law, Vol. I, p. 279). We may add that the rent receipts filed by the defendant describe the estate as the *talug* of the late Mannujam Begum, and not as *wakf* property, and that the question of *wakf* not having been properly raised in the Court below, the defendant had not sufficient opportunity of meeting the point.

For the foregoing reasons we think the tenancy in this case is not permanent and the landlord is not estopped from denying its permanent character.

It remains now to consider the third and the last point raised in this appeal, namely, that relating to compensation.

The defendant claims compensation for the buildings erected on the land. Such claim could not, in the case of a tenant, come [586] within the scope of section 51 of the Transfer of Property Act, even if that Act applied to this case notwithstanding section 2, clause (c), because a tenant could not possibly believe in good faith that he was absolutely entitled to the land. The provision of the Transfer of Property Act relating to a tenant's right with reference to structures raised on the land held by him, is that contained in clause (h) of section 108, which only authorizes the tenant to remove structures raised. The same is the extent of his right under the law of this country in cases not governed by the Transfer of Property Act, as was held by a Full Bench of this Court in the case of *Thakoor Chunder Pramanik v. Ramdhone Bhattacharji*, (1866) 6 W. R. 228. And the right of the tenant-defendant to remove the buildings raised by her or her predecessor in interest was not disputed by the learned *Advocate-General*, who appeared for the appellant. But there is no authority in support of the contention that a tenant in a case like this is entitled to compensation for buildings erected by him. The two cases relied upon by the learned counsel for the defendant, *Duttetrayi Rayaji Pai v. Sridhor Narain Pai*, (1892) I. L. R., 17 Bom., 736, and *Yeshwadabai v. Ram Chandra Takaram*, (1893) I. L. R., 18 Bom., 66, are clearly distinguishable from the present. In the former there were, as Mr. Justice CANDY, who delivered the judgment of the Court, observes,—special circumstances “the near relationship of the parties, thus residing in close vicinity to each other, their ownership of the surrounding lands pointing to the presumption that the plaintiff by his conduct sanctioned the construction of the building and well and afforded hope and encouragement to the defendant that he would be allowed to remain in peaceable possession of the same, or at least would not be ejected without a reasonable return for the expenditure incurred by him.” And in the latter case the land was found to be *fazendari* land from which the tenant could not be ejected, and it was further found that the landlord was precluded by his father's and his own conduct from recovering the land and premises from the tenant in the manner he sought.

[587] The defendant's claim for compensation in this case is therefore untenable.

The result is that this appeal must be allowed, the decree of the Court below, so far as it dismisses the claim for ejectment of the defendant, set aside, and in lieu thereof a decree made awarding the plaintiff possession of the land in dispute upon ejectment of the defendant, but allowing the defendant to remove the buildings and other structures standing on the land within six months from this date. The appellant will recover from the respondent his costs in this Court and in the Court below.

Appeal allowed.

APRIL 23rd. An application made for review of this judgment was rejected.

S. C. G.

NOTES.

[I. As regards the tenant's right to remove the fixtures, see also 27 Mad., 211; 30 Mad., 197; 21 All., 496; 22 Bom., 1; 33 Cal., 1119; 21 M.L.J., 891; 13 O.W.N., 931; 37 Mad., 1.

II. As regards the circumstances from which a presumption of permanent tenancy can be drawn, see also (1901) 5 O.W.N., 846; (1901) 28 Cal., 788; (1902) 6 O.W.N., 352; (1903) 8 O.W.N., 285; 301; (1904) 9 C.W.N., 60; (1905) 32 Cal., 648; (1904) 32 Cal., 41; (1904) 32 Cal., 51.]

[27 Cal. 587]

CRIMINAL APPEAL.

The 23rd February, 1900.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, AND
MR. JUSTICE MACPHERSON.

Queen-Empress

versus

Debendra Krishna Mitter.*

Mortgage—Mortgage, definition of, for purposes of stamp duty—Assignment by way of mortgage of valuable security to secure pre-existing debt—Stamp duty payable thereon—Stamp Act (I of 1879) s. 3, sub. s. (13), s. 61, Sch. I, Art. 29, cl. (b) and art. 44.

Art. 29 of Sch. I of the Stamp Act (I of 1879) applies to an instrument evidencing an agreement to secure the repayment of a loan, executed at the time the loan is made, and not to the case of an assignment by way of mortgage of a valuable security to secure a pre-existing debt. It contemplates an instrument contemporaneous with the advance and with the loan.

For the purpose of ascertaining what stamp duty is payable on an instrument alleged to be a mortgage, it is necessary to see if the instrument is a mortgage as defined in the Stamp Act.

In this case the accused executed an instrument, dated the 24th of August 1898, whereby he promised to pay on demand at Calcutta to one Annada Prasad Moitra, the sum of Rs. 5,232-2 with interest at the rate of 12 per cent. per annum for value received as per certain Promissory Notes executed by the accused in favour of one Shama Charan Moitra, which notes had been endorsed by the said Shama Charan Moitra without recourse [588] to him for valuable consideration to the said Annada Prasad Moitra and were by the said instrument cancelled, and as security for the repayment of the sum of Rs. 5,232-2 with interest the accused mortgaged, transferred, and assigned by way of collateral security all his right, title and interest to and in a Promissory Note payable on demand, dated the 10th of January 1895, executed by one Woodoy Chandra Sanyal, deceased, in favour of the accused, which note was at that time filed in a suit in the Court of the Subordinate Judge of 24-Pergunnahs.

The instrument executed by the accused was as follows :—

CALCUTTA, 24th August 1898.

On demand I, Debendra Krishna Mitter of No. 29, South Chakrabaria Road in Bhowanipur in the suburbs of the town of Calcutta in the District of the 24-Pergunnahs, son of Babu Harish Chunder Mitter, deceased, Kayastha, landholder, promise to pay at Calcutta to Babu Annada Prasad Moitra of No. 50 Sukea's Street, Simla, in Calcutta aforesaid, son of Ramgati Moitra, deceased, Brahmin, landholder, or order, the sum of rupees five thousand two-hundred and thirty-two and annas two only, with interest thereon at the rate of 12 per cent. per annum for value received as per my Promissory Notes on demand

* Criminal Appeal No. 2 of 1900, against the order passed by T. A. Pearson, Esq., Chief Presidency Magistrate of Calcutta, dated the 18th of July 1899.

noted in the memorandum below, which were payable to Babu Shama Charan Moitra, or order, but endorsed by him without recourse to him for a valuable consideration to the said Babu Annada Prasad Moitra, which said notes are hereby cancelled; and as security for the repayment of the said sum of rupees five thousand two hundred and thirty-two and annas two as principal, and for payment of the interest thereon at the aforesaid rate until realization, I hereby mortgage, transfer, and assign by way of collateral security all my right, title, interest, claim, and demand against one Woodoy Chandra Sanyal now deceased, his heirs, representatives, and assigns by virtue of a Promissory Note payable on demand executed by the said Woodoy Chandra Sanyal in my favour on the 10th day of January 1895, and I do hereby authorise and empower the said Babu Annada Prasad Moitra, his heirs, representatives, and assigns solely to apply for and obtain possession from the First Subordinate Judge's Court of the 24-Pergunnahs of the said Promissory Note of the 10th day of January with a Bengali Promissory Note executed by the said Woodoy Chandra Sanyal in my favour on the 28th day of April 1892, which was cancelled and renewed by the said Promissory Note of the 10th day of January 1895, and a Bengali *hathchitta*, dated the 29th day of Falgoun 1298 B. S., corresponding with the 11th day of March 1892, at present all filed in a suit in the said Subordinate Judge's Court in the 21-Pergunnahs being suit No. 119 of 1897, wherein I am the plaintiff, and Sreemutty Surbamongola Debee, the only daughter, heiress, and certificated administratrix to the estate of the said Woodoy Chandra Sanyal is the [589] defendant, to hold the same until the realization of the said principal and interest hereinbefore provided. And I do further absolutely authorise and empower the said Babu Annada Prasad Moitra to draw, recover, and realize the said principal sum of rupees five thousand two hundred and thirty-two and annas two only, together with the aforesaid interest thereon at the rate of twelve per cent. per annum from and out of my said claim on the said Promissory Note of the 10th day of January 1895, either from the said Surbamongola Debee, her heirs, representatives, or assigns by virtue of these presents without any further concurrence or consent on my part or that of my heirs, representatives, or assigns. I bind myself, my heirs, representatives, and assigns absolutely to establish and legally prove my said claim against the said Surbamongola Debee, in the said suit, being suit No. 119 of 1897, in the said Sub-Judge's Court of the 24-Pergunnahs, and shall and will adduce all necessary evidence, and personally attend and give evidence under the guidance of the said Babu Annada Prasad Moitra, and shall not on any account absent myself from Court or be guilty of any laches or compromise, or effect any settlement out of Court or enter into any understanding with the defendant or any one on her behalf, or receive any money or consideration without the consent in writing of the said Babu Annada Prasad Moitra, failing which or acting in any wise contrary to the direction and guidance of the said Babu Annada Prasad Moitra, I shall be liable to be criminally prosecuted for cheating and committing criminal breach of trust; and that in order to completely and more perfectly securing the repayment to the said Babu Annada Prasad Moitra of the aforesaid principal and interest, I do hereby appoint him, the said Babu Annada Prasad Moitra, as my true and lawful attorney irrevocably for me, and on my behalf, to manage and conduct the said suit, settle or compromise the same and to draw, recover, and realise, taking all lawful steps and proceedings therefor all and every the sum or sums of money, which I am entitled to recover and receive from the said Surbamongola Debee, her heirs, representatives, and assigns on the said Promissory Note of the 10th day of January 1895, or any other sum or sums of money which I may be entitled to recover and receive from the said Sreemutty Surbamongola Debee, her heirs, representatives and assigns under and by virtue of any decree made in the suit No. 119 of 1897 by the said Sub-Judge's Court of the 24-Pergunnahs or by means or reason of any amicable settlement out of Court as aforesaid giving sufficient receipts therefor as my said attorney as aforesaid to, for, and with the intent and purpose of my said attorney in the first place paying to and recovering, and realizing for himself all monies for principal and interest which may be due, and owing to him by virtue of these presents, together with all costs incurred or to be incurred by him as to the first charge thereon, and then hold the balance, if any, in trust for me, my heirs, and assigns for their and my benefit as such attorney as

aforesaid, and shall and will pay and distribute the same as by my letter or writing I shall direct him to do. And my said attorney [590] shall and will be at liberty without any further concurrence or consent on my part at any time hereafter to take all such steps and proceedings as may or shall be necessary to obtain delivery to him of the said Bengali Promissory Note of the 17th day of Baisack 1299 B. S., corresponding with the 28th day of April 1892, and the said Promissory Note, dated the 10th day of January 1895, both executed in my favour by the said Woodoy Chandra Sanyal and the said Bengali *kathchitta*, dated the 29th day of Falgoun 1298 B.S. corresponding with the 11th day of March 1892, and my said attorney shall and will be at liberty to delegate his authorities hereinbefore mentioned in writing to any person or persons he shall or may think fit without further concurrence or consent on my part and shall appoint pleaders, attorneys, mooktears or barristers as he may think necessary. And all and whatsoever my said attorney shall do or cause to be done in the premises I agree to satisfy and confirm as my own act and deed.

DEBENDRA KRISHNA MITTER.

WITNESSES :

Prya Nath Sen, Solicitor, Calcutta.

Soshi Bhusan Mukerjee, clerk to Babu P. N. Sen, Solicitor.

This instrument was stamped with stamps of the value of Rs. 9-8. It was impounded and forwarded to the Collector of Stamp Revenue as being insufficiently stamped by the Registrar of Assurances.

The accused was prosecuted under s. 61 of the Stamp Act of 1879 for having executed a mortgage without the same being duly stamped.

The Chief Presidency Magistrate of Calcutta tried, and on the 18th of July 1899 discharged, the accused and gave the following reasons :—

In this case the accused has executed an instrument, dated 24th August 1899, evidencing an agreement to secure the repayment of a loan of Rs. 5,232-2, with interest giving as a collateral security a certain Promissory note payable on demand by one Woodoy Chandra Sanyal, dated 10th January 1895. This note is now the subject of a suit No. 119 of 1897 in the Court of the Subordinate Judge of Alipur, and it is hypothecated to the accused under the instructions above referred to.

This instrument has been stamped with a stamp of the value of Rs. 9-8 ; it has however been impounded and forwarded to the Collector of Stamp Revenue, as being insufficiently stamped by the Registrar of Assurances.

The head assistant in the Stamp Department has produced the document before me in a case in which the accused is prosecuted under section 61 of the Stamp Act of 1879, for having executed a mortgage without the [591] same being duly stamped. The accused contends that the document is not a mortgage.

I agree with the accused's contention. The instrument is not a mortgage, for a mortgage is the "transfer of an interest in specific immoveable property, for the purpose of securing the payment of money advanced or to be advanced by way of loan."

The instrument does not transfer any interest in immoveable property at all, but deals with moveable property only. It in reality hypothecates a valuable security in the shape of a Promissory Note which is moveable property. The complainant contends that it should be stamped under article 44 (b) of schedule I of the Stamp Act, but I think that this is an error and that the instrument should be stamped under article 29 clause (b) of that schedule with half the duty payable on a bill of exchange No. 11 (b) for the amount secured. The fact that the word "mortgage, transfer, or assign" occur in this instrument, does not make the document a mortgage. The accused has already stamped the document with stamps value Rs. 9-8, which is over the value of the stamps required under article 29, clause (b). The accused is discharged—document returned to Mr. Eagleton, as the Registrar holds his receipts for it.

(Sd.) T. A. PEARSON,
Chief Presidency Magistrate.

Calcutta, 18th July 1899.

The *Standing Counsel* (Mr. O'Kinealy) for the Crown.—The Magistrate was in error in holding that the instrument in question was not a mortgage. For the purpose of ascertaining the stamp duty we must look to the definition of a mortgage as given in the Stamp Act and not as given in the Transfer of Property Act, as the Magistrate appears to have done. The instrument is clearly a mortgage as defined in the Stamp Act. The Magistrate has held that the instrument has been sufficiently stamped, and that Art. 29, clause (b) of the Stamp Act applied; that article I submit, has no application to an instrument such as this is; the article which does apply is Art. 44, and that being so the instrument has not been sufficiently stamped.

Babu Dwarka Nath Mitter, *contra*, for the Accused.—I must concede that the document in question is a mortgage as defined in the Stamp Act; nevertheless I contend that it has been properly stamped as it falls within Art. 29 cl. (b) of the Stamp Act of 1879. Art. 44, by excluding a mortgage-deed not provided for by Art. 29, implies that the document contemplated by Art. 29 is also a [592] mortgage-deed. Art. 44 would seem to apply to mortgages of immoveable properties only as it speaks of the delivery of possession of property or any part of the property. The document in this case is an instrument which purports to be an agreement to secure the repayment of a loan made upon the deposit of a negotiable instrument, which is a valuable security and is clearly one contemplated by Art. 29, cl. (b). There is no actual deposit in this case, but there is, I submit, a constructive deposit. A deposit may be either actual or constructive. Here the valuable security is in the possession of the Court in a suit filed by my client, it is therefore a constructive deposit. The term "valuable security" is not defined in the Stamp Act, but is defined in the Penal Code. The Promissory Note deposited in this case comes within that definition. The loan secured by the document is also repayable on demand; there is, I submit, no doubt that the document falls within Art. 29, cl. (b), and has been properly stamped. Should the Court be against me on this point I would submit that, as the accused never intended to defraud the Government, he should be let off with a penalty.

The judgments of the Court (MACLEAN, C.J. and MACPHERSON, J.) were as follows:—

Maclean, C.J.—The short point we have to decide is whether the document in this case ought to have been stamped under Art. 44 of schedule I of the Stamp Act of 1879 or under Art. 29 of that schedule.

I am unable to agree with the learned Chief Presidency Magistrate in his view that, for the purpose of ascertaining what stamp duty is payable, we are to look to the definition of a mortgage given in the Transfer of Property Act. We need not travel so far afield, for a mortgage-deed is defined by subsection 13 of section 3 of the Stamp Act, and the instrument in question in this case is, in my opinion, a mortgage-deed within the meaning of that subsection. It is an instrument whereby for the purpose of securing an existing debt, the transferor transferred to or created in favour of the transferee, a right over specified property. If this be so, as I think it must, what is the stamp duty properly payable upon a mortgage deed? Art. 44 of schedule I tells us [593] what is the duty to be paid upon a mortgage-deed not provided for by Art. 14, 15, 29, or 55. We may admittedly lay aside Art. 14, 15, and 55. They have no bearing upon the present question. The duty then will be payable under Art. 44, unless the case is covered by Art. 29. That brings us to the question whether this is an instrument evidencing an agreement to secure the repayment of a loan made upon the deposit of a valuable security. I think it is not. That article applies to an instrument evidencing the agreement to secure the repayment of the loan, which means I think an instrument executed

at the time the loan is made, not to the case of an assignment by way of mortgage of a valuable security to secure a pre-existing debt. The most common class of case to which it would apply would be that of an ordinary equitable mortgage by deposit of title deeds, accompanied with a memorandum of charge. The article seems to me to contemplate an instrument contemporaneous with the advance and with the deposit, and that is not the case here. I think, therefore, that duty is payable under Art. 44 and that the case must go back to the learned Magistrate with this intimation of our opinion.

Macpherson, J.—I also think that the document in question is a mortgage-deed and that it requires to be stamped under Art. 44 of the First Schedule of the Stamp Act of 1879 and that it is not a document provided for in Art. 29 of that schedule.

D. S.

Case remanded.

[27 Cal. 593]

APPEAL FROM ORIGINAL CIVIL.

The 20th, 21st, 22nd 23rd, 24th and 28th February and 1st, 2nd, and 3rd March, 1899, and 10th January, 1900.

PRESENT :

SIR FRANCIS W. MACLEAN, K. C. I. E., CHIEF JUSTICE, MR. JUSTICE
MACPHERSON AND MR. JUSTICE HILL.

New York Life Insurance Company.....Appellants

versus

Phoebe Stella Gamble.....Respondent.*

Insurance—Life Assurance—Truth of answers to queries of Life Insurance Company—Warranty—Declaration by Assured to Medical Examiner of Company—Admissibility of Evidence to show Declarations not made by Assured—Verbal representation to Medical Examiner, effect of.

[594] *G* applied to the defendant-company in Calcutta to insure his life for the sum of Rs. 10,500, to be secured by five different policies. The policies were duly executed by the Company and delivered to the plaintiff, the wife of *G*, on his behalf. The Company's printed form of application for insurance and the printed form of declarations to the Medical Examiner of the Company were signed by *G*.

The agreement of *G* with the Company was that the statements and representations contained in his application, together with those made to the Medical Examiner by him, should be the basis of the contract between him and the Company. He warranted them to be full, complete, and true, whether written by his own hand or not, and that the warranty was to be a condition precedent to, and a consideration for, the policy which might be issued thereon; and he further agreed that no statements, representations or information made or given by or to any person soliciting or taking the application for the policy, or by or to any other person, should be binding on the Company, or in any way affect its rights unless such statements, representations or information be reduced to writing, and presented to the officers of the said Company at their Home Office in the city of New York on the application.

On *G*'s death the plaintiff sued the Company for the amounts due under the policies.

The plaintiff admitted that certain statements and representations made by *G*, both in his applications and declaration to the Medical Examiner, were untrue, but urged that it was open to her to show (1) that *G* signed the declaration to the Medical Examiner before it

* Appeal from Original Civil No. 9 of 1899, in suit No. 805 of 1897.

was filled up, and in consequence was not responsible for the contents of that declaration ; (2) that *G* showed to the Medical Examiner a certain statement drawn up by *G* of an illness he had suffered from for three years, and that the knowledge thus acquired by the Medical Examiner must be imputed to the Company.

Held, reversing the decision of the Court below, that the plaintiff was bound by the terms of the contract between *G* and the Company. That it was not open to the plaintiff to show that *G* did not state what, under his own signature, he declared to be true, and yet to hold the Company liable on the policy, brushing aside and treating as of no import whatever the statements and representations which formed the basis of the contract.

That the misstatements and misrepresentations made by *G* were amply sufficient to warrant the Company in avoiding the policy.

THIS was a suit brought by the plaintiff against the defendant Company to recover the sum of Rs. 10,500 with interest.

The plaintiff alleged that her husband, one John Frederick Gamble, a Master Mariner and a resident of Calcutta for several years, in September, on the eve of his departure for England, applied to the defendant-company in Calcutta to insure his life for the [595] aggregate sum of Rs. 10,500, to be secured by five policies, and, after reference to the Head Office of the defendant-company in New York, the five policies were duly executed by the defendant-company, and delivered to the plaintiff in Calcutta on behalf of her husband on or about the month of December 1893.

The five policies were, with the exception of the sums thereby secured, all in similar terms both in body and in their endorsements or annexures, three of them being dated the 21st of October 1893 and the two others the 30th of October 1893. Before he applied to the defendant-company to insure his life Gamble had applied to the Sun Life Assurance Company of India for the same purpose, and his application had been refused without his undergoing medical examination. He had also made a similar application to the London and Lancashire Life Assurance Company, and the application was pending, and had not been answered when he made his application to the defendant-company. These facts were disclosed in the application for insurance upon which the policies were granted by the defendant-company.

That the forms of the defendant-company connected with the application for the first three policies, including the printed form of the application for insurance and the printed form of declarations to the Medical Examiner of the defendant-company, were brought to Gamble's house on the 18th of September 1893 by one Chunee Lall Bose, who was employed by the defendant-company as a canvasser, and a native doctor, who was employed by the defendant-company to examine Gamble and to take the declarations. The form of application was then and there filled up and signed by Gamble and was retained by Chunee Lall Bose. The native doctor then examined Gamble in a separate room, and when the examination was finished the form of declaration to the Medical Examiner was signed by Gamble without being filled up, but was retained by the native doctor to be filled up by him. The native doctor made notes in a book of the result of his examination of Gamble to enable him to fill up the form of declaration. That Gamble had by him at the time a statement drawn up by himself sometime previously of an illness from which he had suffered from the year 1888 to 1891, and of which he had been cured by a Doctor D'Mello. [596] This statement Gamble showed to the native doctor and informed him what it was, whereupon the native doctor then read it. The statement had been drawn up by Gamble by way of a puff or commendation of the medicine with which Doctor D'Mello had cured him, and which D'Mello had intended to patent. Gamble went on boardship to depart for England on the night of the 18th September. That on the 18th of September, Gamble

intimated to Chuneelall Bose his wish to be insured by the defendant-company in the further sum of Rs. 4,000 under two policies of Rs. 2,000 each, and with a view to such insurance the defendant-company's printed form of application for insurance and relative form of declarations to the Medical Examiner were forwarded from the defendant-company's office to Gamble's house early on the morning of the 19th of September and were at once sent by the plaintiff to Gamble on boardship. Gamble signed the forms after filling them up in part and returned them to the plaintiff, who forwarded them to the defendant-company at their office in Calcutta. Gamble then left for England. That the premiums in respect of the policies had been paid up to the date of Gamble's death, which occurred in Southampton on the 25th of April 1894, and the plaintiff was entitled to recover the amounts due on the policies.

The defendant-company admitted that Gamble had made two applications to insure his life with them, and that upon the faith of the statements and representations made to them, both in the applications and through their medical adviser by Gamble, they executed and delivered the policies to Gamble. They, however, alleged that in and by the applications Gamble had agreed with them that the statements and representations therein contained, together with those made by Gamble to their Medical Examiner, should be the basis of the contract between Gamble and the company, that Gamble had warranted the same to be full, complete, and true, whether written by his own hand or not, and agreed that the warranty should be a condition precedent to, and a consideration for, the policies to be issued thereon, and also agreed that no statements, representations or information made or given by or to any other person, should be binding upon them, or in any manner affect their rights, unless the same should be reduced [597] into writing, and presented to them at their Home Office in the applications. That Gamble in and by his applications to them and in his statements to their Medical Examiner had made certain statements and representations which were untrue.

That at the time of making his application, Gamble was suffering from Bright's disease of the kidneys, that he had previously had rheumatism and had been subject to dyspepsia, and was at the time of making his application in an anæmic and debilitated condition. He had also suffered during the years 1888 to 1891 from the illness mentioned by him in his statement to Dr. D'Mello and had consulted several medical men. That shortly before applying to the defendant-company, Gamble had made an application to insure his life in the Positive Government Security Life Assurance Company, and had been examined by that Company's Medical Examiner who had pronounced an unfavourable opinion on his life, in consequence of which opinion that Company had refused to issue a policy upon the said application. That these facts had been suppressed by Gamble, who had made false statements in reference to them to the defendant-company. The defendant-company further alleged it was untrue that Gamble's statement to Dr. D'Mello had ever been shown to, or read by, their Medical Examiner, or that the form of declaration to their

Number	Medical Examiner was signed by Gamble before the same
566821	was filled up, nor did they admit that their Medical
Age	Examiner ever examined Gamble. That after the death
41	of Gamble, and on or about the 3rd of August 1894, the
Quarter.	plaintiff claimed the amounts insured by the said policies
Annual Premium	from the defendant-company, and falsely stated in support
Rs. As. P.	of her claim that no doctor had ever attended Gamble
24 2 7	during his stay in India, and that under the circumstances
Extra 1 4 0	they were justified in refusing to pay the amounts of the
for occupation.	said policies.
25 6 7	

The following is the material portion of one of the policies issued by the defendant-company to Gamble :—

Exhibit 12.

Amount
Rs. 2,000

THE NEW YORK LIFE INSURANCE COMPANY,

By this Policy of Insurance,

In consideration of the agreements, statements, representations, and warranties submitted to its officers at the Home Office, in the City of New [598] York, in the written application for this Policy, which are hereby referred to and made a part of this contract, and in further consideration of the sum of twenty-five rupees six annas and seven pies to them in hand paid, and of the quarter annual payment of twenty-five rupees six annas and seven pies to be made on or before the first day of January, April, July, and October in every year during the continuance of this Policy,

Doth insure the life of John F. Gamble, Mariner of Calcutta, Bengal, India (hereinafter called the Insured) in the amount of two thousand rupees commencing on the first day of October 1893 at noon. And the said Company doth hereby promise and agree to pay the amount of the said Insurance, at its office in the City of New York, to Phoebe S, wife of the insured, or in the event of her prior death, to the insured's executors, administrators or assigns upon receipt and approval of proofs, as hereinafter required, of the death, during the continuance of this policy, of the said insured, deducting therefrom all indebtedness to the Company, together with any balance of the year's premium remaining unpaid. This policy is issued and accepted upon the following express conditions and agreements :—

First.—If this policy shall become a claim by death after having been in force two full years, the Company will not contest its payment on account of the incorrectness of any statement in the application, or in the accompanying declarations to the Medical Examiner (except in case of fraud) provided, however, that if the age of the insured is understated the amount of insurance payable shall be such proportion of the amount of the policy as the premium paid bears to the required premium at the true age.

Second.—That if any one of the premiums is not paid, as hereinafter provided, on or before the day when due, then this policy shall become void, and all payments previously made shall be forfeited to the Company except that (as provided by Act of May 21, 1879, Chap. 347, Laws of 1879 of the State of New York) if this policy shall lapse or become forfeited for the non-payment of any premium, after being in force three full years, a paid-up policy will be issued, on demand made within six months after such lapse with surrender of this policy, under the same conditions as this policy, except as to payment of premiums, but without participation in profits, for such an amount as the net reserve on this policy at the time of lapse, computed by the American Table of mortality and interest at four and one half per cent., after deducting all indebtedness to the Company, will purchase as a single premium at the present published rates of the Company, at the age of the insured at the time of lapse ; and all right to any other paid-up policy or surrender value, provided for by the Statute of any state or country, is hereby waived.

Third.—That the provisions, requirements, and benefits, printed or written by the Company, upon the next page of this policy, are a part of this contract, as fully as if they were recited at length over the signatures hereto affixed.

[598] In witness whereof, the said New York Life Insurance Company has, by its duly authorized officers, signed and delivered this contract, this twenty-first day of October one thousand eight-hundred and ninety-three.

CHAS. C. WHITNEY,
Secretary.

JOHN A. MCCALL,
President.

Material portion of Gamble's application to the defendant-company. (Exhibit D).

Abstract (E. & O. E.) of the application for Insurance in the New York Life Insurance Company.

Policy No.

Application to the New York Life Insurance Company for a NON-FORFEITING FREE-TONTINE POLICY.

Ordinary Life

Non-forfeiting
Free Tontine
Policy.

British East
Indies Class.

92-5-14.

9 4. Has any proposal or application to insure your life ever been made to any company or agent, upon which a policy has not been issued, or upon which a policy has been issued at a higher rate than that applied for?

A. Yes; I applied to the Sun Life Insurance Company but was not examined.

B. If so, state full particulars, to what company, when and, &c.

B. I am applying to the London Lancashire.

I do hereby agree as follows.—(1) That the statements and representations contained in the foregoing application, together with those made to the Medical Examiner by me, shall be the basis of the contract between me and the New York Life Insurance Company; that I hereby warrant the same to be full, complete, and true, whether written by my own hand or not, this warranty being a condition precedent to, and a consideration for, the policy which may be issued hereon. (2) That inasmuch as only the officers at the Home Office of said Company, in the city of New York, have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person shall be binding on said Company, or in any manner affect its rights, unless such statements, representations, or information be reduced to writing, and presented to the officers of said Company at the Home Office, in this application. (3) That in any distribution of surplus or profits, the principles and methods which may be adopted by said Company for such distribution, and [600] its determination of the amount equitably belonging to any policy which may be issued under this application, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under such policy. (4) That any Policy which may be issued under this application shall not be in force until the actual payment to, and acceptance of, the premium by said Company or its authorized agent, during my life-time and good health. (5) That the contract contained in such policy, and in this application, shall be construed according to the Law of the State of New York, the place of said contract being agreed to be the Home Office of said Company in the city of New York. (6) That no suit shall be brought against said Company under said contract after the lapse of one year from the date of death of the insured.

Dated at Calcutta this 16th day of September 1893.

Witness
Agent

Signature of the person applying
for Insurance on his life
(write the name in full)

} JOHN GAMBLE.

Free Tontine British East Indies Class.

. 91-2-96.

Policy to date from 1st of October 1893.

Material portion of the declaration made by Gamble to the Medical Examiner. (Exhibit E.)

[601] DECLARATIONS MADE TO THE MEDICAL EXAMINER OF THE NEW YORK LIFE INSURANCE COMPANY.

The Applicant for Insurance must answer the following questions, which will be asked him by the Medical Examiner: the answers form an essential part of the Contract.

1. Have you had, since childhood, any of the following Complaints? Answer (Yes or No) opposite each.									
Apoplexy	...No.	Disease of Heart	No.	General Debility	No.	Piles	...No.	Small pox	...No.
Asthma	...No.	Disease of Kidneys	...No.	Gout	...No.	Pleurisy	...No.	Skin disease	...No.
Bilious colic	...No.	Disease of Liver	No.	Insanity	...No.	Pneumonia	...No.	Spinal disease	No.
Bronchitis	...No.	Disease of Lungs	No.	Jaundice	...No.	Rheumatism	...No.	Spitting or Raising blood	Rai.
Cancer	...No.	Disease of urinary organs	No.	Palpitation	...No.	Rupture	...No.	Syphilis	...No.
Dropsy	...No.	Fistula	...No.	Paralysis	...No.	Scrofula	...No.	Yellow fever	...No.
Disease of Brain	No.	Fits or Convulsions	No.						

Give full particulars of any illness you may have had since childhood.
Except a few attacks of biliousness, I had no other illness.
When were you last confined to the house by illness? I was never confined to the house.

2. Have you ever had severe headaches, vertigo, fits, or any nervous or muscular trouble?	No.
3. A. Are you subject to cough, expectoration, palpitation or difficulty of breathing?	A. No.
B. Have you ever been? If so to which, when, and full details.	B. No.
4. Are you subject or predisposed to Dyspepsia, Dysentery or Diarrhoea?	No.
5. Have you ever met with any accidental or serious personal injury?	No.
6. Have you ever been seriously ill? If so, when, with what, and who was the medical attendant?	No.
(State his name and residence.)	
7. A. Name and residence of your usual Medical attendant.	A. No fixed Medical attendant.
B. When and for what have his services been required.	B. No.
8. Have you consulted any other Medical man? If so, when and for what?	No.
9. Has any proposal or application to insure your life ever been made to any company or agent upon which a policy has not been issued? If so, state full particulars.	No.
10. Has any physician given an unfavourable opinion upon your life with reference to Life Insurance? If so, state particulars.	No.

[602] I hereby declare that I am the person who has made and signed the accompanying application for insurance in the New York Life Insurance Company, dated 18th September,

1893; that I am temperate in my habits, and am, to the best of my knowledge and belief, in sound physical condition and a proper subject for Life Insurance.

JOHN GAMBLE.

The case was heard on February 20th, 21st, 22nd, 23rd, 24th, 28th, and March 1st, 2nd, 3rd, 1899.

Mr. *Sinha* (Mr. *Gregory* with him) for the Plaintiff.

Mr. *Garth* (Mr. *Knight* with him) for the Defendant-Company.

Cur. adv. Vult.

MARCH 10th, 1899. AMEER ALI, J. :—

The plaintiff in this case seeks to recover from the defendant-company Rs. 10,500, the amount of five policies on the life of her husband John Frederick Gamble. These policies were executed on the 1st October 1893. They begin by reciting "that in consideration of the agreements, statements, representations, and warranties submitted to its officers at the Home Office, in the city of New York, in the written application for this policy, which are hereby referred to and made a part of this contract," and in further consideration of certain sums to be paid periodically, the New York Life Insurance Company insures the life of J. F. Gamble who is therein described as a Captain of a vessel. Then follow the other operative parts of the policy and three provisos, the third of which is in these terms :—

"That the provisions, requirements and benefits, printed or written by the Company, upon the next page of this policy, are a part of this contract, as fully as if they were recited at length over the signatures hereto affixed."

No question, however, is raised as to the effect of this proviso and it is unnecessary to dwell on it further. The defendants contend that they had executed the policy in question on the faith of the statements and representations made to the Company by John Gamble in certain applications or proposals for insurance as well as through their medical adviser, which statements and representations it was agreed between the parties were to be the [603] basis of the contract. They further allege that in and by the said application John Gamble "warranted the same to be full, complete, and true, whether written by his own hand or not, and agreed that the said warranty should be a condition precedent to, and a consideration for, the policies to be issued thereon, and also agreed that no statements, representations or information made or given by or to any other person, should be binding upon the defendants or in any manner affect their rights unless the same should be reduced into writing, and presented to the defendants at their Home Office in the said applications," and they allege that the statements made by John Gamble were untrue, and in the result they contend that the policies are void. The fourth paragraph of their written statement sets out in what respects the statements and representations are said to be untrue, and the fifth paragraph is in these terms :—

"The defendants are informed and believe that it is wholly untrue that the said Exhibit B (which is a copy of a statement said to have been given by Gamble to one D'Mello) to the plaint was ever shown to, or read by, their Medical Examiner, or that the form of declaration to their said Examiner was signed by the said assured before the same was filled up as alleged in the eighth paragraph of the plaint, and they do not admit that their said Medical Examiner ever examined the said assured as therein alleged."

The applications on which the policies were issued were made on the 16th and 18th of September, respectively. On the night of the 18th, Mr. Gamble proceeded to England where he died in April following, and there is no question now about his death.

The issue for determination accepted by counsel on both sides is one of fact, namely, whether the statements which are charged by the defendants to be untrue are the statements of John Gamble.

Learned Counsel for the defendants contended that the conditions to which I have referred at the outset of this judgment is a warranty; that the assured warranted thereby the truth of each and every statement and that, if any one of those statements be untrue, the policy would be void. The system of Life Insurance is now becoming so general in this country that it may [604] not be without advantage to call attention to the nature of these conditions. An express warranty, as it is contended the condition contained in these policies amounts to, has been defined to be "a stipulation inserted in writing on the face of the policy on the literal truth or fulfilment of which the validity of the entire contract depends."

By a stipulation of this character the assured binds himself "hand and foot" to use the words of the learned American author whose work is a standard authority on Insurance Law "that his application contains a full, true, and just exposition of all the facts enquired for or its equivalent in a different form of words, and it is to be deemed a warranty." "Such policies are no security at all. The assured is at the mercy of the insurers, and if he is so imprudent as to make such a bargain the Courts cannot help him." The assured may, without the smallest intention of deceiving, undesignedly make a statement as to an immaterial fact. If that turns out to be untrue, that is to say, not in accordance with fact, the insurers are entitled to say that the policy is void. But whilst giving effect to these conditions on the ground that the insurers are entitled to stipulate what they choose in order to safeguard their interests or to prevent even the slightest chance of fraud, Courts of Justice have construed these conditions with the utmost strictness. If the language of the questions in the application or the declarations is indefinite or ambiguous, they must be construed to use Lord WATSON'S language in the case of *Thomson v. Weems*, (1884) L. R., 9 App. Cas., 671, "*contra proferentes* and in favor of the assured."

On this subject the words of the text writer to whom I have referred are worthy of note:—"Where the language of the questions contained in the application is ambiguous or indefinite or calls for answers, which may be to some extent a matter of opinion so as to admit of different answers, if the insured answer in good faith in some proper sense, and when the application is unintentionally defective in a manner known to the insurers or their agent, the insured will be excused though he do not give [605] the desired answer. If the company accepts an indefinite or insufficient answer it will be construed literally in favour of the insured."

Where the words, therefore, are without violence susceptible of two interpretations, that which will sustain the claim of the assured must in preference be adopted. Again Courts of Justice in England and America, where insurance cases are common, have set their faces against constructive warranties, and have invariably insisted upon strict proof that the representations or statements alleged to be untrue are the statements of the persons making them, in order to avoid the contract.

Again where concealment is charged the concealment in fact must be established. In other words, where facts are withheld, which are known or which must be presumed to be known to an ordinary intelligent person, it is held to be concealment, but where the fact is not such as may be fairly presumed to be known to the applicant it cannot be regarded as concealment.

In the case of *Thomson v. Weems*, (1884) L. R., 9 App. Cas., 671, it appears that the deceased Weems applied to the Insurance Company represented by the appellant Thomson to effect a policy on his life. He recorded a printed form of proposal containing, among other questions, a question relating to his habits, namely (1) whether he was of temperate habits; and (2) whether he had always been strictly so, and he answered (1) Temperate, (2) Yes. The case was tried, in the first instance, before the Lord Ordinary who found in favour of the assured and against the company.

On appeal before the House of Lords various questions were argued, and on behalf of the assured it was contended that the question whether a person was of temperate habits or not was a matter of opinion and not a question of fact. Their Lordships overruled the contention, and held that the statement regarding his being temperate or otherwise was a question not of opinion, but of a matter which was within his knowledge, a matter relating to his habits. Lord WATSON in dealing with the several cases cited on behalf of the assured, stated that the cases on which reliance was placed related to an internal disease "of the [606] existence of which the person affected is unconscious, and which medical examination cannot detect until he is *in extremis*, or it may be until life is extinct; and the only point arising for decision was, whether a particular query or statement was so expressed as to include latent and unknown, as well as apparent and known, diseases. But intemperate habits are certainly not in any sense latent disease, only discoverable in a *post mortem* examination. Such habits may in some instances be occult, but as a general rule the knowledge of them is not confined to their owner; indeed it may happen that their outward manifestations are more readily appreciated by bystanders than by the man himself."

It also appears in a case where it was provided in the policy that if the answers were in any respect untrue the policy was to be void, and the question was whether the applicant had any sickness within the last 10 years, and the answer was that he had had pneumonia, but said nothing of a slight attack of chronic pharyngitis. It was held to be no concealment, as the party was not bound to state such facts as would ordinarily be deemed immaterial such as that he had had a cold or a diarrhoea or an irritation of the throat not fairly embraced in what is popularly understood as sickness. The bearing of this observation will be seen later.

The case of *Macdonald v. The Law Union Fire and Life Insurance Company*, (1874) L. R., 9 Q.B., 328, does not militate with the view to which I have given expression. In that case the plaintiff had effected an insurance on the life of another, and in the application or proposal had stated that the person being insured had not been proposed in another office and declined. The contention on behalf of the person insuring was that he was not aware of this fact, but the Appellate Court was of opinion that the fact that he himself was not aware of it did not exclude the policy from the operation of the special condition. As I understand that case it proceeds upon the principle that the matter was one which could have been ascertained by a person of ordinary intelligence and ought to have been known to the person making the contract.

[607] I have already discussed the two principal cases cited at the bar. In *Anderson v. Fitzgerald*, (1853) 4 Cl. H. of L., 484, the decision turned simply upon the question whether an answer was material or not.

The Courts of First Instance were of opinion that the answer said to be untrue was not material. In the House of Lords the Judges held that it did not matter whether the answer was material or not. The question was whether the statement was included in the warranty, and, if so, whether it was untrue

and the case was remanded for re-trial. In *Fowkes v. Manchester and London Life Assurance and Loan Association*, (1863) 3. B. and S. 917, the question was whether the declaration should be read as a part of the policy. The Chief Justice in his judgment pointed out that the two must be read together, and that what followed in the declaration must be held to control the condition in the policy itself, and that as the declaration set out that any false averment designedly made would avoid the contract, the question to determine was whether the statement was intentional or not.

There is another case which was not referred to at the bar, but which may probably be of some importance in dealing with the circumstances of this particular case.

In *Bawden v. London Edinburgh and Glasgow Assurance Company, Limited*, (1892) 2 Q. B., 534, the knowledge of the agent was held to affect the company. In that case the assured in his proposal form stated that he had no physical infirmity, and it was agreed that the proposal should form the basis of the contract.

By the terms of the policy the company agreed to pay the assured £500 on permanent total disablement, and £250 on permanent partial disablement, the policy stating that by permanent total disablement was meant *inter alia*, "the complete and irrecoverable loss of sight to both eyes," and by permanent partial disablement was meant *inter alia* "the complete and irrecoverable loss of sight in one eye."

At the time when he signed the proposal for the insurance the assured had lost the sight of one eye, a fact of which the [608] local agent or canvasser for the company was aware although he did not communicate it to the defendants.

It was held that the knowledge of the agent was the knowledge of the company, and the administratrix of the assured was entitled to recover on the policy.

It will be noticed that the case set up by the defendants here is not that of an unconscious or an unintentional misstatement but one of actual fraud, and it therefore becomes necessary for me to consider the evidence in some detail.

The circumstances connected with the application to the defendant company and the medical examination of John Frederick Gamble are deposed to by the plaintiff, his widow, by Ray, a friend of theirs, who was in the house at that time, and by the defendant's canvasser Chuneo Lall Bose. John Frederick Gamble was the captain of a river steamer plying between Calcutta and Chandbally. But he seems to have been out of employ just at that time. It is not clear, however, when he had given up work.

It is proved beyond doubt that on the night of the 18th September 1893, he left Calcutta for England in the British India Steamer *Goorkha*. Both the plaintiff and Ray state that he was going home with the object of finding employment under his brother-in-law.

Before his departure to England and on the eve of a long voyage he seems to have been anxious to insure his life. It was contended that this desire on his part implied a fraudulent intent. I shall deal with this contention later on. It is enough to say at present that he appears to have applied on the 15th September to the Positive Assurance Company for insuring his life. He was examined by Dr. Caddy for that company, but no reply was given to his application until the 23rd of September, in other words not until four or five days after he had left India. It is not clear on the evidence how he came to go to

the Positive, although Mrs. Gamble does say that the same canvasser was taking him about to several companies.

On the 16th of September he appears to have been taken to Chune Lall Bose, who at that time appears to have been acting [609] as the canvasser of the London and Lancashire Insurance Company as well, with the object of insuring with that company.

Chune Lall says that he took Gamble to Mohendro Nath Bonnerjee, the doctor, employed by the London and Lancashire Insurance Company, who examined him, but it is clear that Dr. Bonnerjee's report was not submitted to his company until the 18th of September. There is nothing to shew that Gamble was aware of the report made by Dr. Mohendro Nath Bonnerjee to the London and Lancashire Insurance Company, or that his application was refused by the Positive or the London and Lancashire.

It is important that the remainder of the story should be given in his own words, for a large part of the case hinges upon his evidence. "After he had been examined by Dr. Bonnerjee we all left, and Mr. Gamble told me that he could not go to any other doctor that day as he would be very much too busy and he asked me to see him at his house, somewhere near Chowringhee Lane. I believe Tottie's Lane. I don't know the number. I went there. He told me to-morrow is a Sunday, I can't go to any doctor, I will go on Monday, but on Monday he said that he was very very busy in packing things and buying things at the bazar, if he could get a doctor at his house he would be examined. I came to the defendant-company's Office and informed Mr. Anderson that he had increased the risk another 4,000 with the London and Lancashire, and he pressed me to take a doctor to his house. I told him any doctor you can send with me. Mr. Gamble has no objection to be examined by him, and I told Mr. Anderson that as Dr. Saunders comes almost every day at 1 o'clock, I can take him with me there, to which Mr. Anderson said there is no certainty of Dr. Saunders coming. I will send for Dr. Rajendro Lall Dey and you can take him, and I took Dr. Rajendro Lall Dey at about 1-30 to Mr. Gamble to the house in Tottie's Lane."

From Chune Lall's statements in cross-examination it appears that Gamble told him he had no time, and could not be bothered with going to any other doctor; upon which Chune Lall said he would go to the Resident Manager of the New York, and arrange to bring Dr. Saunders to examine Gamble at his house, to which he acquiesced. Chune Lall goes on to add [610] that Gamble also told him he would put all the amount of his insurance in the London and Lancashire, Chune Lall then goes on to say, which fact I mentioned to Mr. Anderson, and therefore he said I am arranging with Dr. Dey to come here at 1 o'clock and you can take him. I also told Mr. Anderson that he had increased the risk in the London and Lancashire another 4,000.

"Asked if Mr. Anderson was anxious not to lose Gamble for the New York, the canvasser says as follows:—

"He said to me that he did not like to lose that man. You must take a doctor to him, and he told me, Mr. Bose, take care. Don't put all the amount of the insurance to the London and Lancashire, you must finish the examination for this office, taking Dr. Dey with you. It was one day after first seeing Gamble that I went with Dr. Dey to the house."

Chune Lall describes how Rajendro Lall Dey was sent for and hurried off with him to Gamble's house, where the examination was held, and how afterwards the doctor handed in his report to Mr. Anderson.

Mrs. Gamble swears that on the 18th Chuneo Lall called with a doctor and another Baboo (Poorno Chunder Chunder) whom she afterwards came to know as the head clerk in the Company's Office; that her husband was examined; that the doctor made notes in his pocket-book; and that her husband signed some papers, after which they left. Ray corroborates Mrs. Gamble. He also says that three Baboos, one of them being the doctor, the others the canvasser, Chuneo Lall and Poorno came there that day, and that the doctor examined Gamble partly in his presence and partly in another room.

I have not the smallest doubt that the man who was examined by Dr. Dey was John Frederick Gamble, and I can only say that it was unfortunate the company should have in their written statement raised any question as to the identity of the person examined.

Although in his deposition taken on commission Mr. Anderson had distinctly stated he had no doubt that the person examined [611] was John Gamble, in his evidence in Court he materially varies his language. He was asked in cross-examination regarding the time when he showed Gamble's photograph to Dr. Dey. His answer is as follows:—

"I don't remember when I shewed it to the doctor, whether it was before or after the last interview at the office, I cannot say whether that photo satisfied the doctor that that was the man he had examined."

I don't remember now what he said when he saw the photo. I don't remember what was the result of shewing him the photo. He was then asked if he was satisfied that that was the man the doctor had examined.

His answer is "I came to no conclusion."

Asked, "Have you come to any conclusion now?" He says, "I am not prepared to say that." Asked again, "Is it your case, that a person other than Mr. Gamble was examined by Doctor Dey?" He says "I cannot reply to that." I need not dwell further on this part of the case. As I said before upon the evidence of Chuneo Lall, Mrs. Gamble, and Mr. Ray, I have no doubt that the person examined by Dr. Dey on the 18th of September was John Frederick Gamble and no one else. Mrs. Gamble's story is that when the doctor came, her husband was sitting in an easy chair in the hall, the doctor felt his pulse and asked him questions the answers to which he took down in a notebook, that she called out to her husband to tell the doctor he had had fever some two years ago, and that thereupon Gamble drew out a paper from a drawer and gave it to the doctor to read. This paper is annexed to the plaint and purports to be a copy of a certificate or advertisement which Gamble had prepared with her help for one Dr. D'Mello at D'Mello's request. She goes on to say the doctor baboo turned over the pages, looked at it, and then said he was examining Gamble himself, and that it was not necessary to go further into the paper or words to that effect; that the doctor and Gamble then went into an adjoining room where there was some further examination, to which she cannot depose; after which the doctor came out and then they all left. She says also that she saw her husband signing some papers [612] which he handed to the doctor before he went away. Ray tells substantially the same story. Putting aside the question of identity which seems to have been raised in a shadowy form with the object of creating as it seems to me unnecessary difficulty, the case on the other side is that during the examination the doctor took down the statements of Gamble in the declaration form; that thereafter Gamble signed the same, and that it is not the fact that Gamble shewed to the doctor the statement prepared for D'Mello.

Poorno Chunder Chunder, who was at one time head clerk in the Company's Office, and who was present according to Mrs. Gamble at the examination, was

also called on her behalf, but he was found to be adverse, and in the exercise of my discretion I allowed him to be cross-examined. He was asked whether he had not made a statement to a Mr. Thomas regarding the examination of Gamble. He denied that he had made any statement. The statements said to have been made by him were then put to him; and he denied having made them. He was then asked whether on the 4th February he had not been to the house of Mr. Cranenburgh in connection with this case, which also he denied. The statement alleged to have been made by him to Thomas, and taken down by the latter was put in for the purpose of contradicting him. I must not forget to mention that on the day previous to his examination in Court he was interviewed by Mr. Anderson in the jury room, when another statement made by him to the company's attorney was shown to him. I have no hesitation in saying upon the evidence of Mr. Cranenburgh, Mrs. Bolst, Mrs. Gamble, and Mr. Ray that this Poorno has deliberately perjured himself in saying he did not go to Mr. Cranenburgh's house on the 4th of February. It is unnecessary to dwell further upon his evidence or upon his demeanour in the witness box, as I consider him wholly unreliable.

Mrs. Gamble's testimony regarding certain incidents, which took place in the Company's Office, on the 5th and 8th October 1894, has been challenged, and I have been asked to disbelieve her, because her statements conflict with those of the company's manager and Mr. Robertson.

[613] Excepting so far as Mrs. Gamble's credibility is concerned, the incidents referred to above as having occurred at the Company's Office on those dates have, in my opinion, very little relevancy to the case, but as it is urged that her evidence regarding those matters is false, and that on those occasions she made certain statements differing materially from those made in Court, it becomes necessary to deal with the evidence on both sides relating to those matters.

It is quite clear that until the 8th of October 1894, Mrs. Gamble was not informed in any way that her claim was disputed by the company. If I understand aright Mr. Anderson's evidence, it was not even intimated to her that any suspicion attached to her claim. In consequence of certain information furnished to him by a man of the name of Franks said to be a nominal agent of the company, Mr. Anderson seems to have got hold of the original statement or certificate by whichever name it may be called, that had been given by Mr. Gamble to D'Mello. The document appears to have come into his hands sometime before the 4th of October 1894. It is now beyond doubt that on that day Mr. Anderson was in communication with the Solicitors of the company regarding Mrs. Gamble's claim. On the 4th of October he wrote a letter to Mrs. Gamble asking her to come to the office. The same day he appears to have gone to her house with the object, he says, of getting from her a photo of her husband. He had already succeeded in obtaining some photos of Gamble, but was not satisfied and wanted one from her. So he wrote to her (Exhibit K) asking her to come to the office on the next day which she did on the 5th. She was accompanied by her sister Mrs. Bolst who sat in one room or compartment whilst Mrs. Gamble was called into Mr. Anderson's room, and here begins the divergence between the evidence on the two sides. Mrs. Gamble and Mrs. Bolst say Mr. Anderson came out and asked Mrs. Gamble to come inside his room, telling Mrs. Bolst to stay where she was. Mr. Anderson says he did not say anything to Mrs. Bolst, but simply asked Mrs. Gamble to come into his room. A great deal was attempted to be made out of this difference and I will deal with this later on. Mrs. Gamble [614] went into Mr. Anderson's room and there found Mr. Robertson, the company's Solicitor. At that interview

Mr. Robertson, it is said, showed to the lady the statement given by Gamble to D'Mello. Admittedly the paper was covered up and only Gamble's signature was shown to her, and she was asked whose signature it was, and on her replying that it was her husband's she was required to attest it. It also appears that she was asked a number of questions and her answers were taken down by Mr. Robertson on a piece of paper in red pencil which has now been produced and marked as Exhibit 12, to which Mr. Robertson and Mr. Anderson attached their signatures as witnesses it seems after she had left.

It is admitted she was told nothing on that day with respect to her claim, but according to Mr. Anderson it was thought necessary to get her once more into the office, and on the 6th a letter was written (Exhibit L) asking her to come again bringing with her all the papers in her possession connected with the policy. She came accordingly on the 8th with her sister who again sat outside, while Mrs. Gamble went into Mr. Anderson's room. Mr. Robertson who was there put to her a number of questions and her answers are said to have been taken down on the paper which is marked as Exhibit 13. Mrs. Gamble says Mr. Robertson characterised her claim as fraudulent, and said that she had aided and abetted her husband and made herself liable to a prosecution; that he got very angry, stamped his foot, banged the table and so on; that Mr. Anderson thereupon tried to pacify him saying there was no need for getting angry, that, if she would make over the papers, nothing more would be said about the matter. It is said that she has deposed falsely in saying that Mr. Robertson used that language or that he thumped the table or stamped his foot. It is also said that what she said to Mr. Robertson, and what is taken down on those two papers, contradicts her evidence given in Court.

Although Mr. Anderson in his evidence in Court has chosen to state he did not hear Mr. Robertson use the words fraudulent or aiding and abetting and so forth towards this lady, Mr. Robertson himself would not say he did not use them. The [615] following questions and answers will indicate the general character of his evidence:—

"Q.—After you got her statement did you consider her claim fraudulent?

A.—She was told that during the interview, I think after the statement was taken.

Q.—Did you tell her she had been trying to defraud the company?

A.—I don't recollect.

Q.—Did you tell her that she had been aiding and abetting her husband in attempting to defraud the company?

A.—I don't recollect.

Q.—Did you tell her that she had laid herself open to a criminal prosecution?

A.—No. I have no recollection of telling her that.

Q.—Could you say that you did not?

A.—I would not swear that I did not."

And in his evidence before the Commissioner, Mr. Anderson was in the same predicament; he was not prepared to vouch his oath that words to that effect were not used.

Mrs. Bolst swears she heard those words and the stamping of feet and thumping of the table. It is possible Mrs. Gamble might have construed some impatience or want of suavity natural under the circumstances on the part of the Company's Solicitor into intimidation. Personally I should be loath to think that Mr. Robertson would allow himself deliberately to use any intimidating

language, but it is by no means improbable, and it very frequently happens that people use words in the heat of the moment which in their sober moments they entirely forget. I noted very carefully the demeanour of Mrs. Gamble and Mrs. Bolst and am bound to say, especially in the case of the latter, that I was very favourably impressed. I am not prepared to say simply on the recollection of these two gentlemen, a recollection of a purely negative character, that Mrs. Gamble has deposed falsely in making those statements. I am sorry to observe that **[616]** Mr. Anderson's recollection, excepting where it touches the facts relating to his own case, is of an extremely unretentive character. I should have abstained from saying anything on this part of the case if I had not been invited, nay pressed, to do so. I now come to those two statements which were taken down by Mr. Robertson. Neither Mr. Robertson nor Mr. Anderson will swear that before Mrs. Gamble signed those papers she read them. She swears she did not read them, and she swears that those papers do not contain her statements in the form in which she made them. Both Mr. Anderson and Mr. Robertson say they will not swear that the two documents contain the actual words she used. They say that so far as their recollection goes they merely give the purport of what she said. She was cross-examined on those two statements, and excepting the fact that she gave on one of those occasions the names of several doctors who, she said, attended her husband during his illness, which names she omitted in the claim form, there is nothing in them which requires attention. I will deal with this circumstance more fully in connection with the Exhibit No. 1a.

But the value of these papers used as they are for the purpose of contradicting the witness is to my mind very little. I do not desire to make any comment more than is absolutely warranted by the circumstances of the case on the method by which they appear to have been obtained.

Mr. Robertson says that it was at the instance of Mr. Anderson that the woman was sent for. Mr. Anderson says he left the matter entirely to the solicitors, and they did whatever they thought necessary. I wish Mr. Robertson had adhered to his own original opinion and not adopted this course for obtaining Mrs. Gamble's statements.

Mr. Anderson states she was sent for for the purpose of having her case explained to her. Mr. Robertson says that he wanted to have her there for the purpose of ascertaining the truth by cross-examining her, and that appears to have been exactly what was done on those two occasions. She was cross-examined with the object of getting admissions or statements which might be used afterwards to contradict her.

[617] Although Counsel was pleased to inform me that this method was often resorted to by Insurance Companies for the purpose of getting information from claimants, I am glad to find from Mr. Anderson's statements that it is the first of its kind so far as his company is concerned, and I trust it will remain the last. I must say emphatically that this method of extracting admissions does not commend itself to me.

I now come to the charge of falsehood made against the plaintiff with regard to her answer to the 9th question in Exhibit No. 1a.

The question is in these words: "Name and residence of every physician who attended deceased during the year prior to his death." Mrs. Gamble's answer to this is as follows:—

"Nil. No doctors attended him during his stay in India." This answer is said to be in direct contradiction of the statement made by her to Mr. Robertson, where she named a number of doctors who had attended her

husband, while he was in this country. Mrs. Gamble says she had gone with this paper to Mr. Anderson to ask him how to fill it up. There is nothing improbable in this. She states further that she understood him to say that she ought to write according to what her husband had put down. Her words are as follow :—

“ Mr. Anderson sent me forms to send on to England to have them filled up by the doctors there. After those forms came from England I sent them to the company, and then I received another form for me to fill up.

(Shown Exhibit No. 1a) : I believe this is the form.

After I received this form I went to the defendant-company's office with the form. I saw Mr. Anderson. I did not have any conversation with any one else there. This was on the first visit I made after receiving that form. I saw Mr. Anderson and asked what I was to do and he told me. Then I came back, I afterwards saw Mr. Anderson again in his office. No one else was present. He told me to take this form either to the Presidency Magistrate or the American Consul and swear it, but he would prefer the American Consul. I went to the American Consul.

(Shown Exhibit No. 1a.)

[618] I believe this is what I signed before the Consul. I went back to the company's office and submitted the paper. Mr. Anderson was not in, and I left this with the head clerk and returned home.”

She was cross-examined at great length upon her answer to the question just referred to in Exhibit 1a, and her statement to Mr. Robertson. She was asked how she came to say in her statement to the company that no doctors had attended her husband during his stay in India. She answered “ I was told to agree with whatever my husband had said.”

Mr. Anderson, I believe, told me that. I was interviewed by him, and he said there was a mark against I think the ninth question, and he said I would have to agree with everything my husband had said.”

Asked when that was, she proceeded to add, “ when I received the form from the company, I called on Mr. Anderson. I understood him to refer to the ninth question, and told me to answer according to what my husband had answered. To agree with whatever my husband had said.”

Asked again “ only this ninth question,” she says : “ That is what I understood him to say.”

Mr. Anderson says he did not tell her anything of the kind. There is nothing improbable however in her having understood him to say so

The general result of her evidence on this branch of the case seems to me to be this. She naturally sought Mr. Anderson's help or advice in filling up the paper ; he told her something which she understood to mean she must make her answer conform to her husband's statement. It is a mere matter of comprehension, and, having regard to what she says, I see no reason to disbelieve her.

Regarding the answer itself there does not seem to be anything erroneous in substance. If the answer is read with the question, it would show that her statement related to her husband's stay in India during the year prior to his death. Read in that way, the only right and fair way to my mind, there does not seem to be any untruth in it.

[619] But as I have said already these matters are only relevant for the purpose of considering how far plaintiff's statements regarding the events which took place on the 18th of September are to be believed. She was subjected to an elaborate and minute cross-examination ; and I must say that the

impression it left on my mind was extremely favourable; she appeared to me to give her evidence in a remarkably satisfactory and straightforward manner.

I have no hesitation in saying that in my opinion, judging from her demeanour, she is entitled to the fullest credit. Her evidence with regard to the visit of the doctor on the 18th of September is corroborated by Ray. He is a Government servant, holds a substantial post to which is attached a pension and appears to be a respectable man. He was cross-examined at great length, but beyond the fact that he was a friend of the plaintiff, and her family, nothing was elicited to show he had any interest in this suit. And I saw nothing in his demeanour to suggest that he was deposing otherwise than truthfully and honestly. He swears positively that he was present in the house of Gamble, and remembers a visit to him "of persons from an Insurance Company before he left." I better give his account in his words. "This was the day before his departure, I saw three Baboos came down to see him. They saw Mr. Gamble. I was in the hall. That is the same place where Mr. Gamble was. Mrs. Gamble was there also. They were talking about having his life insured. He spoke of having his life insured and the Doctor Baboo took notes in his pocket book. Mr. Gamble showed him some papers. I don't know if I could identify the papers now. The Doctor Baboo read the paper. His reply was, I am examining you and I can see. Your being ill four years back does not signify so long as you are in health now. I was in the hall. Mr. Gamble was examined in the children's room. I saw him go into the room with the doctor and I saw him come back."

The matter is made still more clear in cross-examination. He was asked how it was that Gamble came to produce the paper he showed to the doctor. His answer is distinct.

"Mrs. Gamble referred to her husband, and he drew it out of a drawer and showed it to the doctor. Yes, I recollect that after [620] all the years' She said something to the effect. 'Jack show that paper to the doctor' or some words to that effect. I don't remember if she said anything about what the paper was." On what possible grounds am I to disbelieve this evidence?

Chunee Lall says the examination of Gamble took place in Tottie's Lane, that the doctor asked him questions and noted down the answers, and that he delivered the declaration personally to the manager. As I have already mentioned, he speaks of Mr. Anderson's desire not to let this life go. I can well understand Mr. Anderson's anxiety to secure him. The man was a European and ostensibly a good life, and there was no reason why Mr. Anderson should not accept his proposal.

Dr. Rajendro Lall Dey's evidence is one of the most extraordinary I have ever heard.

His report shows that John Gamble was a good life. He says he examined the urine which was found to be all right, and the man himself healthy and sound. He states he took down Gamble's answers to questions put by him in the declaration. He denies that any paper was shown to him as is alleged by the plaintiff and Ray. To my mind the whole case turns on the question whether I am to believe Mrs. Gamble and Ray, corroborated as they are by Chunee Lall Bose, or this Dr. Dey. His manner in the witness box was most unsatisfactory. He did not seem to appreciate the gravity of the position in which he was placed. He gave his answers in a nonchalant and careless manner, as if what had happened there did not concern him in the slightest. His recollection was of the vaguest character. Beyond the fact that he examined a certain person in a certain lane he does not seem to remember anything. He does not even remember the face of the person he

examined. When shewn the photograph and asked if that was the man he examined, he says he cannot say. He repeatedly says, beyond the fact of going to a certain place and examining a man he does not remember anything. He is contradicted by Chuneo Lall and by Mr. Anderson on two points. Dr. Dey says that the paper he wrote out in that house he made over to Chuneo Lall. Chuneo Lall denies this emphatically. He says Dr. Dey took it himself and made it over to Mr. Anderson, and he adds that it is against [621] the rule of the company for a doctor to make over the declaration to any one else. Mr. Anderson says in his evidence on commission that Dr. Dey told him he had taken away the urine from the house. Dr. Dey says No; the urine was examined in the house, and that he did not take it away. I prefer to believe Mr. Anderson that Dr. Dey had told him he had brought away the urine. It also appears from Mr. Anderson's evidence, that Dr. Dey told him that he (the doctor) must have examined a different man. The doctor denies having said so. I believe Mr. Anderson. Apparently, when the doctor found himself in a fix concerning this matter, that was the only way he could get out of it and he made that statement to Mr. Anderson.

Mr. Anderson in his evidence on commission says he did not believe the doctor when he said that, and I think he was quite right, nor do I believe him. Now the matter is in this position: Am I to believe a man who has given his evidence in this way, that what he has recorded on that paper correctly represents the statements made to him by Gamble.

The company chooses to employ a man who shews himself wholly unable to appreciate the responsibilities of his position. He has no recollection of any material fact. Would I be justified in saying upon his evidence alone that Mrs. Gamble, Ray and Chuneo Lall have deposed falsely to the most important circumstances bearing on the questions for my determination.

Mrs. Gamble and Ray say that the form was not filled up by the doctor there and then. They say that the fact of Gamble having been ill with fever was mentioned in Dr. Dey's presence, and they swear that the paper was given to him to see. He says he did not see it.

After giving my most careful consideration to the case, I have no hesitation in saying that I believe the plaintiff and her witnesses, and utterly disbelieve the doctor.

The doctor was in fact in a hurry as he himself admits. I do not believe that he filled up the form then. He evidently took down certain facts in his note-book, but what they were, does not appear. The D' Mello paper was shown to him and he looked at it, but does not seem to have attached any import-[622]ance to it. He then went away, filled up the form and handed it to Mr. Anderson. The case for the defendants rests on the statements contained in that paper, which Mr. Anderson obtained from D'Mello, and which is proved to be in the handwriting of Gamble.

The plaintiff, in her statement to Mr. Robertson, and in Court, insists that paper was given to D'Mello as a puff in token of gratitude for having cured her husband of some illness. Mr. Robertson candidly admits that it looks like it, and there can be no doubt it was drawn up in that way. Mrs. Gamble says further that it is considerably exaggerated, but it does undoubtedly mention that he had been ill and had been attended by various doctors.

But if that paper was shewn to Dr. Dey and he had an opportunity of acquainting himself with its contents, then the assured placed all the facts appearing on the paper before the doctor. The defendant's case is not based upon any independent evidence. No doctor has been called to prove Gamble

had been suffering from any illness which he did not disclose; nor is any one called from the hospital to prove that he ever was in hospital. Whatever fact is relied upon is contained in that paper, and the contention is that those facts were not disclosed. But if the paper was placed in the hands of the medical adviser to the company, it seems to me that the company are not entitled to say that there was any fraud, concealment or suppression of any fact. I find nothing which would justify me in saying that the assured did not comply with the condition precedent to the policies. Nor is it possible for me to say that the statements recorded by the doctor in the declaration are the statements of John Gamble.

There remain two other questions. It appears that an application form was first drawn up by Gamble and sent through Chunee Lall to Mr. Anderson; for some reason it was considered insufficient or not properly made out. Mr. Anderson then filled up the application form B, which bore the signature of John Gamble, and the answer to the ninth question is in Mr. Anderson's own handwriting. Gamble appears to have applied for a further policy, for which he had sent in form C. In that form there is some pencil writing in answer to question 9.

[623] Nobody can say in whose hand that pencil writing is.

It certainly is not in Gamble's writing. And Mr. Anderson does not say it is his writing; but form C was cancelled and form D was sent out from the Home Office, filled up, and presumably the pencil writing on form C was put in at the Home Office. It is unnecessary, however, to form any conjecture on that point as it is immaterial. The answer to question 9 in both B and D runs in this way: "Yes; I applied to the Sun Life Insurance Company but was not examined. I am applying to the London and Lancashire."

In considering the sufficiency or insufficiency of this answer or the suppression of any fact, it is necessary to bear in mind what question 9 is. That question is in these terms: "Has any proposal or application to insure your life ever been made to any company or agent upon which a policy has not been issued, or upon which a policy has been issued at a higher rate than that applied for? If so, state particulars, to what company, when, &c." And the contention on behalf of the company is that on the 15th of September he had applied to the Positive Company, and that he did not mention this in his answer. It will be seen from what I have already stated that when there is any ambiguity in any question it is to be construed in favour of the insured, and therefore if the question had been at all ambiguous, I should have been justified upon the cases in construing it in favour of the assured, but is there any ambiguity? What is wanted in the question is information on the subject of any application which has had some result in a particular way, viz., whether there has been an application upon which a policy has not been issued, or if it has been issued, it has been at a higher rate. The reason of the question is plain. It is to give the company information of the fact of his having applied and been found ineligible or so risky as to require him to pay a higher rate. He is not called upon to mention an application which has been made but which has had no result. If the evidence of Mr. Anderson is closely examined, it will be seen that this is the true reason why he did not send for the papers from the London and Lancashire; although, he does try at one stage to explain it away by saying that he understood from the answer that the application to the London and **[624]** Lancashire was not completed. And he went on to say that he thought the application had not been sent, but that Gamble only intended to apply. It is difficult to conceive how he could have understood the answer in that sense in the face of Chunee Lall's distinct statement that he had told

him Gamble had applied to, and wanted to, put all his insurance in the London and Lancashire, and that Anderson wanted him to prevent this.

I therefore hold that Gamble was not bound to state in his answer that he had applied to the Positive, and that his not mentioning the fact does not amount to a breach of the warranty so as to avoid the policy. It was also said that Gamble was suffering from albuminuria. There is nothing to show that he was ever treated for this disease, or that he had any knowledge that he was suffering from a disease of that character. I have referred to the language of Lord WATSON on the question of latent diseases. Dr. Mohendro Nath Bonnerjee in answer to a question put by me stated that the symptoms are distinct in an acute stage, but he admitted that he did not see the man in an acute stage of the disease. I find it impossible to hold that a man who did not know he was suffering from a disease committed a breach of warranty in saying nothing about it. The case of *Anderson v. Fitzgerald*, (1853) 4 Cl. H. of L., 484, is different to this.

I think the present case comes within the words of Lord WATSON. Moreover, Dr. Rajendra Lall Dey, who was employed by the company to examine the man, did not find any albumen in his urine. If he had found it, but did not mention the circumstance in his report, the company, in my opinion, would have been fixed with imputed knowledge through their agent. If the doctor was misled, and I must assume that he was, for otherwise he could not have made an erroneous statement of that character, surely the assured could not be presumed to know of the presence of the disease in his system.

I have no doubt upon the evidence of Mrs. Gamble and Ray that Gamble was going to England in search of employment; and it is clear that before his departure he had applied to two other offices to ensure his life. Learned Counsel for the defend-[625] ants urged me to draw an inference of fraudulent intention from that circumstance. In my opinion there is no reason whatsoever for presuming fraud. The man was going away on a long voyage, and was naturally anxious to make some provision for his family. He was evidently thinking of employment in foreign parts, as appears from the addition to the policy, by which he was allowed in consideration of an extra premium to go as mariner to any other part in the world, except the west coast of Africa. Although I admitted the applications made to the Positive and the London and Lancashire to show that he had been applying to two other companies at or about the same time when he applied to the defendant-company, I repeat I do not think there is any ground whatsoever to justify one in saying there was any fraudulent intention on his part. On the contrary to me it seems he was actuated by a natural desire to make some provision for his family.

Nor does the fact that he died a few months after give rise to the inference that he knew his life was doubtful. The circumstances lead me to a totally different conclusion; I am inclined to believe that he thought he had a long life before him. The conclusion therefore at which I have arrived is this, I hold that the non-mention in his proposal to the defendant-company of his application to the Positive was not required by the question, and therefore it does not amount to a breach of warranty. I hold further that on the evidence it is impossible to say that the declaration filled in by Dr. Dey represents the statements made to him by Gamble; in other words they appear to me to be the doctor's own version of what he was told by Gamble.

I further hold that the doctor was shewn the copy of the statement given by Gamble to D'Mello.

Upon these findings I hold that there was no breach of warranty, and that the plaintiff is entitled to recover. There will be a decree in her favour for the amount claimed with costs on Scale No. 2 and interest at six per cent.

Judgment for the plaintiff.

The defendant-company appealed.

Mr. Garth (Mr. Knight with him) for the appellants.—The [626] lower Court put the *onus* of proof on the company, although it was admitted by the other side that the declaration was signed by Gamble.

The Court held that the fact of its being signed by Gamble did not affect the *onus*; it was on the company to prove Gamble made the statements set out in the declarations, and that those statements were untrue.

The Court, I submit, was wrong; the *onus* lay on Mrs. Gamble and not on the company.

This suit was brought just as the period of limitation was about to expire, and the story now put forward by the other side as to the form being signed by Gamble before it was filled in was thought of then for the first time. No such story was thought of five years before when she put forward her claim.

The statements and representations made by Gamble form the basis of the contract. How can Mrs. Gamble put these on one side and yet hold the company liable? Gamble was bound by the statements appearing under his signature, and Mrs. Gamble was not entitled to go into evidence to show he did not make them. Supposing the allegation made by Mrs. Gamble is true, and the D'Mello puff had been shown to the company's doctor, it cannot affect the company. The terms of the contract are clear. No information or representation given to any one would bind the company, unless reduced to writing and presented in the application to the Home Office.

Upon the facts as found, the company, I submit, is entitled to judgment.

Mr. Sinha (Mr. Dunne with him) for the respondent.—The agreement must be read with the provision in the policy itself, that does not refer to the Medical Examiner's report. What Gamble warranted were the statements and replies in the application itself, and do not include the declarations made to the Medical Examiner.

The declaration must have been written by the doctor from the notes taken by him in his book. The words "any other person" in the application does not include the Medical Examiner, whose report has been dealt with before.

[627] If there was a warranty of every representation I admit there has been a breach.

With regard to the disease of the kidneys knowledge in Gamble must be proved before it can be said there was any breach of warranty, *Thomson v. Weems*, (1884) L. R., 9 App. Cas., 671. Are these the declarations of Gamble? The signature is in different ink to the rest of the document. What I suggest is the doctor did not go through the form of asking all the questions in the declaration.

Cur. adv. Vult.

JANUARY 10th, 1900. **Maclean, C.J.**,—This is a suit to recover from the defendant-company a sum of Rs. 10,500, the amount assured on five policies on the life of the plaintiff's late husband, one John Frederick Gamble, a master mariner, which policies were effected with the defendant-company in the month of October 1893. John Frederick Gamble who, for several years, had been resident in Calcutta, died in England in the month of April 1894 of disease of the kidneys. The policies are granted by the company "in

consideration of the agreements, statements, representations, and warranties submitted to its officers at the Home Office in the City of New York in the written applications for the policies, which are hereby referred to and made part of this contract."

For these policies John Frederick Gamble made application to the company on the 16th and 18th of September 1893. On the 19th September he set sail for England. The applications were in writing in the form usually adopted by the company and were signed by John Frederick Gamble. The portions of such applications, material for the purpose of the decision in the case, are question 9 and the answers thereto. Question 9 runs as follows:—

"A.—Has any proposal or application to insure your life ever been made to any company or agent, upon which a policy has not been issued, or upon which a policy has been issued at a higher rate than that applied for?"

"B.—If so, state full particulars, to what company, when, and etc."

[628] The answer is: "Yes, I applied to the Sun Life Insurance Company but was not examined. I am applying to the London and Lancashire." The answer says nothing about an application to the Positive Life Assurance Office, which undoubtedly had been made by Gamble. The application contains the following agreement by Gamble: "I do hereby agree as follows:—

(1) That the statements and representations contained in the foregoing application, together with those made to the Medical Examiner by me, shall be the basis of the contract between me and the New York Life Insurance Company; that I hereby warrant the same to be full, complete, and true, whether written by my own hand or not; this warranty being a condition precedent to, and a consideration for, the policy which may be issued hereon.

(2) That, inasmuch as only the officers at the Home Office of said company, in the City of New York, have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, or information made or given by or to the person soliciting or taking this application for a policy or by or to any other person, shall be binding on said company or in any manner affect its rights, unless such statements, representations, or information be reduced to writing and presented to the officers of the said company at the Home Office in this application."

John Frederick Gamble was examined by the Medical Examiner of the defendant-company, a certain Dr. Dey, on the 18th September 1893, and on that day he undoubtedly signed the declaration made to the Medical Examiner Dr. Dey. (Exhibit E).

By that declaration he declared that he had not, since childhood, had disease of the kidneys or disease of the urinary organs; and in answer to the question "Give full particulars of any illness you may have had since childhood," he replied, "except a few attacks of biliousness, I had no other illness," and in reply to another question "When were you last confined to the house by illness?" he declared, "I was never confined to the house." In reply to question 4 "Are you subject or predisposed to dyspepsia?" he answered "No;" and in reply to question 6, "Have you [629] ever been seriously ill?" he answered "No;" and to question 7, "Name and residence of your usual medical attendant," he replied "no fixed medical attendant;" and in reply to the question "Have you consulted any other medical man, if so, when and for what?" he answered "No." Upon that application and declaration, the life was accepted and the policies in question were granted.

As I have stated, John Frederick Gamble died in England in the following April of disease of the kidneys. A claim was subsequently made against the company by his widow, the present plaintiff, as the person entitled to the benefit of the assurance for the amount mentioned in the policies. The company appear to have had their suspicions aroused as to the truth of the statements in the applications and declaration, and in consequence two interviews took place on the 6th and 8th October 1894 at the office of the company in Calcutta, between the plaintiff and Mr. Anderson, the defendant's manager in Calcutta, and their solicitor Mr. Robertson. I shall have to refer later on to these interviews somewhat more in detail, but for the moment, it is sufficient to say that the plaintiff was then told that her claim would not be admitted, and that the company regarded the transaction as a dishonest, if not a fraudulent, one.

Nothing more was heard of the matter by the company, until nearly two years after, namely, on the 28th of September 1896, when a Mr. Cranenburgh, a pleader of the Presidency Magistrate's Court, wrote, on behalf of the plaintiff, to Mr. Anderson, the letter (Exhibit 2), in which he demanded immediate payment of the amount due on the policies with interest, and stated that, in default of immediate payment, proceedings would be taken for recovery of the money. The defendants' solicitor at once replied repudiating liability on the policies, but this suit was not instituted until the 22nd of April 1897.

I will now refer to paragraph 8 of the plaint which is in the following terms: "The defendant-company's forms connected with the said application for the said policies Nos. 566820, 566821, and 566822, including the printed form of application for insurance, and the printed form of declarations to the Medical Examiner of the defendant-company were brought to the house [630] of the said John Frederick Gamble on the 18th September 1893, by one Chunee Lall Bose, who was employed by the defendant-company as a canvasser, and a native doctor, whose name the plaintiff does not recollect, who was employed by the defendant-company to examine the said John Frederick Gamble and to take the said declarations. The said form of application was then and there filled up, and signed by the said John Frederick Gamble and was retained by the said Chunee Lall Bose. The said native doctor then examined the said John Frederick Gamble in a separate room, and when the examination was finished the said form of declarations to the Medical Examiner was signed by the said John Frederick Gamble, but to the best of the plaintiff's recollection and belief without being filled up, but being retained by the said native doctor to be filled up by him and forwarded to the defendant-company's office. The said native doctor made notes in a note book of his, as the plaintiff believes the result of his examination of the said John Frederick Gamble, and of the information obtained to enable him to fill up the said form of declarations. The said John Frederick Gamble had by him at the time a statement drawn up by himself sometime previously of an illness, from which he had suffered during the years 1888—1891, and of which he had been cured by one Dr. D'Mello, by some medicine invented by the latter, and this statement the said John Frederick Gamble showed to the said native doctor then and there, and informed him what it was, and the said native doctor then and there read it (a copy of the said statement is annexed hereto and marked B), and the plaintiff prays that it may be taken as part of her plaint; the said statement had been drawn up by the said John Frederick Gamble by way of a puff or commendation of the medicine with which the said Dr. D'Mello had treated and cured him as aforesaid, and which the said Dr. D'Mello intended to patent."

In their defence the defendant-company state that the policies were granted upon the faith of the statements and representations made to the defendants by the assured, both in his application and in his declaration to the Medical Examiner, and they rely upon the warranty contained in his applications; they charge that certain of those statements and representations were untrue; they deny in [631] *toto* the allegations in paragraph 8 of the plaint; and do not admit that their Medical Examiner ever examined the assured. I may dispose of the latter point at once by saying that it has not been insisted upon.

The case came on for trial before Mr. Justice AMEER ALI, and after lasting many days the learned Judge gave judgment in favour of the plaintiff. Hence the present appeal by the company.

Passing by, for the moment, the question of whether or not it is open to the plaintiff, in the face of the contract between her late husband and the company, to adduce evidence in support of the allegations in paragraph 8 of the plaint, and taking it that the plaintiff is bound by the terms of the contract between Gamble and the company, I will, first, consider whether the statements and representations made by the assured, both in his applications and declaration to the Medical Examiner, were, or were not, true. I need not go into this question much in detail, for substantially, it has not been denied by the respondents that certain of such statements and representations, sufficient to vitiate the policy, were, in fact, untrue. There cannot, I think, be any reasonable doubt, that, at the time of making the applications, the assured was suffering from disease of the kidneys and urinary organs; that he had been subject to dyspepsia from 1888 to 1891; that he had suffered from the illness described in Exhibit B to the plaint; that he had been frequently confined to the house through illness, and had also been in hospital; that he had consulted several medical men, and especially a certain Dr. D'Mello and that he had made an application to insure his life in the Positive Government Security Life Insurance Company, and had been examined by the said company's Medical Examiner, of which he says nothing in answer to question 9 in the application.

As regards the disease of the kidneys and urinary organs, it is urged that this was a latent disease, and that there is nothing to show that the assured was conscious of its existence at the time he made the representations, and, in support of this reliance is placed upon a passage in the judgment of Lord WATSON in the case of *Thomson v. Weems*, (1884) I. R., 9 Ap. Cas., 671, 694, where that most learned [632] and distinguished Judge says: "Both these authorities relate to internal disease, of the existence of which the person affected is unconscious, and which medical examination cannot detect, until he is *in extremis* or, it may be, until life is extinct; and the only point arising for decision was, whether a particular query or statement was so expressed as to include latent and unknown, as well as apparent and known diseases."

I much question whether those observations can apply to the case of disease of the kidneys or disease of the urinary organs, of which, when it had reached such a stage as in Gamble's case, it seems unlikely that the patient could be quite ignorant when he made his applications and declaration, and in this connection, it must be remembered that the witness Dr. Mohendra Nath Banerjee, in answer to the following question from the Court:—"Could all the symptoms you have put down there have been known to the man himself" replied, "The symptoms of Bright's disease should be known to him. The quantity of urine would be abnormal, and in the acute stage of the disease, he would pass blood and there are various other things. I did not see him in an acute stage."

The plaintiff tells us that her husband suffered from dyspepsia, and there cannot, I think, be any doubt, in the face of Exhibit B to the plaint, a document which, admittedly, was signed by Gamble, that the declaration that, with the exception of a few attacks of biliousness, he had no other illness, and was never confined to the house, were absolutely untrue. It is again very difficult for the plaintiff to explain away the negative answer to the sixth question in the declaration made to the Medical Examiner: "Have you ever been seriously ill?"

It is urged that the answers to questions 7 and 8 in that declaration are sufficiently accurate, and that, "inasmuch as the words used are ambiguous, they must be construed *contra proferentes* and in favour of the assured," adopting the language of Lord WATSON in the case to which I have referred. The contention is, that, as in answer to question 7, the applicant said he had no "fixed" medical attendant, not perhaps a very ingenuous answer—the question, "Have you consulted any other medical man?" must mean a medical man other than a fixed medical attendant [633] and, as he had no "fixed" medical attendant, he was truthful and justified in saying that he had not consulted any other medical man. This argument is replete with casuistry, and seeing that we are dealing with a case of a person applying for an insurance on his life, a situation demanding from him the disclosure of all material facts within his knowledge, it does not impress me favourably.

The same species of reasoning applies to his answer to question 9 of the application, in which answer he says nothing about his application to the Positive Life Insurance Office, the argument being that the words "upon which a policy has not been issued," mean "a policy which has been refused." I do not propose to go into this, as to my mind the misstatements and misrepresentations made by the assured are amply sufficient to warrant the company in avoiding the policy.

If, then, the matter rested here, the defendants are bound to succeed. But it is urged for the plaintiff, first, that it is open to her to show that Gamble signed the declaration to the Medical Examiner before it was filled up: and that in consequence, he is not responsible for the contents of that declaration and is not bound by it; and secondly, that he showed to the Medical Examiner his written statement to Dr. D'Mello, and that the Medical Examiner must be taken to have known of the contents of that statement, and that the knowledge thus acquired by the Medical Examiner must be imputed to the company.

I am unable to take that view, having regard to the agreement of the assured with the company. He agreed that the statements and representations contained in his application, "together with those made to the Medical Examiner by me," should be the basis of the contract between the parties. He warranted them to be full, complete, and true, whether written by his own hand or not, and that the warranty was to be a condition precedent to, and a consideration for, the policy which might be issued thereon.

Now the plaintiff says she is entitled to resile from all this, to show that Gamble did not state what under his own signature he declared to be true, and yet to hold the company liable on the [634] policy brushing aside and treating, as of no import whatever, the statements and representations which form the very basis of the contract.

But Gamble's agreement did not stop here; there is another and an extremely important feature in it. He agreed for the reason which is recited, that no statements, representations, or information made or given by, or to any person soliciting or taking the application for the policy, or by or to any other

person, shall be binding on the company, or in any manner affect its rights unless such statements, representations, or information be reduced to writing and presented to the officers of the said company at the Home Office, in the application.

This being the bargain between the two contracting parties, are we to say that all this means nothing, that these terms were not binding on the assured, and that they are to be treated as against him as so much waste paper? I think not. The object of such clauses is obviously to provide against a case of the very class which is now set up by the plaintiff; to prevent those claiming under the assured from going behind his written declarations which are the very basis of the contract. If it were otherwise, it is difficult to see how any certainty in contracts of this class would be afforded to the assuring company, or how, in many cases, as in the present case, heavy and prolonged litigation between the assured and the company is to be avoided. For my own part, I should have thought and think that, when the company had put in the contract between the parties, and shown, as they did, that, in important particulars, many of the statements and representations made by the assured were untrue, there would have been an end of the plaintiff's case. The learned Judge, however, in the Court below, has thought otherwise, and has allowed the plaintiff to go into evidence in support of her allegations in paragraph 8 of her plaint, and has not noticed the argument as to whether or not she was entitled to do so in the face of the contract between the parties.

I will therefore—though in the view I take it is not strictly necessary—now deal with that evidence, premising that in my opinion the plaintiff's story ought to be most carefully analysed, and that she ought not to succeed unless, in the face of the docu-[635]ments signed by Gamble, her case be established by clear and cogent testimony. I am bound to say that her story strikes me at the outset as a somewhat suspicious one, and that suspicion is not diminished by the consideration that it has never even been suggested until the filing of the plaint, although some two-and-a-half years before that date the plaintiff had been virtually told that the claim was a dishonest one, and that it would not be admitted. We hear nothing of this story at the interviews in October 1894, when the plaintiff's claim was challenged, nothing of it during the long silence between that date, and Mr. Cranenburgh's letter two years later, nothing about it in that letter, and nothing about it until after Dr. D'Mello's death.

I will now pass to a consideration of the evidence, with the view of ascertaining and determining what really took place at the interview of the 18th of September 1893, for this is the crucial question, and in dealing with this evidence, it is necessary to bear in mind that the witnesses are speaking to an event which occurred nearly six years before the date when they were giving their evidence, a circumstance to which any discrepancies in that evidence may not unfairly be attributed. Dealing first with the question of whether or not the declaration was filled in when Gamble signed it, the plaintiff can tell us but little. She merely says that her husband sat at the desk and took up the pen to write something, but she did not know what he wrote. This, to my mind, carries her case no way at all, whilst all that the witness James Ray can say in his evidence-in-chief, is that, on the date in question, Mr. Gamble signed some papers in his presence, and that is all that he can say about the forms, though, no doubt, in answer to a question by the Court, the question being "Besides making any notes in the pocket-book, did the doctor write on any forms;" he said, "No, I only saw Mr. Gamble sign some papers."

If this evidence stood alone it would not justify us in concluding that the answers in the declaration had not been filled in by the doctor before Gamble signed it, quite apart from the positive evidence of Dr. Dey, who distinctly says that the declaration was signed in his presence, after he had filled up the form, which would be in accord with the usual practice in such cases.

[636] In dealing with the evidence I am not unmindful of the fact that the learned Judge in the Court below enjoyed the great advantage of seeing the witnesses, and so far as anything turns upon their demeanour, we must be cautious in not differing from the opinion of the learned Judge who tried the case. The learned Judge appears to have formed a very favourable impression of the plaintiff as a witness, and an equally unfavourable one of Dr. Dey; he says that he utterly disbelieves the doctor. So far as one can judge from the way the latter gave his answers, as we see them in print before us, this sweeping denunciation might appear somewhat unmerited, but, upon the demeanour of the witness, the Judge in the Court below is in a position to form an opinion which we are not. No doubt in answer to questions repeated by the Court, as to his recollection of what passed on the occasion, the doctor said that he remembered very little about the case, though there is force in his observation that it was very difficult to remember when the transaction took place so long ago. But, taking the evidence of the plaintiff and the witness Ray, who is in a somewhat humble position in life, I think that it is impossible to hold that the plaintiff had substantiated that the declaration was filled in after Gamble had signed it.

I now pass to the question as to whether Gamble's statement to Dr. D'Mello was shown to Dr. Dey. The plaintiff, in her evidence-in-chief, says: "The doctor took this paper in his hand and looked at it; whether he read it he looked at it and turned it over. I said that does not matter."

To the Court.—Q.—Do you believe he read it?

A.—Yes, he looked at it and turned it over.

To Mr. Gregory.—I did not hear the doctor say much. On the paper being shown, he said to my husband: "I am examining you, it's all right," and he returned the paper to him. And in cross-examination she says:—

Q.—Was there anything untrue in the statement?

A.—Not untrue, but exaggerated. Made to appear bad, when it was not quite so bad.

Q.—Merely the symptoms of the illness were exaggerated, nothing more?

[637] A.—No, nothing more. I did not hear any of the answers of my husband to the questions put by the doctor Baboo.

Q.—Do you still suggest that Dr. Rajendra read through the statement and then filled up the form as it is?

A.—He looked at it. He may have glanced or he may have read.

The Court.—You think he read it?

A.—Yes, he had a look at it.

Taking her answer as a whole the witness is, I think, very hesitating in saying that the doctor read the statement.

Ray says:—

Q.—Did you hear what transpired?

A.—About insuring his life. They were talking about having his life insured. He spoke of having his life insured, and the doctor Baboo took notes in his pocket-book. Mr. Gamble showed him some papers. I don't know if I

could identify the papers now. The doctor Baboo read the paper. His reply was:—"I am examining you and I can see; your being ill four years back does not signify, so long as you are in health now." That is not a very definite statement, and does not amount to much more than that the doctor read some paper. In cross-examination he says:—

"Yes, but I had not read it. I had seen it with Mrs. Gamble in her hands. That was when she was going to the company backwards and forwards. Then it was that I saw this paper."

Q.—I asked you if you had ever seen it before that occasion when the doctor was there?

A.—No, I had not.

Q.—How did that come to be produced on that occasion?

A.—Mrs. Gamble referred to her husband, and he drew it out of a drawer and showed it to the doctor. Yes, I recollect that after all these years. She said something to the effect "Jack show that paper to the doctor," or some words to that effect. I don't remember if she said anything about what the paper was.

He says that Dr. Dey was some 10 or 15 minutes reading it all through, the plaintiff says, five minutes or so. Dr. Dey [638] denies that he ever saw the paper. But apart from Dey's evidence, to my mind, neither the evidence of the plaintiff nor of Mr. Ray is sufficiently convincing to warrant us in finding that the written statement to Dr. D'Mello was ever read by Dr. Dey, even if it were ever shown to him. It is almost incredible that if it had been so shown and read, the plaintiff should, under the circumstances, have kept back the fact for so long a time from the company. I am quite unable to accept the story now set up by the plaintiff and I have formed a very adverse opinion as to the honesty of her case, and the honesty of the transaction on the part of her late husband. The other witnesses called do not appear to have thrown much light on this part of the case. I think it is a very fair inference from all the circumstances of the case, that this story about the statement to Dr. D'Mello having been shown to Dr. Dey on the 18th September 1893 is a mere afterthought, consequent upon the plaintiff's knowledge acquired at the interview of October 8, 1894, that that statement had reached the hands of the company. As I have pointed out nothing was heard of this story until after Dr. D'Mello's death.

In the view I take, it is not very important to deal minutely with the evidence as to what took place at the interviews of the 6th and 8th October 1894, nor to express any opinion as to whether, or not, Mr. Anderson and Mr. Robertson were well advised in seeking or having those interviews. That the plaintiff, at those interviews, signed the Exhibits No. 12 and No. 13 cannot be questioned, though she alleges that at the time she was quite stunned and confused, and that they were not voluntarily made by her. As regards Exhibit No. 12 the plaintiff admits that she did make the statements in that paper to Mr. Anderson, and goes on to say that those statements are in point of fact true, one of those statements being that her husband had been eighteen years in India, and that during that period he had never been attended by any doctor. This obviously is incorrect, and I am unable to place any credence upon the plaintiff's statement that her answer to question 9 in Exhibit No. 1a was given, because Mr. Anderson said she must agree with everything her husband had said. Except as going to the credibility of the plaintiff, it does not appear to me that what she stated on the [639] 6th or 8th October is of much materiality upon the real issue of fact

which we have to decide, namely, as to what occurred on 18th of September 1893.

I may notice in passing, that in the letter of the 28th of September 1896, written about two years afterwards, Mr. Cranenburgh says nothing about the plaintiff being stunned or confused at the interviews in October 1894, he rather implies that she was quite able to take care of herself, and that she easily saw through the so-called ruse of Mr. Anderson.

It is unnecessary, having regard to my opinion on the case, to decide whether the declarations made by Gamble to the London and Lancashire and Positive Offices were admissible in evidence in this case, though the inclination of my opinion having regard to the issues involved is that they were.

Upon these grounds the claim of the plaintiff absolutely fails; her suit must be dismissed with costs and she must pay the costs of this appeal.

Macpherson, J.—I agree.

Hill, J.—I also agree.

Attorneys for the Appellants: Messrs. *Orr, Robertson and Burton.*

Attorney for the Respondent: Mr. *E. J. Fink.*

D. S.

[27 Cal. 639]

PRIVY COUNCIL.

The 10th and 15th November and 9th December, 1899.

PRESENT :

THE LORD CHANCELLOR, LORDS HOBHOUSE, MORRIS, DAVEY, AND
ROBERTSON, AND SIR RICHARD COUCH.

Haranund Chetlangia..... ..Plaintiff

versus

Ram Gopal Chetlangia and another..... ..Defendants.

[On appeal from the High Court at Fort William in Bengal.]

Evidence Act, 1872, ss. 65, 66, 74, 79, 86 -- Foreign State, judicial proceedings in--Record not certified as specified in s. 86--Secondary evidence--Public document, contents of, s. 74.

The record of proceedings in a Court of Justice is presumed to be genuine and accurate, if it is certified as directed by s. 86* of the Evidence Act.

But the proceedings may be proved by an official of the Court speaking to what takes place in his presence and also to an uncertified record thereof. [640] The latter thereby becomes secondary evidence under ss. 65 and 66 of the certified record (being a public document under s. 74) admissible without notice to the adverse party when the person in possession thereof is out of the jurisdiction.

* [Sec. 86 :—The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India resident in such country to be the manner commonly in use in that country for the certification of copies of judicial records.]

APPEAL from a decree (4th April 1894) of the High Court, affirming a decree (30th November 1891) of the Subordinate Judge of Nuddea.

The appellant, a minor on the 31st August 1888, sued on that date by his adoptive mother and guardian, Chuni Bibi, both being then resident at Goari, Kishnagar, in the Nuddea division of Bengal, for his, the minor's, share of property valued at more than four lakhs, basing his claim on an alleged adoption as son to the late Shib Narain Chetlangia, who died there in June 1877. The first respondent and first defendant was the only brother of Shib Narain. Both the brothers were the sons of Ram Buksh Chetlangia, deceased in 1884, who left also a widow, Jodhi Bibi, the second respondent. To the latter Ram Buksh by his will, proved on the 14th October 1884, left part of his property, leaving the residue to his son Ram Gopal.

This Chetlangia family was first settled in Sikhar, in the talukh of the Raja of Sikhar, in Jeypur territory, whence Ram Buksh came to Bengal about the year 1855. After Shib Narain's death, Chuni Bibi returned to Sikhar. She purported to adopt the plaintiff, under an authority from her husband to adopt a son to him.

That she had no such authority was decided on this appeal. There had been a suit brought at Sikhar by Ram Buksh against Chuni Bibi, in consequence of her attempt to adopt the plaintiff. It was also decided incidentally to the main question on this appeal, that although no copy of those proceedings in a foreign Court, certified in accordance with s. 86 of the Evidence Act, I of 1872, by the Political Agent at Jeypur, was produced at the hearing of this suit, still the evidence given as to the proceedings that had taken place in the Court at Sikhar, given by an official of that Court who was present, with his further evidence as to a copy of the recorded proceedings, which copy he produced, was admissible evidence.

The plaint stated that for several years after the adoption, Chuni Bibi and the plaintiff lived together in Sikhar, but in [641] August 1880 they came to Bengal, and lived with Ram Buksh as a joint family till the 7th March 1883, when Ram Buksh excluded the widow and the adopted son, the plaintiff, who now claimed his adoptive father's share in the joint family property, asking for partition and an account.

The first defendant denied in his written statement both the fact and the validity of the adoption. He denied that the widow had authority from Shib Narain for making the adoption. He relied on the proceedings in Jeypur as conclusive against it.

The issues raised questions whether Chuni Bibi had authority to adopt, and whether the adoption had been valid according to the custom in such matters in Jeypur; also as to the effect of the proceedings in that State. The nature of the property, whether ancestral or self-acquired by Ram Buksh, was also in issue.

The Subordinate Judge was of opinion that by the Mitakshara law, as it prevailed in the State of Jeypur, and in Sikhar within that State, an authority to adopt given by a husband could not be legally carried out by his widow without the assent of the head of the family. He recorded no finding as to Shib Narain's authority, but found that Ram Buksh had never consented to the exercise of such an authority by his widow. He therefore held that the adoption was invalid. Upon an issue as to the quality of the property claimed he found that none of it was the joint property of Shib Narain and Ram Buksh, but was the self-acquired property of the latter. He found that the business at Goari was not an ancestral joint-family business, and that Shib Narain only

assisted his father in it, without having a share. For these reasons he dismissed the suit.

On the plaintiff's appeal to the High Court, a Division Bench (PRINSEP and AMEER ALI, JJ.), maintained the decree of dismissal, stating their reasons in separate judgments. Both the Judges declined to accept the proceedings in the Sikhar Court, including the final order disallowing the alleged adoption, as conclusive against its validity, or against the fact of its having been effected. They considered the fact that no record was in evidence before them certified by the Political Agent under s. 86 of the Evidence Act, 1872. The absence of the [642] certified record rendered the whole set of documents relating to the proceedings in Jeypur inadmissible, according to the judgment of the one Judge, and rendered proof of the jurisdiction defective in the opinion of the other. On the main question of the asserted authority to adopt having been given by Shib Narain to the wife to be exercised by her after his death, both the Judges decided that there was no sufficient evidence in proof of it. As to the necessity for the widow's having had the assent of the head of the family, Ram Buksh, the Judges were not in complete accord. Both of them, however, concluded that the authority from the husband, Shib Narain, which was necessary to give validity to the widow's act of adoption, had not been established as having been given by him. The adoption, therefore, failed.

Mr. J. H. A. Branson, for the Appellant.—There has been sufficient evidence of the husband's having given his authority to the wife, to adopt after his death, to warrant the finding that the widow's adoption was good and valid. The Courts below should have taken that view. It has not been proved that the refusal by Ram Buksh to consent that this adoption should take place was, by a custom governing the parties, sufficient to invalidate the adoption by the widow under the authority of her husband. Such a custom would not be in accordance with the Hindu law of adoption according to the Mitakshara.

The Right Hon'ble H. H. Asquith, Q. C., and Mr. J. D. Mayne, for the Respondent.—On the evidence the authority to adopt has not been proved to have been given by the husband. That defence derived support from the proceedings at Sikhar, which showed that Ram Buksh had opposed the widow's attempt to adopt. The evidence of those proceedings had been erroneously excluded as inadmissible, on the ground that the copy of the record had not been certified within the terms of section 86 of the Evidence Act, 1872. Although there was no certified record produced, there was the primary evidence of a witness who stated the proceedings that had taken place in his presence, and had, with knowledge of the writer's handwriting, whom he knew to be one of the amlas of the Sikhar Court, testified to the correctness of the copy, thereby rendering it secondary evidence of the contents of the record. They referred to ss. 65, 66, 74, 79 of the Evidence Act. Section 86 only prescribed one mode of proving the record of a foreign judicial proceeding which did not exclude all others.

Mr. J. H. A. Branson in reply.

1899, DEC. 9th.—The judgment of their Lordships was delivered by

Lord Hobhouse.—The plaintiff, now appellant, is suing to recover a share of the estate of Ram Buksh, who died about the year 1884. He alleges that Chuni Bibi, who was the widow of Shib Narain, the eldest son of Ram Buksh, adopted him to be the son of her husband after his death, which took place in the year 1877. It is not disputed that in point of form the adoption took place; but the defendants deny that Shib Narain gave his widow any authority for that purpose. Unless the plaintiff can prove that she had such authority, his suit must fail. It has failed in both the Courts below, and at this Bar the

argument has been confined to the one question : Had the widow authority to adopt, or not ?

The Subordinate Judge dismissed the suit on another objection, which need not now be dwelt on. In the High Court Mr. Justice PRINSEP throws serious doubt on the evidence given to prove that Chuni Bibi had authority, but he does not rest his own judgment finally on that ground. He considers that the parties are governed by the law of their domicile, which is in the State of Jeypore, and that in Jeypore there prevails a local custom to the effect that a widow cannot adopt without permission both from her husband and from the head of the family, for the time being. Ram Buksh was the head of the family, and so far from permitting the adoption, he strongly opposed it.

The other Judge was Mr. Justice AMEER ALI. He thinks that the evidence given to establish the local custom alleged by the defendants is not sufficient. He supports the decree below on the ground that the plaintiff failed to show any authority given by Shib to Chuni Bibi. In his view the utmost that the evidence can prove in favour of the plaintiff is that Shib may have suggested to his wife to adopt a boy, who would be chosen by his father Ram Buksh.

[644] Besides the evidence of Chuni Bibi herself, Mr. Branson has laid before their Lordships the evidence of four witnesses : three of them being uncles of Chuni Bibi, and the other a cousin. It is very far from precise. With regard to three of these witnesses, named Rurmāl, Bridhi, and Chota Lal, what they say rather suggests that Shib Narain was desirous that a boy should be brought to himself for adoption, preferably by his father Ram Buksh, and failing his father should be brought by his wife. The language ascribed to him is not that of a man conferring an important authority on his wife. The other witness, Sadasuk, speaks more definitely of permission. His evidence-in-chief is as follows :—

"About a month and-a-half after Shib Narain's coming to Calcutta, one day, at about 11 or 12 o'clock of the day, I was seated near Shib Narain, when Chuni Bibi seeing Shib Narain vomit a large quantity of blood, began to cry. Upon this Shib Narain said, 'My father said that he will get you a boy, if he does not get you a boy, you take a boy and preserve my family (name) I give you permission.' Shib Narain said this to Chuni Bibi in the presence of every one."

From his cross-examination it appears that nobody else said anything except Ram Buksh, who said to Shib "May God restore you to health ; if you are not restored I will get you a boy."

This is at best a very slender basis on which to rest an authority in the wife which the husband did not take the trouble to put into writing. Ram Buksh's remark, elicited in cross-examination, suggests what the three other witnesses suggest, that, if Shib's illness continued, his father was to bring him a boy for adoption. But the witnesses are not very well agreed together. Sadasuk says that Rurmāl was present, and Rurmāl says that there was only one occasion on which he heard adoption talked about. These two then must be speaking of the same occasion ; and Rurmāl says nothing about permission. Bridhi also is said to have been present. He tells us that after Shib Narain spoke nobody said anything on the point of adoption, only Ram Buksh spoke, and what he said was that, as Shib had not recovered in Calcutta, he would take him to Goari. Chota Lal is said to have been present too. He speaks of several conversations in the family about adoption ; and it is not easy to identify that one of which Sadasuk speaks. Some of these conversations clearly contemplate [646] a boy being brought to Shib for adoption ; and in none of them is any express permission mentioned such as Sadasuk speaks of.

These are small differences, quite consistent with the truthfulness of the witnesses, who, it will be remembered, were speaking of conversations some 12 or 14 years after they took place. But the question is whether, when these persons were present, Shib intended to confer, and did so express himself as to confer, a legal authority on his wife; it is of importance to know exactly what he said; and the differences between the narrators are such as to reduce to a very low value the introduction of two or three important words by one of them. Their Lordships do not refer here to the denial of such conversations by Ram Buksh's wife Jodhi and his son Ram Gopal, who are alleged to have been present. The Judges of the High Court attached importance to these denials: but at present the sufficiency of the plaintiff's evidence is under examination.

There remains the important witness Chuni Bibi. She must, unless she has forgotten, know the truth, her evidence is not lacking in precision; and, if believed, it would fully support the plaintiff's case. She gives an account of the conversation at which Sadasuk and the others were present. It is as follows:—

"No children were born of me. I said 'get me a son.' I also told my brother Chota Lal to tell him (my husband) to get me a son. My brother went to Babu Shib Narain and told him, 'You are now ill; have a son brought. Upon this, Shib Narain Babu said, 'If I recover from my illness, then I will go to my native country and bring a boy.' I then began weeping; upon which he said, 'why do you weep? My father, mother, and brother are sitting here: if my father brings you a boy, that will be well; if not, I 'give you permission to take a son and preserve my family.' All this talk took place in the house of Natu Ramji Lodu. This talk took place in the month of Magh of the year in which he fell ill. At the time of this talk the persons present were, Chota Lal, Sadasuk, Rurnal (my uncle), Bridhi Chand, the son of my maternal uncle Ram Coomar, my father-in-law Ram Buksh, and Latu Ram, Ram Gopal, the brother of my husband, the defendant Jodhi Bibi, my mother-in-law, Ramanund Thakoor, the servants of the house, and other persons. All this talk took place at 11 or 12 o'clock in the day. No one gave any answer when my husband said all this. My father-in-law said 'God may cure you of your illness, otherwise I will get a boy for you.'"

[646] This accords with Sadasuk's account, except that Chuni makes the important addition that she and Chota Lal opened the attack on Shib, and that the permission given by him was the outcome of that attack; whereas Sadasuk deposes that Chuni said nothing, and the three others do not mention any intervention by her.

In her cross-examination she admits that her husband several times put off her importunities. "He used to say 'I shall go home after my recovery and fetch a boy'" or "when I am well I will talk about it." That accords with the answer which she says that Shib made to her brother Chota Lal at the outset of this interview. But she alleges that he gave formal permission on four several occasions. He used these very words: "If my father procures a boy for you, well and good; if not, I authorise you to preserve my family by taking a son in adoption." But his words were not put into writing, and neither Chuni nor any other of the numerous people who heard these things ever once suggested that they should be put into writing.

The other incidents to which Chuni deposes need not be detailed. If believed, she proves the plaintiff's case. If she is to be treated as a witness intending to speak truth, but only liable like every one else to error or forgetfulness or the unconscious bias of interest or the tendency to ascribe to a particular time and person things belonging to later times and other persons, all the evidence should be carefully weighed to see whether her story, however

improbable on its surface, may not after all be the true result. But, if she has made false statements on important matters of fact, which it is impossible that she should not recollect, her testimony on other matters in favour of herself is attended with great suspicion.

The defendant Ram Gopal in his written statement, filed in 1889, alleges that in the year 1880 litigation took place in Jeypore regarding this adoption between Ram Buksh and Chuni, as the result of which the adoption was declared by the Court of Sikhar to be invalid. The defendants relied on this decision as *res judicata* in bar of the present suit, but the High Court has rightly disallowed that plea. The nature of the Jeypore suit is left too uncertain for any such use to be made of it. But the [647] proceedings are material to show that Ram Buksh disputed the adoption and that Chuni supported it. The way in which she meets the defendants' allegation is to deny the litigation entirely. "Ram Buksh Eabu did not bring any suit against me before the Raja of Sikhar. I did not give any evidence at Sikhar." This she said in March 1891.

The defendants then brought evidence to prove the Sikhar proceedings. One Bala Buksh was examined. He is an official in the Sikhar Court. He speaks of the litigation there, and says that in his presence the evidence of Chuni Bibi was taken by the Judge Moonshi Mahomed Meeah, and that, in his presence, the suit was adjudicated and the order passed. He puts in a document, which he swears is a copy of Chuni's deposition, and is in the handwriting of one of the Court amlas. It is endorsed "Copy corresponding with the original," which is in the handwriting and bears the signature of Mohun Lal, the Sherishtadar of the Court. He proved in the same way the deposition of Ram Buksh, whom he knew personally. Ram Buksh alleges that a widow has no power to adopt a son. Chuni does not meet the allegation by alleging authority from her husband, but complains of the interested hostility of her father-in-law, who is Shib's heir.

Bala Buksh's evidence was given in May 1891. Evidence was taken through the months of June and July, and the cause was not heard till the end of November. The plaintiff did not make any attempt to introduce rebutting or explanatory evidence. He has now nothing to say in answer, except to suggest that the woman, who was called Chuni Bibi, in the Sikhar Court, was somebody who personated the real Chuni Bibi, the widow. It is impossible to listen to such a suggestion of audacious fraud, unsupported by a shadow of proof or even of allegation. Bala Buksh was cross-examined at some length, but no question was asked tending to suggest a trick of the kind which the plaintiff now puts forward. There is nothing to contradict him except Chuni's general denial of all proceedings against her at Sikhar made before he had spoken. The plaintiff does not improve his mother's position, or his own, by his present suggestion. Their Lordships must look on Chuni's denial as a wilful falsehood and as invalidating her testimony.

[648] The High Court appear to have excluded all the Sikhar proceedings on the ground that they were not proved according to the mode mentioned in section 86 of the Evidence Act. That section says that, if a copy of a foreign judicial record purports to be certified in a given way, the Court may presume it to be genuine and accurate. It does not exclude other proof. The assertion of Bala Buksh that Ram Buksh sued Chuni, and that she gave evidence before Moonshi Meeah in his presence is primary evidence of those matters. His proof of the Sikhar records is secondary evidence; and by sections 65 and 66 of the Evidence Act secondary evidence may be given of public documents, which these are under section 74, without notice to the adverse party, when

the person in possession of the document is out of the reach of or not subject to the process of the Court, which is the case here. Bala Buksh shows that Chuni has told downright falsehoods, and that in a litigation in which her authority to adopt was challenged, she did not assert it. Their Lordships wholly disbelieve the story, at best an improbable one, which she tells of her husband's permission.

The result is to leave the plaintiff's case substantially unsupported. It is probable enough that some conversations took place between Shib Narain and his relatives concerning the adoption of a son by him; but their Lordships agree with the learned Judges below in thinking that the attempt to prove an authority given by him to his wife has failed. They will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs.

Appeal dismissed.

Solicitor for the Appellant:—Mr. W. W. Bor.

Solicitor for the Respondents:—Messrs. T. L. Wilson & Co.

C. B.

NOTES.

[This was applied in (1907) 34 Cal., 576 : 11 C.W.N., 622 : 6 C.L.J., 30.]

[649] APPEAL FROM ORIGINAL CIVIL.

The 24th and 25th January, 1900.

PRESENT:

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,

MR. JUSTICE MACPHERSON, AND MR. JUSTICE HILL.

Rajnarain Bhaduri and another.....Plaintiff

versus

S. M. Katyayani Dabee.....Defendant*.

Hindu Law—Will—Contruction of Will—Dayabhaga family—Disposition to widow as malikatwa.

K, a Hindu, died without issue leaving him surviving a widow B, having made a will in the following terms:—"I, having by reason of ill-health come to the house of my father-in-law N, and not having recovered under various modes of medical treatment, (and hence) considering my life in peril I appoint" (literally "make") "my wife B, to the malikatwa (ownership) after my demise as exercised" (literally "done") "by myself in respect of the family dwelling-house (describing it) and wearing apparel, utensils, &c., whatever there is (i. e.) in respect of all the properties aforesaid, I of my own free will make this will."

Held that B took an absolute heritable and alienable interest.

* Appeal from Original Civil No. 28 of 1899, in suit No. 207 of 1898, reported at p. 44.

THIS was an appeal from a judgment of Mr. Justice STANLEY, dated 7th September 1899 (*supra.*, 44). The facts of the case as found in the Court below are as follows:—

One Kristo Lall Bhadury died leaving an only widow Bhubunessari Dabee, but no issue surviving. He made a will in Bengali, dated 2nd June 1862, of which the following is a translation:—

“To the blessed Srimati Bhubunessari Dabee,—

This instrument of willnamah (will) is executed by Sri Krishna Lall Bhadury to the following effect: “I having by reason of ill-health come to the house of my father-in-law Srijut Nilmoney Chuckerbati Mahashaye, at Mouzah Novogram in the district of Hooghli, and not having recovered under various modes of medical treatment (and hence), considering my life in peril, I appoint” (literally “make”) “my wife Srimati Bhubunessari Dabee to the *malikatwa* (ownership) after my demise as exercised” (literally “done”) “by myself in respect of the [650] family-dwelling house (consisting of) two *cottahs* and six *chittaks* of land with building purchased in the name of my father Nilmoney Bhadury Mahashaye, deceased, at Sutanutygram in the town of Calcutta, and wearing apparel, utensils, etc., whatever there is (*i.e.*) in respect of all the properties aforesaid, I of my own free will make (this) will. Finis 1269 date 20th Joisto.

Sree Krishna Lall Bhadury,
of Sutanuty.”

Witnesses :

Sree Raj Krishna Biswas

Sree Bhutnath Sastree, etc.

After the testator's death his widow Bhubunessari took possession of his property and remained in possession of it till her death on the 17th January 1898. She died intestate leaving Ashutosh Chuckerbati her sole heir. On the 28th October 1899, Ashutosh Chuckerbati died intestate and without issue leaving him surviving the defendant, Sreemati Katyani Dabee, his sole widow and legal representative. The plaintiffs were grandsons of Roodnarain Bhadury, who was brother of Joynarain Bhadury, the grandfather of the testator Kristo Lall Bhadury, and as such were the reversionary heirs of Kristo Lall Bhadury. They contended that under the will Bhubunessari Dabee took only the ordinary estate of a Hindu widow in his immoveable property and that upon her death they became entitled to this property, as reversionary heirs.

JAN. 24. Sir Griffith Evans and Mr. Chakravarti for Appellants.

Mr. Hill and Mr. M. Dutt for Respondent.

JAN. 25. Maclean, C.J.—The question which we have to decide in this case is dependent upon the construction of the will of one Kristo Lall Bhadury who died many years ago leaving a widow surviving him and no issue.

His will which was made in Bengali is dated the 2nd of June 1862, and is in the following terms:—“I, having by reason of ill-health come to the house of my father-in-law” (naming him) “and not having recovered under various modes of medical treatment and hence, considering my life to be in peril, I appoint” (literally “make”) “my wife, Sreemutty Bhubunessari Dabee, to [651] the *malikatwa* (ownership) after my demise as exercised” (literally “done”) “by myself, in respect of the family dwelling-house,” (describing it) “and wearing apparel, etc., whatever there is, (*i.e.*) in respect of all the properties aforesaid, I, of my own free will, make (this) will.”

The question is whether the heirs of the deceased testator, who are plaintiffs, or the heirs of the widow, who died in January 1898, who are the defendants, are entitled to this property, and this depends upon the question what was the estate which the widow took, whether she took an absolute interest, or only the interest of a childless Hindu widow. The learned Judge in the Court below has dismissed the suit, hence the present appeal by the heirs of the deceased testator.

It is urged for the appellants that, although the words of the will, having regard to the true import of the word *malikatwa*, might have conferred upon the widow an absolute interest, had the property been given to her under the will of a stranger,—I should say that the question only arises as to the immoveable property,—that when the gift is by a husband to his wife the same considerations do not apply, and that she does not, and cannot, take an absolute interest upon the ground that there is a distinct and binding rule of Hindu law that, unless upon the language of the will, although the word “malik” or *malikatwa* may be used, an express or implied power of alienation can be taken as given to the widow, she only takes the limited interest of a childless Hindu widow.

For this proposition the appellants rely upon the case of *Bhoba Tarini Debya v. Peria Lall Sanyal*, (1897) I.L.R., 24 Cal., 646, which followed the decision in the case of *Koonj Behari Dhur v. Prem Chand Dutt*, (1880) I. L. R., 5 Cal., 684.

I ought to state that, admittedly, the case is not affected by the Hindu Wills Act, or by section 82 of the Succession Act.

In the case of *Bhoba Tarini Debya v. Peari Lall Sanyal*, (1897) I. L. R., 24 Cal., 646, the law at page 649 of the report is laid down as follows:—“If this stood alone,”—‘this’ referring to the words in the [652] particular will which the Judges were then construing,—”and section 82 of the Succession Act was not applicable to the case, then as the bequest (which in this respect follows the same rule as a gift) was one of immoveable property by the husband to his wives, they would take a limited estate under the *Dayabhaga*. They would take the property without having any power to alienate it; and property over which they have not the power of alienation, cannot constitute their *stridhana* or absolute property (see *Dayabhaga*, Chapter IV, sections 1, 18, 19, and 23), and must on their death pass to the heirs of her husband (see Colebrooke’s Digest Book, V, p. 515, commentary:)”—and, later on at page 651, the same view is further expressed in the following passage:—“We only wish to observe, with regard to those cases, that an important distinction, which is some times lost sight of, may reconcile the apparent conflict in some of them. The rule of Hindu law, referred to above, is based upon a text attributed to Narada cited in the *Dayabhaga*, Chapter IV, section I, 23, and is limited to the case of gift of immoveable property to the wife, and it is to this particular case that the decision in *Koonj Behari Dhur v. Prem Chand Dutt*, (1889) I.L.R., 5 Cal., 684, relates.”

Taking then the law to be that as stated in the cases I have mentioned, we have to ascertain whether upon the construction of the will, in this case and accepting as a guide to that question of construction, the law as laid down by the Privy Council in the cases of *Srimati Soorjeemoney Dasi v. Denobundo Mullick and others*, (1857) 6 Moore’s I. A., 526, and *Moulvie Mohamed Shumsol Hooda v. Shewukram*, (1874) L. R., 2 I. A., 7, an express or implied power of alienation can be regarded as given to the widow. If the gift had stopped at the words, “after my demise,” there would be considerable force in the argument of Sir Griffith Evans, that an absolute interest was not conferred, but we must give some effect to the words that follow “as exercised by myself,” ownership as exercised by myself! What do these words mean? What was the nature

[653] of his ownership? It was an absolute ownership, and as incident to it, there was an absolute power of alienation; and he confers upon his wife the same class of ownership, that is, an ownership with power of alienation. In this view, which I take to be the true one, she takes an absolute interest, an interest which upon her death, devolved upon her heirs and not upon the heirs of her late husband.

We have been much pressed with a decision of the Bombay High Court, in the case of *Hari Lal Pran Lal v. Bai Rewa*, (1895) I. L. R., 21 Bom., 376, where the language used was somewhat similar to that in the present case. There the Court held that the widow only took a limited and not an absolute interest. Whilst entertaining the greatest respect for the decisions of that tribunal they are not binding upon us, and moreover the language of that will is, in many respects, different from that in the present case. The whole of that will is not set out in the report, and though no doubt these are the words "Just as I am the owner of the property at present, in the same way my wife, Ujum, is the owner," those words were regarded by the Court as qualified by other provisions in the will, provisions which we do not find in the will now before us. But even in that case the learned Judges expressed doubt as to the conclusion at which they arrived. I am unable to regard that case as governing the present; the two wills are very different in their language and provisions.

Having regard to the circumstances of the testator in this case—at the date of his will he had no children and no near relatives—it is not improbable that he should wish to give his wife an absolute interest in the property, and in my opinion the language of his will has done so.

The view taken by the Court below is right and the appeal must be dismissed with costs.

Macpherson, J.—I am of the same opinion.

Hill, J.—I am also of the same opinion.

Appellants' Attorneys: Messrs. *M. C. Dutt and Son*.

Respondent's Attorney: *Babu Prya Nath Sen*.

F. K. D.

Appeal dismissed.

NOTES.

[The word '*malik*' generally indicates an inheritable and alienable estate, unless the context showed a different meaning:—(1907) 30 All., 84; (1909) 14 C.W.N., 458; (1906) 29 All., 217; (1900) 5 C.W.N., 300; (1906) 8 Bom. L.R., 482.

See also (1901) 28, Cal., 517 at 529; (1903) 5 Bom. L.R., 334; (1906) 8 C.L.J., 369; (1902) 30 Cal., 20.]

[654] CRIMINAL APPEAL.

The 30th March, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Queen-Empress

versus

Sonai Mugh.....Appellant*

*Chittagong Hill Tracts, Conviction of offences committed within—Appeal
from—Jurisdiction of High Court to hear such appeal—Chittagong
Act (XXII of 1860), s. 1—Penal Code (Act XLV of 1860),
ss. 379 and 457.*

There is no jurisdiction in the High Court to hear appeals in respect of sentences passed on conviction of offences committed within the districts known as the Chittagong Hill Tracts.

IN this case the accused, who was an inhabitant of Banarhan, zillah Chittagong Hill Tracts, was convicted and sentenced by the Commissioner of Chittagong on the 17th of November 1899 under ss. 457 and 379 of the Penal Code.

Against this conviction and sentence the accusd preferred an appeal from jail.

The judgment of the Court (Prinsep and Stanley, JJ.) was as follows:—

By Act XXII of 1860, s. 1, the tracts of country described in the schedule to that Act and known as the Chittagong Hill Tracts were removed from the jurisdiction of the existing Civil and Criminal Court. Consequently the Court of Sudder Dewany Adawalut had no jurisdiction to hear appeals in respect of sentences passed on conviction of offences committed within those districts. Jurisdiction has not since that date been given either to the Sudder Court or to the High Court. There is, therefore, no jurisdiction in the High Court to hear this appeal. It is accordingly rejected.

D. S.

Appeal rejected.

* Criminal Appeal No. 876 of 1899 against the order passed by F. R. S. Collier, Esq., Commissioner of Chittagong, dated the 17th of November 1899.

[655] CRIMINAL REVISION.

The 9th February, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Khan Baputi Dewan and others.....Petitioners

versus

Bispati Pundit.....Opposite Party*.

Cow, Slaughter of—Open verandah—Annoyance to residents of locality—Open place, Meaning of—Residents or passengers—General Police Act (V of 1861), s. 34—Act for the Regulation of Police (VIII of 1895), s. 13, being an Act to amend Act V of 1861.

The slaughtering of a cow in an open verandah, so as to cause annoyance to the residents of the locality, and in spite of their remonstrances is a breach of the law, being an act in an "open place" within the terms of s. 34 of Act V of 1861 as amended by Act VIII of 1895.

The words "open place" coupled with "road, street, or thoroughfare" should not be interpreted *ejusdem generis*. It seems rather that the addition of these words was intended to have a wider significance, and this is shewn by another amendment in the same section made at the same time in which the annoyance, etc., caused must be not to the residents and passengers, but to residents or passengers. The intention of the Legislature was to extend the Act not only to passengers who would be on such a road, street, or thoroughfare but to residents, who are not passengers.

IN this case it appeared that at 4 P. M. on the 17th May 1899, the accused slaughtered a cow in an open verandah, so as to cause annoyance to the residents of the locality and in spite of their remonstrances. The accused were tried and convicted by the Deputy Commissioner of Shibsagar on the 27th of June 1899, under s. 34 of Act V of 1861, of slaughtering the cow in an open place and fined Rs 50 each, in default, eight days' rigorous imprisonment.

Moulvie Syed Shamsui Huda for the Petitioners.

The judgment of the Court (PRINSEP and STANLEY, JJ.) was delivered by

Prinsep, J.—The order in this case convicting the petitioners [656] has been passed under s. 34 of Act V of 1861, as modified by Act VIII of 1895. It has been found that the petitioners have slaughtered a cow in an open verandah, so as to cause annoyance to the residents of that locality and in spite of their remonstrances. The learned pleader, who appears for the petitioners, contends that the slaughtering in this open verandah does not constitute a breach of the law, not being an act "in an open place" within the terms of s. 34 as amended, and he contends that the words "open place" coupled with "road" "street," or "thoroughfare," must be interpreted *ejusdem generis*. We are not prepared to construe the law in this limited sense. It seems to us rather that the addition of these words was intended to have a wider significance, and this seems to be shewn by another amendment in the same section made at the same time, in which the annoyance, etc., caused must be not to the "residents and passengers" but to "residents or passengers." We understand from this that the intention of the Legislature was to extend the Act not only to passengers, who would

* Criminal Revision, No. 863 of 1899, made against the order passed by H. C. Barnes, Esq., Officiating Deputy Commissioner of Shibsagar, dated 27th June 1899.

be on such a road, street or thoroughfare, but to residents, who are not passengers. This rule is, therefore, discharged.

D. S.

Rule discharged.

[27 Cal. 656]

The 1st February, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Nakhi Lal Jha.....Petitioner

versus

Queen-Empress.....Opposite-Party.*

Security for good behaviour—Imprisonment in default of security—Reference to Sessions Judge—Accused—Notice—Right to be heard by pleader—Order of confirmation—Grounds for such order—Code of Criminal Procedure (Act V of 1898), ss. 110, 123 and 34C.

Where a reference is made to the Sessions Judge under s. 123 of the Code of Criminal Procedure, he is bound to give notice to the person concerned and also to hear his pleader, if he should be so represented. The term "accused" in s. 340 of the Code of Criminal Procedure applies to a person, who is liable under s. 123 of that Code to imprisonment in default of giving security.

[657] The Sessions Judge, in confirming the order of a Magistrate under s. 123 of the Code of Criminal Procedure in regard to the imprisonment of a person in consequence of his being unable to furnish the necessary security, is bound to find a special ground, on which the order is passed, having special reference to s. 110 of that Code. It is not sufficient where he only finds in general terms that it is for the interests of the community at large that such person should be bound over to be of good behaviour.

ON the 31st May 1899 the petitioner in this case was ordered by the Sub-Divisional Magistrate of Kishengunj to execute a bond for Rs. 500 with one surety for the like amount for the maintenance of his good behaviour for three years, under s. 110 of the Code of Criminal Procedure; in default to suffer rigorous imprisonment for that period. The petitioner not being able to furnish security, the matter was referred to the Sessions Judge of Purneah under s. 123 of that Code.

The Sessions Judge being of opinion that it was not necessary to give the petitioner notice, and that the petitioner was not entitled as of right to appear by pleader, upon the examination of the record alone passed the following order under s. 123 of the Code of Criminal Procedure. "I find no reason to dissent from the Deputy Magistrate's decision, that it is for the interests of the community at large that the defendant should be bound over to be of good behaviour."

* Criminal Revision No. 865 of 1899, made against the order passed by F. MacBlaine, Esq., Officiating Sessions Judge of Purneah, dated the 16th of August 1899.

Mr. *Abdur Rahim* (with him *Babu Pramatha Nath Sen*) for the Petitioner.
The judgment of the Court (PRINSEP and STANLEY, JJ.) was delivered by

Prinsep, J.—The rule must be made absolute on both the grounds stated.

This is a reference to the Sessions Judge under s. 123 of the Code of Criminal Procedure, the person bound over to give security for good behaviour not being able to furnish security, and being in consequence liable to imprisonment, under the Magistrate's order, for the term of three years, subject to confirmation by the Sessions Judge. We have no doubt that, on hearing such a reference, the Sessions Judge is bound to give notice to the person concerned and also to hear him by [658] pleader, if he should be so represented. The Sessions Judge in his judgment seems to think that this was unnecessary, and that it was only, if he thought that there were good grounds for requiring a pleader to appear before him, that he was bound to allow such appearance. Section 340 of the Code of Criminal Procedure declares that every person accused before a Criminal Court may of right be defended by a pleader, and the term "accused" in that section has been held to apply to a person situated as the petitioner in the matter before us. In the next place, the Sessions Judge, in confirming the order of the Magistrate in regard to the imprisonment of the petitioner in consequence of his being unable to furnish the necessary security, was bound to find a special ground, on which the order is passed, having special reference to s. 110. He has only found in general terms that it is for the interests of the community at large that the defendant should be bound over to be of good behaviour. That is not a sufficient finding. The order of the Sessions Judge must, therefore, be set aside, and he is directed to hear the reference in accordance with law.

D. S.

Reference remanded.

NOTES.

[Notice should be given :—(1908) 25 All., 375 ; (1900) 25 Cal., 660 ; (1910) 7 M.L.T., 202.]

[27 Cal. 658]

The 7th February, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Har Kishore Dass and others.....Petitioners

versus

Jugul Chunder Kabyarathna Bhattacharjee.....Opposite-Party.*

Conviction of accused—Further inquiry—Offence not charged—Other Persons not before Magistrate—Code of Criminal Procedure (Act V of 1898), ss. 203, 204 and 437—Penal Code, ss. 144 and 426.

On a complaint made to the Deputy Magistrate he convicted one of the accused H, of mischief. On application made to the Sessions Judge he directed a further inquiry to be made by the Magistrate into another offence, under s. 144 of the Penal Code, in respect of

* Criminal Revision No. 882 of 1899, made against the order passed by D. N. Mitter, Esquire, Officiating Sessions Judge of Tipperah, dated the 5th of October 1899.

H, no charge of any such offence having been made at any time against him. The Sessions Judge also directed a further inquiry against other persons, who apparently were mentioned in the complaint, but who had not been summoned to appear before the Magistrate.

Held, that the order of the Sessions Judge was without jurisdiction, not being within the powers described by s. 437 of the Code of Criminal Procedure.

[659] IN this case it appeared that on a complaint made to the Deputy Magistrate of Tippera, he, on the 15th of August 1899, convicted *H*, one of the accused, of mischief under s. 426 of the Penal Code and sentenced him to pay a fine of Rs. 30, and in default to undergo rigorous imprisonment for fifteen days. On application being made to the Sessions Judge of Tippera, he, on the 5th October 1899, directed the District Magistrate to cause further inquiry to be made into the complaint under s. 144 of the Penal Code against *H*, no charge of any such offence having been made at any time against him, and under ss. 144 and 426 of the Penal Code against certain other persons who apparently were mentioned in the complaint, but who had not been summoned to appear before the Magistrate.

The judgment of the Sessions Judge was as follows :—

I am of opinion that the Deputy Magistrate has dealt with the case rather too lightly. He believes the complainant's case to be true, but he has convicted only the accused No. 1 under s. 426 of the Penal Code, and gives no reason why he should not be tried for the offence of being a member of an unlawful assembly. At dead of night, the accused came with a number of lathials armed with deadly weapons and forcibly broke down a hut erected by the complainant some time before without any objection. The Deputy Magistrate has refused to take any action against the accomplices of the accused No. 1, though it is clear upon the evidence that they were as much responsible as the accused No. 1 for the unlawful assembly and mischief. I therefore direct that the District Magistrate do cause further enquiry to be made by himself or by some Magistrate subordinate to him into the complaint under s. 144, Penal Code, against Har Kishore Das, and under s. 144 and s. 426, Penal Code against Kamini Kishore Das, Sobed Ali and Motboor Singh.

Babu Gobind Chunder Das for the Petitioners.

The **judgment** of the Court (PRINSEP and STANLEY, JJ.) was delivered by

Prinsep, J.—On a complaint made to the Magistrate he convicted one of the petitioners, Har Kishore Dass, of mischief and sentenced him to fine. On application made to the Sessions Judge he directed a further inquiry to be made by the Magistrate into another offence, *viz.*, under s. 144 of the Penal Code in respect of Har Kishore Dass, no charge of any such offence having been made at any time against him. The Sessions Judge has also directed a further inquiry against other persons who **[660]** apparently were mentioned in the complaint, but who had not been summoned to appear before the Magistrate.

In our opinion the order of the Sessions Judge is without jurisdiction not being within the power described by s. 437. The complaint had not been dismissed under s. 203 or sub-s. (3), of s. 204 of the Code of Criminal Procedure, inasmuch as on that complaint Har Kishore Dass had been convicted, nor was this a case in which any accused person had been discharged, because Har Kishore Dass had never been tried for any offence except that of mischief, and in regard to the other petitioners, they had never been before the Court at all. It may be that proceedings can be taken against all these persons. That, however, is a matter for the discretion of the Magistrate, but it is not one, on which the Sessions Judge can under s. 437 of the Code of Criminal Procedure direct the Magistrate to proceed. The order for further inquiry is accordingly set aside and the rule is made absolute.

D. S.

Rule made absolute.

NOTES.

[In Boys's Criminal Procedure Code 1898 (1st Edn. 1913), p. 436 sec. 739, this decision is criticised at length.]

[27 Cal. 660]

The 30th January, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Jatu Sing and others.....Petitioners

versus

Mahabir Singh.....Opposite Party.*

Theft, Charge of—Conviction—Appeal—Acquittal of theft—Conviction of offence of different character, legality of—Code of Criminal Procedure (Act V of 1898), s. 423—Penal Code (Act XLV of 1860), ss. 143 and 379.

The accused were convicted of theft : that was the only charge which they were called upon to answer. In appeal the District Magistrate held that no theft had been committed, but he convicted accused of being members of an unlawful assembly. Held, that on the trial the accused were called upon to answer only a charge of theft, they were never called upon to answer any other charge, and they therefore could not fairly be convicted on their appeal of an offence of an entirely different character.

It is on the proceedings taken before the Magistrate that the facts constituting an offence for which a trial is held, are made known to the accused and the law is applied by the Magistrate to the facts established, so as to constitute the charge which the accused is called upon to answer.

[661] It therefore cannot be said that sufficient notice was given to the accused because mention of s. 147 of the Penal Code (rioting) together with theft was made in the final report of the Police, as the offences considered to have been established, and that the accused must have been made acquainted with such report.

In this case the Sub-Deputy Magistrate of Barh convicted the accused on the 27th June 1899 of theft : that was the only charge which they were called upon to answer. The accused appealed to the District Magistrate of Patna, who, on the 17th July 1899, held that no theft had been committed by the accused, but he at the same time convicted them of being members of an unlawful assembly under s. 143 of the Penal Code.

Mr. K. N. Sen Gupta for the Petitioners.

The judgment of the Court (PRINSEP and STANLEY, JJ.) was delivered by

Prinsep, J.—In this case the Magistrate convicted the petitioners of theft, and that was the only charge which they were called upon to answer.

In appeal the District Magistrate has held that no theft was committed, but, at the same time, he has convicted the accused of being members of an unlawful assembly. That, however, was an offence of which they had never been accused, and regarding which they had not been called upon to enter on their defence, and it was, moreover, an offence of an entirely different character from that of theft, for which they had been tried.

* Criminal Revision No. 837 of 1899, made against the order passed by H. L. Mesurier, Esq., District Magistrate of Patna, dated the 17th of July 1899.

In his explanation, the Joint Magistrate, who is in charge of the office of District Magistrate, has stated that sufficient notice was given to the accused because mention of s. 147 of the Penal Code (rioting) together with theft was made in the final report of the Police, as the offences considered to have been established, and that the accused must have been made acquainted with such report. We do not see how this applies to the present case. It is on the proceedings taken before the Magistrate that the facts constituting an offence for which a trial is held are made known to the accused, and the law is applied by the Magistrate to the facts established so as to constitute the charge which the [662] accused is called upon to answer. Here, on the trial, the accused were called upon to answer only a charge of theft. They were never called upon to answer any other charge, and they therefore could not fairly be convicted on their appeal of an offence of an entirely different character. The conviction and sentence will therefore be set aside, and the fines, if paid, refunded.

D. S.

NOTES.

[See also (1910) 7 M.L.T. 202.]

[27 Cal. 662]

The 25th January, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Queen-Empress

versus

Iman Mondal.....Petitioner.*

Proceedings for taking security for good behaviour—Discharge of person called upon—Further inquiry, Power to order, in such proceedings—Code of Criminal Procedure (Act V of 1898), ss. 110 and 437.

A further inquiry cannot be made into the case of a person against whom proceedings under s. 110 of the Code of Criminal Procedure have been taken and who has been discharged. If it be considered by the Magistrate that it is necessary to institute further proceedings, he is competent to do so under the law, on fresh information received.

The further inquiry which can be ordered under s. 437 of the Code of Criminal Procedure is into a complaint which has been dismissed or into the case of any accused person who has been discharged.

Proceedings under s. 110 of the Code of Criminal Procedure cannot be regarded as on a complaint, nor can they be regarded as a case in which any accused person has been discharged, for the terms "accused person" and "discharged" in s. 437 of the Code of Criminal Procedure, clearly refer to a person accused of an offence who has been discharged from a charge of that offence within the terms of Chapter XIX of the Code.

* Criminal Revision No. 209 of 1899, made against the order passed by B. C. Sen, Esq., District Magistrate of Bogra, dated the 5th of September 1899.

IN this case proceedings under s. 110 of the Code of Criminal Procedure were instituted against the petitioner, who was tried and released by the Deputy Magistrate of Bogra on the 5th September 1899. A further inquiry was made into the matter under s. 437 of the Code by the District Magistrate of Bogra, who, on the 30th September 1899, ordered the petitioner under s. 118 of the Code to execute a bond for Rs. 200 with two sureties for Rs. 200 each for his good behaviour for one year.

Babu Sarat Chunder Roy Chowdhry for the Petitioner.

[663] The judgment of the Court (PRINSEP and STANLEY, JJ.) was delivered by

Prinsep, J.—The order for further inquiry in this case purports to have been made under s. 437 of the Code of Criminal Procedure, and it relates to proceedings taken under s. 110, requiring the petitioner to give security for good behaviour. Section 437, which is the only law authorizing a Magistrate to reopen proceedings in which a person has been discharged or "released," does not relate to a case of this description. The further inquiry which can be ordered under s. 437 is into a complaint which has been dismissed or into the case of any accused person who has been discharged. A reference to the definition of complaint will show that it relates only to the commission of an offence, and an offence means any act or omission made punishable by any law for the time being in force; so that proceedings under s. 110 of the Code of Criminal Procedure cannot be regarded as on a complaint. Nor can they be regarded as a case in which any accused person has been discharged, for the terms "accused person" and "discharge" in s. 437 clearly refer to a person accused of an offence who has been discharged from a charge of that offence within the terms of Chapter XIX of the Code of Criminal Procedure. The order must therefore be set aside. If it be considered by the Magistrate that it is necessary to institute further proceedings, he is competent to do so under the law on fresh information received.

D. S.

NOTES.

[This was not followed in (1911) 35 Bom., 401; (1901) 24 All., 148; (1913) 36 All., 147, but was followed in (1914) 24 I.C., 843 (Burma); (1909) 33 Mad., 85.]

[27 Cal. 663]

APPELLATE CIVIL.

The 4th May, 1900.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE HARINGTON.

Bhekdhari Lal and others.....Defendants

versus

Badhsingh Dudharia and others.....Plaintiffs.*

Landlord and Tenant—Lease—Suit for account—Principal and Agent, relationship of—Set off—Rent set off against advances—Suit for rent—Limitation Act (XV of 1877), Arts. 85, 49, Sch II.

[664] The plaintiffs executed a lease for nine years in favour of the defendant No. 1 at a fixed annual rent payable by instalment. The defendant under instructions from the plaintiffs paid from time to time Government revenue, cesses, expenses of litigation, &c., on their behalf, and used to set off those sums against the rent due to them under the lease; no sum of money by way of advance or otherwise from the plaintiffs ever came into the hands of the defendant. After the expiry of the lease the plaintiffs instituted this suit against the defendant for an account :

Held, that the suit for an account was not maintainable; the relationship between the parties as created by the lease was simply that of landlord and tenant, and the only relief which the plaintiffs could have properly asked for was a decree for rent, if any was still due.

ON the 25th of September 1885 the plaintiffs executed a lease for nine years in favour of the defendant No. 1 as the head of a joint Mitakshara family, at an annual rent of Rs. 1,400, payable by fixed instalments, and they received Rs. 700 from the defendant by way of security for due performance of the contract. The defendant, under the direction of the plaintiffs, paid from time to time Government revenue, public cesses, cost of *gilandazi* or embankments, expenses of litigation, &c., on behalf of the plaintiffs, and used to set off those amounts against the rent due to them under the lease; and the defendant never received any money from the plaintiffs by way of advance or otherwise.

The term of the lease expired on the 30th of Bhadra 1301 F. S. (15th of September 1894).

On the 29th of July 1897 the plaintiffs instituted this suit for an account in respect of the leased property alleging that there was a relationship of principal and agent between the parties, and prayed for a decree for Rs. 1,364-7-9 with interest and costs, the defendants failing to render such an account.

• The defendant pleaded that the relationship between the parties being only that of landlord and tenant, the suit for an account would not lie; that the payments of Government revenue, &c., were made with the permission of the plaintiffs; that no relationship of principal and agent ever existed between them; and that the suit was barred by limitation under the Bengal Tenancy Act.

The Court of First Instance dismissed the plaintiffs' claim, holding that the suit for an account was not maintainable, and it being really a suit for rent was barred by limitation.

* Appeal from Order No. 113 of 1899, against the order of J. Knox-Wight, Esq., District Judge of Patna, dated the 23rd of December 1898, reversing the decree of Babu Upendra Chunder Mullick, Subordinate Judge of that District, dated the 17th of August 1898.

[666] The District Judge, on appeal, set aside the order of the first Court. He held, relying upon the case of *Narsingh Narain Singh v. Lukputty Singh*, (1879) I. L. R., 5 Cal., 333, that the plaintiffs were equitably entitled to a rendition of account, as the relationship of principal and agent was established between the parties, there having been "a sort of running account" between them; and he accordingly remanded the case to the original Court to be tried on its merits.

Against this order of remand the defendants appealed to the High Court.

Babu *Karuna Sindhu Mukerjee* and Babu *Surendra Nath Ghosal*, for the Appellants.—This being really a suit for rent, it is barred by limitation. The plaintiffs have purposely framed the suit as one for an account, and not for rent, in order to save the limitation. The case of *Narsingh Narain Singh v. Lukputty Singh*, (1879) I. L. R., 5 Cal., 333, relied upon by the lower Court, is distinguishable from the present one. That case involved the question of a mortgage, and the suit was for possession of the demised property and for an account.

The Art. 89, Sch. II of the Limitation Act, contemplates reciprocal obligations or duties, and is therefore not applicable to the present case where the transactions were only one sided. This being clearly a suit for arrears of rent is barred under the provisions of the Bengal Tenancy Act.

Babu *Promotho Nath Sen* (with him Babu *Saroda Charan Mitter*) for the Respondents.—This suit was within time under Art. 89, Sch. II of the Limitation Act. If the defendant held my money in his hands, he was liable to render me an account. He was not a mere tenant but he also acted as my agent, and is accountable to me for paying Government revenues, cesses, &c., on my behalf. [GHOSE, J.—Is there any statement in your plaint showing that the defendant occupied the position of an agent?] I don't find any such statement in the plaint. In the case of *Narsingh Narain Singh v. Lukputty Singh*, (1879) I. L. R., 5 Cal., 333, there was a prayer for an account, and therefore it was rightly relied upon by the [666] District Judge. And the finding of the lower Court being that there was a current account between the parties, Art. 85, Sch. II of the Limitation Act may also apply to this case.

Babu *Saroda Charan Mitter* following.—The only question is whether a suit for an account is maintainable. It appears that there was a subsequent arrangement between the parties that the defendant should pay Government revenue, cesses, &c., on behalf of the plaintiffs, as admitted in his written statement, and as a matter of fact the defendant did make such payments from time to time. It is a case of an ordinary bailee having my money in his hands. Upon these admitted facts the suit for an account would lie, and this appeal should be dismissed.

The judgment of the Court (GHOSE and HARRINGTON, JJ.) was delivered by

Ghose, J.—This is an appeal against a judgment of the District Judge of Patna, by which a suit instituted by the plaintiffs was remanded to the Court of First Instance for the purpose of an account being taken from the defendant.

The facts out of which the suit arose are shortly these. The plaintiffs executed a *ticca* lease for nine years, commencing from the year 1293, and ending in the year 1301 F. S., upon an annual rent of Rs. 1,400, Rs. 700 being deposited by the defendant, the lessee, by way of security in the hands of the lessors, with this stipulation, that the amount should be applied towards the rent of the last year of the lease, namely, 1301.

The plaintiffs' case, as set out in the plaint, is that, after the expiration of the period for which the *ticca* was given, they called upon the defendant for

an account of the collections of the annual rent and the payments made by him; but the defendant failed to comply with the requisition, and therefore they (the plaintiffs) are entitled to sue for an account in connection with this ticca transaction from Assin 1293 to Bhadra 1301; and they pray that in default of the defendant rendering such account, a decree may be given to them (the plaintiffs) for Rs. 1,364-7-9.

It will be observed, on a reference to paragraphs 6 and 7 of the plaint, that the plaintiffs treat the defendant as servant from the [667] year 1302, and also allege some agency or other in him (the defendant), in regard to the collection of arrears of rent from the *raiya*ts antecedent to the execution of the ticca lease in question. But as regards any money due in connection with such agency or agencies the plaintiffs distinctly state they would bring a separate suit for the same.

We should desire here to state that in the schedule annexed to the plaint, showing how the sum of Rs. 1,365-7-9, which the plaintiffs sue for, in default of the defendant rendering an account, is arrived at, we find that the sums on the credit side are only sums made up of the rent due from the defendant under the ticca lease, no other sum of money by way of advance or otherwise on the part of the plaintiffs being set out; and on the other side of the account in the schedule are put down items of expenses by way of Government revenue, road cess, and certain other items, which the defendants paid on plaintiffs' account.

The defendant in answer to this suit pleaded, in the first place, that the suit was barred by limitation, and, in the second place, he contended that a suit for an account was not sustainable against him; and he further stated that, with the permission of the plaintiffs, he (the defendant) used to pay into the Collectorate revenue and road cess, and he also paid the expenses in connection with certain litigation in which the plaintiffs were concerned, and that the said items of expenditure had been set off against the rent payable to the plaintiffs; and he went on to say, with reference to the account filed by the plaintiffs, that the latter had not deducted certain items of expense which he (the defendant) had met on plaintiffs' account, and that the account filed by the plaintiffs was incorrect.

The Court of First Instance, with reference to these pleadings, held that no suit for an account could be sustained, and that the only relief which the plaintiffs could have asked for was recovery of rent, which relief was barred by the law of limitation.

This judgment, however, has been set aside by the District Judge on appeal. He seems to find that there was a sort of running account between the parties, and in reference to this particular matter, what he says is as follows: "So far of course the deed showed merely the relationship of landlord and tenant. But [668] the parties by their acts went a good deal beyond this. Defendant No. 1 used to pay Government revenue, and the expenses of litigation and the costs of *gilandazi* or embankments, &c., &c. In this way there was a sort of running account between the plaintiff and the defendant No. 1. That this was clearly understood by the parties is proved by the defendant's own defence." And then he holds that the plaintiffs are entitled to call upon the defendant for an account, and that the suit having been brought within three years from the end of the year 1301, when the *thika pottah* terminated, is not barred by the law of limitation, but that if a suit for rent had been brought, it would certainly have been so barred. In this view of the matter the learned Judge remanded the case to the Court of First Instance with a view that the defendant might be called upon to render an account.

In second appeal by the defendant it has been contended that, accepting the facts as found by the District Judge, no suit for account could be maintained against the defendant; and we think this contention is correct. The relationship between the parties, as created by the *thika pottah*, to which we have already referred, was simply that of landlord and tenant; and that being so, the only relief that the plaintiffs *prima facie* were entitled to ask for was a decree for rent. But then, it is said, that by reason of the subsequent conduct of the parties, the relationship, as created by the *thika pottah*, underwent considerable alteration, so as to make the defendant liable to render an account to the plaintiffs in respect of the rent which he (the defendant) had been retaining in his hands (for that is the way in which it is put on behalf of the plaintiffs) and in respect of the disbursement which he (the defendant), as agent of the plaintiffs, had been making on their behalf. Now the facts on which the conclusion arrived at by the District Judge is based, and upon which also the learned vakil for the respondent has placed considerable reliance, are those to which we have already referred, namely, that the defendant used to pay Government revenue and expenses of litigation and cost of *gilandazi*; and the question, which here arises, is, whether, by reason of these circumstances, there was the relationship of principal and agent created between the parties, such that in the event of the defendant not paying the rent due to the plaintiff, as it fell [669] due year after year, they could, after the termination of the *thika* in the year 1301, call upon the defendant for an account. Now referring back for a moment to the written statement of the defendant, this is how he puts his defence, namely, that with the permission of the plaintiffs he (the defendant) had been paying on their account revenue and road cess into the Collectorate, and also litigation expenses; and that these sums of money which he thus paid were set off against the rent payable to the plaintiffs; or, in other words, that by reason of the payments that he made from time to time under the direction of the plaintiffs, the whole of the rent had been discharged. And that is really the footing upon which the defendant has been found by the District Judge to have been acting, and nothing more, namely, that under an arrangement come to between the parties, subsequent to the grant of the *thika*, the defendant had been paying, on account of the plaintiffs, certain sums of money by way of payment of the rent due to the plaintiff. We think that the facts that have been found by the District Judge, even if accepted as thoroughly correct, do not entitle the plaintiff to call upon the defendant for an account, and that the only relief which the plaintiffs could have properly asked for was a decree for rent against the defendant, if such rent was still due. If they had brought such a suit the defendant might have pleaded the payments made by him as discharging either wholly or partly the rent due to the plaintiffs; but that is not the present case.

In the view that we have just expressed, we think that the suit for an account is not maintainable. The result is, that this appeal must be allowed, and the suit dismissed with costs in all the Courts.

B. D. B.

Appeal allowed.

[670] *The 23rd November, 1899 and 2nd March, 1900.*

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE STEVENS.

Ganga Das Seal.....Judgment-debtor

versus

Yakub Ali Dobashi and another.....Decree-holder.*

*Appeal—Civil Procedure Code (Act XIV of 1882), ss. 2, 232, 244, cl. (c)—
Civil Procedure Code Amendment Act (VII of 1888)—Application by
transferee from legal representative of decree-holder—Question relating
to execution, discharge, satisfaction or stay of execution of decree—
Parties to suit—Legal Representative—Meaning of the terms
“transferee” and “representative”—Decree—
Administrator of estate.*

Any person who, at the time of the execution of a decree, is a *transferee* within the meaning of s. 232 of the Code of Civil Procedure is a *representative* of the decree-holder within the meaning of s. 244, cl. (c), of the Code; and the term *representatives* in that section includes subsequent transferees as well as those who purchased directly from the person who obtained the decree.

An order of a Court executing a decree determining whether an alleged transferee from a decree-holder or from his legal representative is or is not the representative of the decree-holder within the meaning of s. 244, cl. (c), of the Code of Civil Procedure, is an order under that section and therefore a decree, and an appeal lies from such order.

Dwar Buksh Sirkar v. Fatik Jali, (1898) I. L. R., 26 Cal., 250; and *Badri Narain v. Jai Kishen Das*, (1894) I. L. R., 16 All., 483, followed.

ONE Abdul Rahaman obtained a money decree against one Ganga Das Seal in 1896, and on his death, his son, Fazal Rahaman, was appointed sole administrator to his estate. Fazal Rahaman applied for execution of the decree on the 11th June 1898. The judgment-debtor raised several objections, which were heard and rejected on the 6th August, 1898. On the 8th August, 1898, the present applicant, Yakub Ali Dobashi, applied for an order to substitute him in the place of Fazal Rahaman and to allow him to execute the decree. It was alleged that the decree had been transferred to the applicant by Fazal Raha-[671] man by a *kobala*, dated the 5th August 1898. The judgment-debtor objected to the application on the grounds: (1) That the alleged transfer of the decree was a fraudulent and *benami* transaction, made with a view to defeat and delay the execution of a decree, which he himself had obtained against the decree-holder, and (2) that the estate of the decree-holder having been vested in a Receiver appointed by Court, Fazal Rahaman was not competent to transfer the decree.

The Munsif on the evidence held that the alleged transfer of the decree was not *bonâ fide*, and without entering into the question raised by the second objection dismissed the application for substitution.

An appeal was preferred to the District Judge from the decision of the Munsif. On behalf of the judgment-debtor, respondent, it was contended that no appeal lay. The District Judge overruled this preliminary objection, holding

* Appeal from Appellate Order No. 79 of 1899, against the order of G. Gordon, Esq., District Judge of Chittagong, dated the 23rd of December 1898, reversing the order of Babu Tincow Chowdhry, Munsif of Chittagong, dated the 10th of September 1898.

that an appeal did lie to him. On the merits he held that there was no reason to find that the alleged transfer of the decree was a paper transaction and he allowed the application without considering or referring to the second objection raised by the judgment-debtor in the first Court.

The judgment-debtor, Ganga Das Seal, appealed to the High Court. The appeal came on for hearing before MACPHERSON and STEVENS, JJ., on the 23rd November 1899.

Babu Jatra Mohan Sen for the Appellant.

Moulvi Serajul Islam for the Respondents.

Cur. adv. vult.

MARCH 2, 1900.—The **judgment** of the High Court (**Macpherson and Stevens, JJ.**) was as follows :—

Abdul Rahaman, having obtained a decree for money against the appellant, died before the decree was executed. Fazal Rahaman, the administrator of his estate, put the decree in execution and then transferred it by assignment in writing to Yakub Ali Dobashi, who applied to have his name put on the record as decree-holder and to execute the decree. The Munsif on the appellant's objection rejected the application, holding on the evidence adduced by the parties that the alleged transfer was a [672] sham and collusive transaction. Yakub Ali Dobashi appealed, and District Judge, finding that there was a good transfer for consideration, reversed the Munsif's order and allowed the application.

This appeal is preferred by the judgment-debtor against the order of the District Judge, and his contention is that the Judge acted without jurisdiction in reversing the Munsif's order, as there was no right of appeal against that order.

We think this contention fails. In our opinion the case comes under s. 244 of the Civil Procedure Code and the Munsif's order is a decree according to the definition of that term in s. 2 of the Code. The Allahabad Court held in *Badri Narain v. Jai Kishen Das*, (1894) I. L. R., 16 All., 483, that a person who purchased a decree from the person in whose favour the decree was made is his representative, within the meaning of clause (c), s. 244, and that the order of the execution Court determining whether he is or is not such a representative, if that question arises, is an order under s. 244 and therefore a decree.

This Court came to the same conclusion in *Dwar Buksh Sirkar v. Fatik Jali*, (1898) I. L. R., 26 Cal., 250. In the present case the decree was purchased, not from the person who obtained it, but from his legal representative, the person who was administering his estate. We think the purchaser is *qua* the decree as much the representative of the person who obtained the decree, as if he had purchased it directly from him.

It is argued that although the term "representatives" in section 244 may include a purchaser direct from the person who obtained the decree, and who was necessarily a party to the suit, subsequent transferees would not be included in the term. We see no reason for any such distinction. If the term "representatives" in cl. (c), s. 244, includes a transferee at all, it includes, we consider, any person who is at the time of execution a transferee within the meaning of s. 232. This was the conclusion arrived at in the Allahabad case cited above, and we adopt without repeating the reasons given in that case. If the [673] transferee of the decree to whom the provisions of s. 232 would apply is not, *qua* the decree, the representative of the person, who originally obtained it, within the meaning of s. 244, the result would be this: that

in no case in which a decree had been transferred could any question relating to the execution, discharge or satisfaction of the decree, or to the stay of execution thereof be determined under s. 244 as between the transferee and the judgment-debtor, although the transferee is the decree-holder, as that term is defined in the Code, and the person who is entitled to execute the decree. Obviously, we think, this was not the intention of the Legislature in enacting s. 244 and the addition made thereto by Act VII of 1888.

We hold, therefore, that an appeal did lie to the District Judge. The appellant cannot question in second appeal the Judge's decision that there was in fact a transfer for consideration. It was, however, contended in the first Court that Fazal Rahaman had no power to make the transfer, even if he did make it, as the estate was at the time of the transfer vested in a Receiver appointed under an order of Court. The first Court, holding that there was in fact, no transfer, did not go into this question; but the District Judge before reversing the order ought to have determined it.

If the estate was at the time of the transfer vested in a Receiver duly appointed, and the decree appertained to the estate, Fazal Rahaman had apparently no power to transfer the decree. We do not know what the facts on this point are. They must be determined by the Judge. His order must be set aside and the case sent back in order that he may determine them and dispose of the case accordingly. The cost of this appeal will abide the result.

M. N. R.

Case remanded.

[674] *The 25th May, 1900.*

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE HARINGTON.

The Secretary of State for India in Council.....Defendant

versus

Mohiuddin Ahmad.....Plaintiff.*

*Income-Tax Act (II of 1886), ss. 3, 4, 5—Religious Endowment—Sajjadanashin—Khankah—Liability of the Sasseram Sajjadanashin to pay Income-tax—Assessment of Income-tax—Exemption from assessment—
“Salary”—Remuneration—Maintenance—Position of
Sajjadanashin as distinguished from that of
Mutwalli—Wakf—Farrukhsyari
property.*

The *Sajjadanashin* of the Sasseram *Khankah* is not liable to be assessed with income-tax under the provisions of Act II of 1886, in respect of such moneys as he draws from the *Khankah* properties for the purpose of his own maintenance and that of his family.

* Appeal from Appellate Decree No. 1372 of 1898, against the decree of F. H. Harding, Esq., District Judge of Shahabad, dated the 18th of April 1898, affirming the decree of Moulvie Ali Ahmed, Munsiff of Sasseram, dated the 16th of July 1897.

The position of the *Sajjadanashin* discussed, and distinguished from that of a *Mutwāllī*.
Semble.—The maintenance of the *Sajjadanashin* of the Sasseram *Khankah* is a part of the purpose for which the *Khankah* was established.

Mohiuddin v. Sayiddin, (1893) I. L. R., 20 Cal., 810; *Piran v. Abdool Karim*, (1891) I. L. R., 19 Cal., 203, referred to.

THE plaintiff is the *Sajjadanashin* (Superior) of an old endowment known as Sasseram *Khankah* founded by Shah Kabir Dervish in the early part of the eighteenth century. In 1717 the Emperor Farrukhsyar, by a Firman, granted several villages in Pergunnah Sasseram (known as Farrukhsyari properties) as a free gift in perpetuity, for the purpose of defraying the expenses of the *Khankah*, to Shah Kabir Dervish, to descend to his heirs in succession.

The material portion of the grant was to this effect:—

"In this auspicious time the illustrious *firman* is promulgated. By it one lac of *dams* out of Pergunnah Huvelee Sasseram in Subah Bahar, amounting to 1,197 rupees more or less, are granted as *altumgha*, * * * * to defray the expenses of the *Khankah* of Shah Kabir Dervish. * * * [675] Let all the Imperial officers, now and hereafter, leave the above *dams* in his possession for generation after generation and descendant after descendant, and consider them in every respect free of all charges." * * *

Subsequently various other grants of landed properties were made from time to time for the maintenance of the institution and the support of Shah Kabir's descendants.

The plaintiff, as *Sajjadanashin* for the time being, is in sole possession of the *Khankah* properties the income of which is wholly derived from agricultural lands. Out of this income he appropriates a portion for his own maintenance and that of his family, and the rest is spent in religious matters in connection with the *Khankah*.

The Collector of Shahabad, under the provisions of Act II of 1886 (an Act for imposing a tax on income derived from sources other than agriculture) assessed an income-tax of Rs. 130-3-4 per annum, on that portion of the income of the *Khankah* which the plaintiff appropriated for his maintenance. The plaintiff took objection to this assessment, but the Collector overruling his objection realized from him the amount of the tax together with fine, costs of recovery, &c. Upon that the plaintiff, questioning the validity of this taxation, instituted this suit praying for a declaration among other reliefs, that he had been illegally taxed under the aforesaid Act,—he having a beneficial interest in the endowed property, the income of which is derived purely from an agricultural source.

The Collector of Shahabad contested the suit, on behalf of the Secretary of State for India in Council, alleging *inter alia*, that the plaintiff was rightly assessed on the income he derived by way of remuneration from the endowment, by virtue of the office he held, for the support of his family, and had not been assessed on the income derived from landed property.

The Court of First Instance held that the plaintiff derived his income from an agricultural source, and was therefore not liable to be assessed under Act II of 1886, and gave judgment for the plaintiff.

The District Judge, on appeal, found that "the Farrukhsyari [676] properties were regarded as devoted to religious purposes including the maintenance of the Superior and his family, and that the plaintiff was not liable to be taxed under the Act any more than any other person deriving an income from land

* A religious establishment in the nature of a monastery where religious devotees congregate or reside for religious instruction or spiritual communion.—*Ameer Ali*.

† A royal grant in perpetuity descending to posterity.

used for agricultural purposes," and he accordingly affirmed the judgment and decree of the first Court.

The defendant appealed to the High Court mainly on the following grounds:—

(1) "That both the lower Courts are wrong in holding that the income on which the tax was levied was agricultural and not taxable under Act II of 1886."

(2) "That the *Sajjadanashin* of the *Khankah* is not the owner of the estate in any sense of the word, and that whatever he gets by way of maintenance allowance is not an income derived from agriculture."

Babu Ram Charan Mitter (*Senior Government Pleader*) and Babu Srish Chunder Chowdhuri (*Junior Government Pleader*) for the Appellant.—The sole question is whether the plaintiff is exempted from liability to pay income-tax on the allowance received by him as *Mutwalli* of the endowed property. If he were the beneficial owner of the property he might have been exempted. But he is not so. That portion of the income which goes to the pocket of the *Mutwalli* is his salary or allowance, and it must be regarded as his private income not derived from agriculture and therefore assessable. Under s. 3, cl. (4) of the Income-Tax Act "salary" includes an allowance; and "income" is defined by cl. (5) of the same section. [HARINGTON, J.—Has the plaintiff any power to appropriate any fixed sum to his own use?] That does not appear; but the practice is for the *Sajjadanashin* to prepare annually a budget showing how much is to be spent for the religious purposes of the *Khankah*, and how much for his own maintenance and that of his family. And, it is true, the plaintiff appropriates the balance of the *Khankah* income to his own use after defraying the expenses of some religious rites and ceremonies. If an allowance be paid to a *Mutwalli*, be it for his maintenance, it would be [677] his "salary" within the meaning of s. 3, cl. (4) of the Income-Tax Act; and it being an income derived from a source other than agriculture would be liable to an assessment under the Act.

The owner of a monastery may not be liable to taxation, under the Act, but if an allowance be made by him to another person in consideration of his services, the latter would be liable to the tax. The plaintiff is only a *Mutwalli*, and the real owner of the property is the *Khankah*, which pays him a certain sum of money in consideration of his services. In the case of *Jewan Das Sahoo v. Shah Kubeer-ood-deen*, (1840) 2 Moore I. A., 390 (420), which was in reference to this *Khankah*, their Lordships of the Privy Council held that the real owner was the *Khankah*, and the persons named in the grant, were only *Mutwallis* of the *Khankah*. In the case of *Mohiuddin v. Sayiduddin*, (1893) I. L. R., 20 Cal., 810, relied upon by the lower Courts, it was not held that a *Mutwalli* had any beneficial interest in the *wakf* property. Regard being had to the nature of the institution, the allowance given to the plaintiff is a purely personal allowance, for which he should be made liable to pay the income-tax, and he should be considered a salary-holder. So long as he is not the owner of the property, but merely a recipient of only a small portion of its income for his maintenance, he is liable to the tax. The plaintiff being only the *Mutwalli*, and his allowance for services rendered being payable from out of the agricultural income of the *Khankah*, he cannot be said to derive his own income from agricultural sources, and he cannot, therefore, claim an exemption from the operation of the Income-Tax Act.

Babu Umakali Mukerjee (with him Moulvie Serajul Islam) for the respondent.—The income that comes to the plaintiff's hands is agricultural produce and rents, and whatever he gets is derived from agricultural lands, and therefore

it cannot be taxed under s. 5, cl. (a) of Act II of 1886. [HARINGTON, J.—Is not a person receiving a fixed sum for performing religious ceremonies liable to the tax?] Yes, if there be a distinct person under whom he acts as manager or servant; but that is not the case here. According to the *firman* itself no pay is paid to the plaintiff. He receives the whole of the *Khankah* income, spends a [678] portion of it in performing religious ceremonies, and appropriates a portion for his own maintenance and that of his family. He has the uncontrolled possession of the *Khankah* properties and of the income derived therefrom, and therefore he has a beneficial interest in the same. His income may be regarded as a part of the *Khankah* expenses, and consequently like the other expenses of the *Khankah*, is not assessable with the tax. He has no fixed salary or income, and therefore the money he draws for his support is not assessable under schedule II, Part I of Act II of 1886, nor is it liable to be taxed under s. 5, cl. (c) of the Act.

The decision in the case of *Mohiuddin v. Sayiduddin*, (1893) I. L. R., 20 Cal., 810, is conclusive on the question of the plaintiff's position as *Sajjadanashin*.

Babu *Ram Charan Mitter* in reply.—Section 5, cl. (c) of the Income-tax Act has no application whatever to the present case. That clause exempts from taxation all incomes, agricultural or otherwise, of religious or charitable institutions. The *Khankah* being the beneficial owner of the property is certainly not liable to the tax, but a person employed by it, and who receives a remuneration or allowance from it, is liable—the remuneration or allowance being his private property. A *Mutwalli*, who has only to perform certain duties relating to the *wakf* properties on receipt of an allowance, is liable to the tax.

The judgment of their Lordships was delivered by—

Ghose, J.—The question which arises in this case is whether the *Sajjadanashin* of the Sasseram *Khankah* is assessable with income-tax under the provisions of s. 4 of Act II of 1886, in respect of such moneys as he draws from the properties appertaining to the *Khankah* for the purpose of his own maintenance and the maintenance of his family.

Section 4 of the Act prescribes: "Subject to the exceptions mentioned in the next following section, there shall be paid, in the year beginning with the 1st day of April 1886, and in each subsequent year, to the credit of the Government of India, or as the Governor-General in Council directs, in respect of the sources [679] of income specified in the first column of the second schedule to this Act, a tax at the rate specified in that behalf in the second column of that schedule." The word "income" has been defined in an earlier section, s. 3, and it means "income and profits accruing and arising or received in British India, and includes in the case of a British subject within the dominions of a Prince or State in India in alliance with Her Majesty, any salary, annuity, pension, or gratuity payable to that subject by the Government or by a local authority established in the exercise of the powers of the Governor-General in Council in that behalf." And referring to the definition of the word "salary," as herein mentioned, we find that it includes allowances, fees, commissions, perquisites or profits received, in lieu of or in addition to a fixed salary, in respect of an office or employment of profit, but subject to any rules which may be prescribed in this behalf, it does not include travelling, tentage, horse or sumptuary allowance, or any other allowance granted to

meet specific expenditure. Section 5 of the Act lays down: "Nothing in s. 4 shall render liable to the tax—

"(a) Any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue or subject to a local rate assessed and collected by officials of the Government as such; or

(b) Any income derived from—

(i) Agriculture or (omitting the other portions of the section).

(c) Any income derived from property solely employed for religious or public charitable purposes" and so forth.

In the present case the whole of the income, which the *Khankah* derives, is from agricultural lands; and it follows therefore, in view of s. 5, to which we have just referred, that the income derived by the *Khankah* could not be assessed with income tax.

Now, the argument on behalf of the Secretary of State is this, that the *Sajjadanashin*, the plaintiff in this case, when he draws any allowance or remuneration from the income of the *Khankah* property, he does so as an officer of the *Khankah* or as a *Mutwalli*, [680] and what he draws must be regarded as a "salary" within the meaning of s. 3 of the Act.

This argument brings us to the question, what is the true position of the *Sajjadanashin* of the Sasseram *Khankah*. His position has been considered in at least two cases before this Court, one in the year 1886 (unreported), and the other being the case of *Mohiuddin v. Sayiduddin*, (1893) I. L. R., 20 Cal., 810, in the year 1893. In the first mentioned case, it would appear from the judgment which was then delivered, that it was found that the whole of the endowment property had been made over to the *Sajjadanashin* for the time being, and remained in his uncontrolled possession for 15 or 16 years; and upon that ground the property was restored to him.

The learned Judge of the Court below relying upon the judgment of this Court in 1886, (unreported), and also upon certain passages in the judgment of this Court pronounced in 1893, (1893) I. L. R., 20 Cal., 810, has come to the conclusion that the *Sajjadanashin* has "the uncontrolled possession of the Farukhshayri properties which were regarded as devoted to religious purposes including the maintenance of the Superior and his family." The question seems to have been raised in the case of 1893, (1893) I. L. R., 20 Cal., 810, whether the *Sajjadanashin* could be regarded as a *Mutwalli*, and as such liable to removal from office in the event of his spending upon himself more than he ought. Upon this question the learned Judges seem to have regarded the *Sajjadanashin* as not occupying the same position as a *Mutwalli* does; and in the course of the judgment, which they delivered, they expressed themselves as follows: "For example, where a *wakf* is created and no *Mutwalli* is appointed, or no provision is made for his allowance, the *kazi* is directed in making the appointment, or in fixing the allowance, not to allow the stipend to exceed one-tenth of the rents and profits of the *wakf* properties. But this provision does not and cannot apply, from the nature of the institution and the position of the *Sajjadanashin* in relation to it, to the endowment in dispute. In considering this question, we have to bear in mind the character of the person to whom the grant was made, the nature of the institution of which he was the founder, [681] and the rites and ceremonies connected therewith." And they proceeded to consider what was the true position of the *Sajjadanashin* of this *Khankah*, and they held that he occupied the position of a *dervish* or a *Sufi* of particular sanctity settled in the locality. Referring, then, to another case in this Court,

viz., the case of *Piran v. Abdul Karim*, (1891) I. L. R., 19 Cal., 203, they made the following observations: "These *dervishes* professed esoteric doctrines and distinct systems of initiation. They are mostly *sufis* or Eastern mystics. Some of them were followers of *Mian Roushan Bayezid*, who flourished about the time of the Emperor Akbar, and who had founded an independent esoteric brotherhood in many respects differing from the *sufis*, in which the Chief or *Pir* occupied a peculiarly distinctive position. So long as he lived the founder himself was the *Sajjadanashin*, the one seated on the prayer mat; in other words, the Chief or Superior. After his death some one among his heirs indicated by him as qualified to initiate the *murids* into mysteries of the *tarikah* or holy path, succeeds him in his office of *Sajjadanashin*. He is not only a *Mutwalli* but also a spiritual preceptor, and in him is supposed to continue the spiritual line (*Silsilla*)." There are abundant indications on this record that this is exactly the case with the *Khankah* of Sasseram. Shah Kabir was, as his title shows, a *dervish*, and from the evidence of the defendant it is clear that the doctrines supposed to be inculcated by those men are, as he calls it, of *tassawuf* or *sufism*. We have dwelt so far on the character of the institution, in order to show how materially it is connected with the personality of the *Sajjadanashin* or Superior. He is an integral part of the institution and the central figure, so to speak, therein. Its existence depends on his personality. This is evident from the very terms of the grant in question. It was this view which was practically enunciated by the Government in its letter of the year 1842, and substantially reiterated by the High Court in its judgment. Again, from the nature of things, it would be impossible to spend more than a certain amount for the various religious purposes which, admittedly, ought to be performed in the *Khankah*, the *Imambara*, and the *Masjid* or in respect of the students who live there. There is no provision for accumulation, and in the [682] absence of any sufficient evidence to show that the rites and ceremonies have not been properly performed, there is nothing in the Mahomedan law which warrants our saying that in taking the balance of the income for his maintenance and the maintenance of his family and relatives, the defendant committed a breach of trust such as would justify his removal." So that it seems to be pretty clear, that the position of the *Sajjadanashin* of the Sasseram *Khankah* is materially different from that of a *Mutwalli* of an ordinary *wakf* property; and we gather from the statements made before us by the learned Vakils, that the practice is for the *Sajjadanashin* to prepare, year after year, a budget showing how much is to be spent for the purpose of the *Khankah*, and how much is to be spent for his own maintenance, and the maintenance of his family. There is no rule, so far as we can discover (nor have we been informed anything to that effect) determining how much of the income should be spent upon the *Kankah*, and how much upon himself. Indeed, the expenditure depends entirely upon his own discretion. But, however, that may be, it could hardly be said, having regard to the judgment of this Court to which we have just referred, that the money that he appropriates out of the *Khankah* income, for his own maintenance, was a "salary" or remuneration for his services within the meaning of s. 3 of Act II of 1886.

Exception has been taken to the conclusion of the District Judge when he holds that the religious performances of the *Khankah* include the maintenance of the superior and his family. It seems to us, however, from the very nature of the thing, and from the unique position of the *Sajjadanashin* of this *Khankah*, as expressed in the judgment of this Court to which we have referred, that his maintenance is really a part of the purpose for which the *Khankah* was established.

Upon all these grounds we are of opinion that the moneys drawn by the *Sajjadanashin* from the *Khankah* properties are not assessable with income-tax.

We accordingly dismiss this appeal with costs.

B. D. B.

Appeal dismissed.

NOTES.

[See also (1909) 6 A.L.J., 632 ; (1904) 6 Bom. L.R., 1058.]

[683] APPELLATE CIVIL.

The 19th and 20th December, 1899 and the 9th January, 1900.

PRESENT :

MR. JUSTICE BANERJEE AND MR. JUSTICE STEVENS.

Satya Prashad Pal Chowdhry and another.....Defendants

versus

Motilal Pal Chowdhry and others.....Plaintiffs.*

Probate and Administration Act (V of 1881). ss. 82 and 92—Direction in the will that all the executors will act jointly—Act of an executor who has taken out probate, and the others not having done so, how far binding on the estate of the testator.

Where by a will more than one person are appointed executors, and all of them jointly are empowered to alienate any property for payment of debts and to borrow money for the improvement and preservation of the estate of the testator, s. 92† of the Probate and Administration Act (V of 1881), by reason of any such direction in the will, does not disqualify one of the several executors, who alone has obtained probate, to act singly, the others having refused to accept service.

Where such an executor renewed *hatchittas* which were originally executed by the testator, in the same terms as the testator did, and a suit was brought upon these *hatchittas* against the heirs of the testator.

Held, that the debt was binding on the estate of the testator.

Farhall v. Farhall, (1871) L. R., 7 Ch., App., 123, referred to; and *Syed Nerul Hossein v. Sheo Sukai*, (1892) L. R., 19 I.A., 221, distinguished.

THESE appeals arose out of an action brought by the plaintiffs for recovery of a certain sum of money due on *hatchittas* or signed accounts. The allegations of the plaintiff were that the defendant's father Koilash Chunder Pal in the year 1289 B. S. borrowed a certain sum of money from them ; an

* Appeals from Original Decrees Nos. 377, 380 and 381 of 1898, against the decrees of Babu Prasanna Kumar Ghose, Subordinate Judge of zillah Nuddia, dated the 30th of July 1898.

†[Sec. 92 :—When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary in the will or grant of letters of administration, be exercised by any one of them who has proved the will or taken out administration.] Powers of several executors or administrators exercisable by one.

account having been settled, Koilash Chunder executed *hatchittas* in favour of the plaintiffs in the *Ramnavami* day of the year 1290 B. S., and commenced business with the plaintiffs on condition of paying interest on the said money at the rate of 12 annas per cent. per mensem, and renewing the *hatchittas* on the *Ramnavami* day of each succeeding year, reckoning the principal and interest due on that date as [684] principal, and allowing the same rate of interest on the whole amount. According to this practice he renewed *hatchittas* up to the *Ramnavami* day, i.e., the 14th Cheyt of the year 1300 B. S. ; in the Assin of that year he died leaving a will and his widow Damini Dasi having taken out a probate to the said will on the security of defendants Nos. 1 and 2 became entitled to and obtained possession of the estate of Koilash Chunder as executrix ; and she continued to renew the *hatchittas* year after year, and got the said *hatchittas* signed by her son, defendant No. 2 ; in the year 1303 B. S. a dispute having arisen among the defendants, she did not renew the *hatchittas* any more ; that the defendant's mother, Damini Dasi, while acting as executrix, borrowed Rs. 1,500 from the joint *karbar* of the plaintiffs for the benefit of the estate, and executed a *hatchitta* in favour of plaintiff No. 3, on the 6th Baisak 1303 B. S., on condition of paying interest at one rupee per cent. per mensem ; and subsequently on the 22nd Jeyt of the said year she borrowed Rs. 100 through her son defendant No. 2 on the aforesaid terms : that the probate obtained by the defendant's mother was revoked by the District Judge of Nuddia on the objection of defendant No. 1 on the 11th August 1896, and on appeal to the High Court on the basis of the *solenamah*, with the consent of all parties, the order for setting aside the probate was maintained ; that according to the terms of the will of Koilash Chunder, his sons and heirs, the defendants, became entitled to and obtained possession in equal shares of the estate left by him ; that in spite of demands made by the plaintiffs, the defendants did not pay the amount due to them. The defence, *inter alia*, was that the suit was barred by limitation ; that the plaintiffs were not entitled to maintain the suit without joining their mother as a plaintiff ; that Damini Dasi did not execute the *hatchittas* ; that she had no power to borrow money or renew *hatchittas* as an executrix.

By the will five persons were appointed executors, and they were jointly empowered to alienate any property for payment of debts and to borrow money for the improvement and preservation of the estate. The first defendant No. 1, eldest son of the testator, never applied for probate, but stood as security when probate was granted to Damini Dasi ; the second never applied for probate, and was one of the plaintiffs in this suit ; the third was dead, [686] when probate was granted to Damini Dasi, the fourth never applied for probate, and was a *nath* or agent of Damini Dasi, and the fifth, Damini Dasi, was the only person who applied for and obtained probate.

It appeared upon the evidence that two of the sons of Damini Dasi, defendants Nos. 2 and 3, conducted the monetary affairs of the estate on her behalf, and defendant No. 2 signed her name in the *hatchittas* as her agent, while defendant No. 1 admitted that the amount claimed was justly due, and moreover when the plaintiffs were about to institute their suits, two of the defendants induced them to forbear for a time upon promise of payment or renewal of *hatchittas*.

The Court of First Instance gave the plaintiffs a decree. Against this decision the defendants Nos. 2 and 3 appealed to the High Court.

DECEMBER 19. Dr. Rash Behari Ghose (with him Babu Jogesh Chunder Roy, Babu Soshi Shekhar Bose and Babu Amar Nath Bose), for the Appellants.— There being a provision in the will that all the executors will act together, the executrix, Damini Dasi, who took out probate, could not act alone, and

therefore had no authority to renew the *hatchittas*. That being so, the defendant-appellants were not liable to pay—see s. 92 of the Probate and Administration Act. Damini Dasi is personally liable for it. The debts could not bind the estate of the testator in the hands of the appellants—see the case of *Farhall v. Farhall*, (1871) L. R., 7 Ch., App., 123. By the renewal of the *hatchittas*, Damini Dasi, the executrix, made herself personally liable for the debt. An executor cannot after the death of the testator enter into any contract as executor which could bind the estate—see *Corner v. Shew*, (1838) 3 M. & W. Rep., 350. In the present case the executrix renewed the *hatchittas*, agreeing to pay compound interest, the effect of which would be not to free the testator's estate of its debts, but to add to its burdens. In such a case the executor is only personally liable, and the debt could not be binding on the estate—see *Signell v. Harpur*, (1850) 4 Excheq. Rep., 773, *Childs v. Monius*, (1821) 2 Brod. & Bing., 460 (463). [686] Damini Dasi alone took out the probate, the other executors appointed by the will could have acted without doing so—see *Watkins v. Brent*, (1835) 1 Mylne & Craig, 97 (104); *Krishna Kinkur Roy v. Rai Mohun Roy*, (1886) I. L. R., 14 Cal., 37. The other executors, who could have acted without taking out the probate, not having joined in the renewal of the *hatchittas*, the act of Damini Dasi could not bind the estate of the testator.

DECEMBER 19, 20: Babu Saroda Churn Mitter (with him Babu Haro Kumar Mitter) for the Respondent.—Section 92 of the Probate and Administration Act does not contemplate a case where more than one person having been appointed executors to the will of a testator, who directed that all the executors should act jointly, only one person has taken out probate, and the others either did not take out probate or refused to act. It contemplates a case where all the executors have taken out probate. In the present case Damini Dasi alone took out the probate, the others did not do so. That being so, the renewal of her *hatchittas* by her would bind the estate of the testator, in the hands of the defendant-appellants. It is only the executors who have obtained probate who can act as representatives of the testator—see s. 82 of the Probate and Administration Act. In this case the demand arises in consequence of a contract made with the testator, and therefore the renewal of the *hatchittas* by the executrix did not make her personally liable—see the cases of *Dowse v. Coxe*, (1825) 3 Bingham, 20; and *Powell v. Graham*, (1817) 7 Taunton, 581.

Dr. Rash Behary Ghose in reply.

Cur. adv. vult.

JANUARY 9. The judgment of the High Court (Banerjee and Stevens, JJ.) was as follows:—

This appeal* arises out of a suit brought by the plaintiffs-respondents against three persons, namely, Pramatha Nath Pal Chowdhry, Satya Prasad Pal Chowdhry, and Lolit Mohun Pal Chowdhry, for recovery of a certain sum of money due on *hatchittas* or signed accounts on the allegation that the late Koilash [687] Chunder Pal Chowdhry, father of the defendants, carried on monetary dealings with the plaintiffs on *hatchittas*, on condition of paying interest at the rate of 12 annas per cent. per mensem and of renewing the *hatchitta* on the *Ramnavami* Puja day of each year, so that interest at the said rate might run from that day on the amount due as principal and interest; that Koilash Chunder Pal Chowdhry died in Assin 1300, after having executed his last *hatchitta* on the 14th of Cheyt preceding, for Rs. 27,527 odd; that on his death his widow Damini Dasi, mother of the defendants, having obtained probate of his will on the security of defendants 1 and 2, continued renewing his *hatchitta*

year after year down to Cheyt 1302, as his executrix, her name being signed by defendant No. 2; that the said Damini Dasi as the executrix of Koilash Chunder Pal Chowdhry and for the benefit of his estate borrowed from the plaintiffs a further sum of Rs. 1,600, promising to pay interest at 1 per cent. per mensem; and that subsequently on the objection of defendant No. 1, Promatha Nath Pal Chowdhry, the grant of probate to Damini Dasi having been revoked, the defendants under the will of their father have become possessed of his estate, and are liable for the amount claimed. The defence was limitation, denial of the plaintiff's right to sue without joining their mother as a plaintiff, denial of the execution of *hatchittas* by Damini Dasi, and denial of her power as executor to borrow money or renew *hatchittas*.

The Court below has found for the plaintiffs upon all the issues raised in the case and has given them a decree.

Against that decree defendants No. 2 and 3, Satya Prosad Pal Chowdhry and Lolit Mohan Pal Chowdhry, have preferred this appeal; and it is contended on their behalf, *first*, that the Court below is wrong in holding that Damini Dasi alone was competent to exercise the powers of an executor when the will of Koilash Chunder Pal Chowdhry appoints not her alone but her and four other persons as executors, and directs that they shall act jointly; *secondly*, that, even if Damini Dasi was competent to act alone, the Court below is wrong in holding that the renewal of *hatchittas* by her as executrix was binding on the estate of the testator; *thirdly*, that, even if Damini Dasi was competent to act alone, the Court below was further wrong in holding that the estate of the testator was [688] liable to pay the money borrowed by her; and *fourthly*, that the Court below ought to have held that the plaintiffs were not competent to maintain this suit without joining as a co-plaintiff their mother as heir of their deceased brother, who had a share in the money sued for.

In support of the first contention, paragraph 1 of the will of Koilash Chunder Pal Chowdhry and s. 92 of the Probate and Administration Act (Act V of 1881) are relied upon.

Paragraph 1 of the will no doubt shows that five persons, of whom Damini Dasi is one, were appointed executors, and that all the executors jointly are empowered to alienate any property for payment of debts and to borrow money for the improvement and preservation of the estate. And section 92 of Act V of 1881 enacts that "when there are several executors or administrators the powers of all may, in the absence of any direction to the contrary in the will or grant of letters-of-administration, be exercised by any one of them, who has proved the will or taken out administration." The effect of this section, so far as it relates to executors, is, in our opinion, this, that where several executors obtain probate and the will directs them all to act together, none of them can act singly; but the section is not intended to disqualify, by reason of any such direction in the will, one of several executors who alone has obtained probate, the others having either renounced or refused to accept office. This view is supported by section 82 of the Probate and Administration Act, which shews that it is only the executors, who have obtained probate, that can act as representatives of the testator; and we think it but reasonable that an executor, who renounces or refuses, or is unable to act, should be regarded as if he had never been appointed.

This being our view of the law, let us see how the facts stand. Of the five persons appointed as executors, the first, Promatha Nath Pal Chowdhry, defendant No. 1, the eldest son of the testator, never applied for probate, but stood as security when probate was granted to Damini Dasi: the second, Tariqi Prosad Pal Chowdhry, never applied for probate and is one of the plaintiffs in the suit;

the third, Mohendra Nath Biswas, was dead when probate was granted to Damini Dasi; the fourth, Hira Lal Pal, a son-in-law of [689] the testator, never applied for probate, and was, as his own deposition shews, a *naib* or agent of Damini Dasi; and the fifth, Damini Dasi, is the only person who applied for and obtained probate. Thus the three executors other than Damini Dasi, who were alive when the last-named person applied for and obtained probate, if they had not formally renounced, must be taken practically to have refused to accept office. Damini Dasi was therefore, in our opinion, competent to act as executrix. We may add that the defendants, who were the beneficiaries under the will, and in particular two of them, namely, the two appellants, as appears from the depositions of defendants 1 and 2, acted for their mother Damini Dasi, and in fact did all that was done in her name as executrix.

For the foregoing reasons the first contention of the appellants must, in our opinion, fail.

Upon the second point it is urged for the appellants that, even if Damini Dasi was competent to act alone as executrix, she could not in that capacity bind the estate of the testator by executing the *hatchittas* in question, especially when by so doing she had heavily increased the debt originally due from the testator by allowing compound interest to be charged. It is argued that a contract of borrowing made by an executor only binds him personally, and that the only liability created by the *hatchittas* is a personal liability of the executrix; and in support of this argument, *Farhall v. Farhall*, (1871) L. R., 7 Ch. App., 123, and certain other cases referred to in Williams on Executors, Pt. IV, Bk. II, Ch. II, para. 1, are relied upon.

No doubt one of the primary duties of an executor is to free the testator's estate of its debts and liabilities and not to add to its burdens; and for that purpose he can alienate the property of the testator subject only to certain restrictions. It is only in certain special circumstances that an executor's promise to pay money can bind the estate of the testator. MELLISH, L. J., in the case of *Farhall v. Farhall*, (1871) L. R., 7 Ch. App., 123, cited for the appellants, after quoting from Williams' work on Executors, the following statement of the law (9th edition, page 1661):—"The more modern authorities [690] have, however, established that in several instances the executor may be sued as executor on a promise made by him as executor, and that a declaration founded on such a promise will charge the defendant no further than a declaration on a promise of the testator," observes:—"But if we look through the different cases which follow that statement, it will be found that in every one the consideration for the promise of the executor was a contract or transaction with the testator." And a little further on, after referring to two other cases—*Dowe v. Coxe*, (1825) 3 Bingham, 20, and *Powell v. Graham*, (1817) 7 Taunton, 580,—the learned Judge says: "That shews no doubt that a count for money paid for the use of an executor is a good count to charge him in his representative character, when the demand arises in consequence of a contract made with the testator." Let us then see what the demand in this case arises from and how far the consideration for the promise of the executrix arose out of a contract or transaction with the testator. The *hatchittas* in question were given by the executrix in successive renewal of *hatchittas* originally executed by the testator and renewed by him year after year on the *Ramnavami* day, and interest was allowed on interest in the *hatchittas* executed by the executrix in accordance with the practice followed by the testator himself. This fact is proved by the deposition of the plaintiff, Mati Lal Pal Chowdhry, and is not disputed. That being so, we think the Court below was right in holding that

the *hatchittas* executed by Damini Dasi as executrix were binding on the estate of the testator in the hands of the defendants.

There is another reason why these *hatchittas* should be held to be binding on the estate in the hands of the defendants. As we have observed in dealing with the first contention of the appellants, it is proved by the evidence of the defendants 1 and 2 and of other witnesses, that when Damini Dasi was in possession of the testator's estate as executrix, two of her sons, namely, the defendants 2 and 3, the appellants before us, conducted the monetary affairs of the estate on her behalf, and defendant No. 2 signed her name in the *hatchittas* as her agent; while defendant No. 1, who has not appealed against the decree, admitted [691] in the Court below that the amount claimed was justly due. Moreover, when the plaintiffs in this and in another analogous suit, out of which appeal No. 380 arises, were about to institute their suits, the defendants or two of them (see the depositions of Hari Prosad Chatterjee and Narahari Mukerjee) induced them to forbear for a time upon promise of payment or renewal of *hatchittas*. It was argued for the appellants, upon the authority of the case of *Syed Nurul Hossein v. Sheo Sahai*, (1892) L. R., 19 I. A., 221, that as the defendants were then acting as agents of Damini Dasi, their representations could not bind them now when they are sued in their capacity as beneficiaries. This argument is not sound. The case cited is quite distinguishable from the present. For there the representations relied upon were made by a person who never was the reversionary heir to the widow for whom he acted as her agent, and who neither professed nor had any right to act in any other capacity, than that of agent; whereas here the defendants were the beneficiaries of the estate, and only one of them was the agent of Damini Dasi. The true view of the facts is clearly this, that while Damini Dasi acted as executrix in name, the business in connection with the renewal of the *hatchittas* was really conducted by her sons, the defendants, who were then, as they are now, the beneficiaries. It is not therefore open to them to question the binding character of the *hatchittas*. The second contention of the appellants must therefore also fail.

Nor has the third contention much force. It is true that a part of the claim in this suit is made up of two sums of Rs. 1,500 and Rs. 100 borrowed by Damini Dasi as executrix. But she had power under the will to borrow money as executrix for the improvement and preservation of the estate; and the evidence [see the depositions of defendant No. 1, Promatha Nath Pal Chowdhry, and the plaintiff, Moti Lal Pal Chowdhry, and exhibits 1 (4) and 4] amply shews that the money was borrowed for paying off a certain decree in execution of which a portion of the immoveable property belonging to the estate had been advertized for sale. It was argued by the learned vakil for the appellants that as the power of borrowing money was given to [692] five persons jointly, one of them, Damini Dasi, could not exercise that power singly. The answer to this argument is that the power was given not to the five persons in their individual capacity, but to them as executors and by virtue of their office; and if, as we have said above, Damini Dasi was, by reason of the death of one of the executors and refusal of the other three to act, alone competent to act as executrix, she was also competent to exercise the power of borrowing money by virtue of her office as executrix. The view we take is in accordance with that taken in the case of *Crawford v. Forshaw*, (1891) L. R., 2; (1891) Ch. Vol. II, p. 261.

Upon the fourth and the last contention, it is enough to say that the evidence of the plaintiff, Moti Lal Pal Chowdhry, which is un rebutted, and which we see no reason to disbelieve, shews that his mother had many years before

suit relinquished in favour of him and his brothers the right she had acquired by inheritance in the share of his deceased brother in the money claimed in this suit.

The contentions urged before us therefore all fail, and this appeal must consequently be dismissed with costs.

This judgment will govern appeals from Original Decrees Nos. 380 and 381, which are analogous to this case, with only this difference that the third and fourth contentions raised in this appeal do not arise in them. Appeals from Original Decrees Nos. 380 and 381 will accordingly be also dismissed with costs.

S. C. G.

Appeal dismissed.

NOTES.

[See also (1909) 34 Bom., 209.]

[27 Cal. 692]

CRIMINAL REVISION.

The 12th, 13th and 14th February, and 23rd March, 1900.

PRESENT:

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, AND
MR. JUSTICE MACPHERSON.

Ahmed Hossein.....Appellant

versus

The Queen-Empress.....Respondent.*

Arms or ammunition—Possession of or control over—Search, legality of—

Sanction to prosecute—Code of Criminal Procedure (Act V of 1898),

ss. 55, 103 and 165—Arms Act (XI of 1878), ss. 19, 20, 25, 29 and 30.

[693] The license of the accused for the possession of firearms and ammunition was cancelled in August 1897. He was suspected of being in possession of arms after the cancellation of his license. On the 23rd of April 1899, the Assistant Magistrate of Purneah with a number of Police went to the house of the accused to search for arms. They surrounded it, arrested the accused and then searched his house. The Police had no search warrants, nor was there anything to show upon what charge the accused was arrested. Two gun stocks, some ammunition and implements for reloading were discovered in the house. There was nothing to show that the sanction required by s. 29 of the Arms Act was given before proceedings were instituted against the accused. Accused was convicted and sentenced under ss. 19 and 20 of the Arms Act.

Held that the conviction under s. 20 was not sustainable, but that the accused must be taken to have had arms and ammunition as defined by the Arms Act within the meaning of sub-section (f) of s. 19 of that Act and the conviction under that section must be confirmed.

Held further that with respect to the question of whether or not any previous sanction had been given under s. 29 of the Arms Act, the Court was not unmindful of the suggestion

* Criminal Appeal No. 35 of 1900, made against the order passed by W. H. Vincent, Esq., Sessions Judge of Bhagalpore, dated the 3rd January 1900.

that the charge in this case was, in the first instance, in respect of an alleged offence under s. 20 and not of one under s. 19; but that ss. 19 and 20 were so interwoven that it was difficult to see how an offence could be committed under the first paragraph of s. 20 unless an offence under one of the enumerated sub-sections in s. 19 had also been committed. It was not suggested that the charge here was an offence under the second paragraph of s. 20.

IN this case it appeared that the Magistrate of Purneah, in August 1897, cancelled certain licenses granted in that neighbourhood, and among them any license held by the accused for the possession of arms and ammunition. The accused was called upon to deliver up any arms he possessed after the license had been cancelled, and he delivered up the barrel of a muzzle-loading gun. He was, however, suspected of having other arms in his possession.

On the 23rd of April 1899 the Assistant Magistrate of Purneah together with a large number of Police proceeded to the home of the accused, who appeared to be a man of position and means; their object being to search for arms in his house. They reached the accused's house at daybreak, and having surrounded it, at once arrested him and had him photographed, and then proceeded to search the house.

The Police had no search-warrants, nor was there anything to [694] show upon what charge the accused was arrested. The search resulted in the finding of the stocks of two guns, some loaded and unloaded cartridges, and implements for reloading. The accused was removed in custody. There was nothing to show definitely when proceedings against the accused were first instituted or whether the sanction required by s. 29 of the Arms Act was given before those proceedings were instituted or what in the first instance, was the precise charge made against the accused, who, it appeared, had been kept in custody for nearly a fortnight until released on bail by an order of the High Court about the 12th or 14th of May. The accused was subsequently committed to the Sessions, and was convicted on the 3rd January 1900 by the Sessions Judge of Bhagulpore, of an offence under ss. 19 and 20 of the Arms Act of 1878, and sentenced to six weeks' rigorous imprisonment and a fine of Rs. 500.

Mr. Jackson, (Mr. K. N. Choudhury with him) for the Appellant.—There is nothing on the record to show how the proceedings in this case originated, nor upon what the Police proceeded to take steps. The accused was in possession of a license for 15 or 17 years until 1897, when it was cancelled, and when called upon he gave up his gun.

With regard to the steps taken by the Assistant Magistrate and the Police, every provision of law appears to have been broken. The search could not possibly have been held in view of the charge apart from the illegal manner in which it was held. It is clear the search was not made under s. 25 or 30 of the Arms Act, nor under s. 165 of the Code of Criminal Procedure. There was no search-warrant, nor is it pretended that there was one. The search was, I submit, illegal, and that being so the conviction must go, as the accused could not be held responsible for what occurred at that search. Then, again, what right had they to arrest him; there was no warrant, nor could it be said that s. 55 of the Code of Criminal Procedure applied.

Under s. 103 of the Code the list of things found during the search must be prepared in the presence of witnesses at once and signed by them; here a list in English was put in, prepared from notes made by the District Superintendent of Police. It bears thumb-marks, but it is not shown that the [695] witnesses to it could read English. Apparently proceedings under s. 110 of the Code were first instituted against the accused; these, however, were

dropped after the 25th of April, from that date the proceedings became a prosecution under the Arms Act. Sanction was necessary under s. 29 of that Act; the so-called sanction was given on the 29th of April after the proceedings had commenced. See *Reg. v. Parshram Keshav*, (1870) 7 Bom. H. C. Cr., 61, and *Queen-Empress v. Morton*, (1884) I. L. R., 9 Bom., 288.

Under s. 29 of the Arms Act sanction is necessary in order to prosecute for an offence under s. 19, sub-section (f), of that Act; that being so it is obviously necessary in order to take action under s. 20. Further under s. 20 of the Arms Act concealment must be at the time of search, the Police, however, had him hard and fast, so that he could not possibly have concealed anything at that search.

The *Deputy Legal Remembrancer* (Mr. *Leith*) for the Crown.

Cour. adv. vult.

MAR. 23, 1900.—The following judgment was delivered by **Maclean, C.J.** (**Macpherson, J.**, *concurring*):—

On the 23rd of April 1899, the Assistant Magistrate of Purneah proceeded to search the house of the prisoner, who appears to be a man of position and means, and took with him two Superintendents of Police, several Inspectors of Police and a number of constables and chowkidars, the whole constituting, in point of numbers, a small army of about sixty men. Their object was to search for arms in the house of the prisoner. They reached his house at daybreak; they surrounded the house, went in, and at once arrested the prisoner and had him photographed. Some of the witnesses say—photographed with a constable holding him by the hand or arm—and then proceeded to search the house. The Police had no search-warrant, nor is there anything to show upon what charge the prisoner was arrested. The search lasted practically throughout the day, with the result that the stocks of two guns, some loaded and unloaded gun and revolver cartridges, a ramrod, a box of percussion caps, and a gun case with reloading implements for cartridges, and some empty powder [696] flasks were found on the premises. The articles so found must be taken to be arms and ammunition, within the meaning of the Arms Act, XI of 1878, and they must be taken to have been in the possession of the prisoner within the meaning of sub-section (f) of section 19 of that Act. The prisoner was removed in custody.

What subsequently took place is involved in some little obscurity. The materials before us do not enable us to say definitely when any proceedings against the prisoner were first instituted, or whether the sanction required by s. 29 of the Arms Act was given before those proceedings were instituted or what, in the first instance, was the precise charge made against the prisoner, and the learned Deputy Legal Remembrancer, who appeared for the Crown, has not been able to enlighten us upon these points. The prisoner, however, appears to have been kept in custody for nearly a fortnight, until he was released on bail by an order of this Court, about the 12th or 14th of May. Ultimately he was committed to the Sessions Court at Bhagulpore, and convicted on the 3rd January last of an offence under ss. 19 and 20 of the Arms Act of 1878, and sentenced to six weeks' rigorous imprisonment and a fine of Rs. 500. Both the assessors were for acquitting the prisoner.

I must say, I am at a loss in the absence of explanation, to understand the action of the Police in this matter. I do not understand upon what charge the appellant was arrested, why he was photographed, what right the Police had to photograph him, least of all in custody, or in the absence of a search-warrant under what authority the search was made. It is not suggested that the search was made under s. 25 of the Arms Act, though I notice in his

questions to the assessors the Sessions Judge puts it as a search under s. 25, whilst in his judgment he treats the search as one made under s. 165 of the Criminal Procedure Code. No attempt has been made at the Bar to treat the search as one made under s. 25 of the Arms Act, and the learned Deputy Legal Remembrancer has not been able to assist us in elucidating the reasons for the action of the Police, which appears to me to have been high-handed and arbitrary. It is equally unfortunate that the prisoner was detained in custody [697] so long and not allowed out on bail, until he was released on bail by an order of this Court, which indicates clearly that this Court thought it was a case for bail. We have heard no argument that the search was properly made under s. 165 of the Code of Criminal Procedure or that the arrest was properly made under s. 55 of the same Code.

With respect to the question of whether or not any previous sanction had been given under s. 29 of the Arms Act I am not unmindful of the suggestion that the charge here was, in the first instance, in respect of an alleged offence under s. 20 and not of one under section 19; but ss. 19 and 20 are so interwoven that it is difficult to see how an offence can be committed under the first paragraph of s. 20, unless an offence under one of the enumerated sub-sections in s. 19 has also been committed. It is not suggested, save in the Sessions Judge's questions to the assessors, that the charge here was an offence under the second paragraph of s. 20 of the Arms Act. Nor could it have been successfully, for the provisions of s. 25, were not complied with in this case.

As regards the charge under s. 20, I entertain a grave doubt whether the evidence is sufficient to justify a conviction under that section, and whether the first paragraph of that section applies to a case such as the present. The accused is entitled to the benefit of that doubt, and in my opinion the conviction under s. 20 is not sustainable.

The accused, however, must be taken to have had in his possession or under his control, arms and ammunition as defined by the Arms Act of 1878 within the meaning of sub-section (f) of s. 19 of that Act, and in my opinion the conviction under that section must be confirmed. I think, however, that the sentence passed was far too severe, and that under the circumstances of the case, a much more lenient sentence would have met the justice of the case. I understand that the prisoner has already undergone some days of rigorous imprisonment before he was again admitted to bail by this Court; and in my opinion, the imprisonment he has already undergone is an ample punishment for the offence which he has committed. In the result, then, the conviction under s. 20 must be set aside and that under s. 19 must be sustained, [698] and the sentence must be the number of days of rigorous imprisonment, which the prisoner has already undergone. The prisoner, then, will be at once discharged and the fine of Rs. 500 must be remitted, and, if paid, must be refunded.

D. S.

[27 Cal. 698]

APPELLATE CIVIL.

The 4th April, 1900.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,
AND MR. JUSTICE BANERJEE.

Chunder Kumar Mukerjee and others.....Plaintiffs
versus

The Secretary of State for India in Council and another.....Defendants.*

*Public Demands' Recovery Act (Bengal Act VII of 1880), ss. 2, 8, 10 and
12—Bengal Act VII of 1868, ss. 2 and 8—Sale for arrears of cesses—
Suit to set aside such a sale on the ground that no notice was
issued under s. 10 of the Act, whether maintainable in the
Civil Court.*

A suit to set aside a sale held for arrears of cesses on the ground that no notice of the certificate under s. 10 of Bengal Act VII of 1880 was served upon the plaintiff is maintainable in the Civil Court.

Bajinath Sahai v. Ramkut Singh, (1896) I. L. R., 23 Cal., 775, and *Saroda Charan v. Kista Mohun*, (1897) 1 C. W. N., 516, referred to.

THE plaintiffs brought a suit in the Court of the Munsif at Faridpur to set aside the certificate and the sale of certain lands held by the Collector under a certificate issued under the Public Demands' Recovery Act, and for confirmation of possession thereof. The allegations of the plaintiffs were that no notice of the certificate was served upon them; that no sale processes were published as required by the law, and, if they were published, they were irregular, illegal and fraudulent; that, inasmuch as they could not know of the sale in proper time, they were unable to prefer an appeal to the Commissioner of the Division, impugning the validity of the sale. The plaintiffs through their pleader stated [699] that there were no cesses due at the time when the sale took place. The defence of the defendants was that the plaintiffs' only remedy was by way of an appeal to the Commissioner, and they not having preferred an appeal, the suit was not maintainable in the Civil Court; that the suit was barred by limitation; that the proceedings were all regular, and as such the sale was not liable to be set aside. The Court of First Instance dismissed the plaintiffs' suit. On appeal the Subordinate Judge, while assuming that the notice was not duly served, but relying upon the provisions of s. 8 of Bengal Act VII of 1880, and the case of *Troyluckho Nath v. Pahar Khan*, (1896) I. L. R., 23 Cal., 641, held that the Civil Court had no jurisdiction to set aside the sale and confirmed the decision of the first Court.

Against this decision the plaintiffs appealed to the High Court.

Babu Lal Mohun Das (with him Babu Chunder Kant Sen), for the Appellants.—The case of *Troyluckho Nath v. Pahar Khan*, (1896) I. L. R., 23 Cal., 641, is quite distinguishable from the present case. In that case the sale was sought to be set aside, not on the ground of non-compliance with the provisions of s. 10 of Bengal Act VII of 1880, but on the ground of irregularity. Where a

* Appeal from Appellate Decree No. 711 of 1898, against the decree of Babu Behari Lal Mullick, Subordinate Judge of Faridpur, dated the 11th of January 1898, affirming the decree of Babu Mohim Chunder Chuckerbutty, Munsif of Madaripur, dated the 16th of March 1897.

sale is sought to be set aside on the ground that no notice of the certificate was served, a suit in the Civil Court is maintainable. The cases of *Bajinath Sahai v. Ramgut Singh*, (1896) I. L. R., 23 Cal., 775, and *Saroda Charan v. Kista Mohun*, (1897) 1 C. W. N., 516, support this view. A suit to set aside a sale for arrears of cesses will lie, although no previous appeal has been made to the Commissioner; see the case of *Mohibul Huq v. Shew Sahay Singh*, (1897) I. L. R., 25 Cal., 85. The lower Court has relied upon s. 12 of the Act as barring the present suit. But s. 12 pre-supposes a case where a notice has been issued. Where a certificate was issued upon a wrong person, who had ceased to be an owner, the Privy Council held that a sale in pursuance of such a certificate was illegal; see *Mahomed Abdul Haq [700] v. Gujraj Sahai*, (1893) I. L. R., 20 Cal., 826. It was never suggested in that case that a Civil Court had no jurisdiction.

Babu Ram Churn Mitter (the *Senior Government Pleader*), for the respondent.—This is a suit to set aside a sale on the ground that the certificate was bad in law. Under the provisions of s. 12 of Act VII of 1880, it is not absolutely necessary that there should be a notice. The second portion of the section says: "where no such notice has been duly served." It contemplates a valid certificate, where no notice under s. 10 has been duly served. Unless the certificate itself is set aside, the Civil Court cannot have any jurisdiction to set aside the sale under s. 20 of the Act. As no cause has been made out to set aside the certificate under s. 8, the sale cannot be set aside. The appellant's remedy was to apply to the Commissioner for setting the sale aside, and, he not having done so, was precluded from bringing this suit in the Civil Court.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.):—

Maclean, C. J.—I think, though with some little doubt, that there must be a remand in this case to the Lower Appellate Court, for that Court either to take the evidence itself, or send the case to the first Court to do so, for the determination of the question whether the Collector issued to the judgment-debtor a copy of the certificate upon which the sale was based and notice in Form IV in the Second Schedule annexed to Act VII (B. C.) of 1880, in other words, to ascertain and determine whether the provisions of s. 10 of the Act were strictly and properly complied with. I direct this remand, because in my opinion the finding of the Court below is not quite so explicit as it ought to be, though I should rather infer from his language that it was the Judge's intention to find that the notice had not been duly served in accordance with the provisions of s. 10. If the Court should find that the provisions of s. 10 have not been complied with, then in my opinion the sale cannot stand, and I feel no difficulty in holding that the Civil Court has jurisdiction to entertain a suit to set aside the sale.

[701] It was contended that there is no jurisdiction in the Civil Court to entertain a regular suit to set aside the sale, having regard to the provisions of s. 2 of Act VII (B. C.) of 1868. But that section only enables the Commissioner of Revenue to "receive an appeal": it does not make it compulsory upon the judgment-debtor, who complains of the sale, to appeal to that tribunal, nor does it deprive him of his right to institute a regular suit to set aside the sale. If the case of *Troyluckho Nath v. Pahar Khan*, (1896) I. L. R., 23 Cal., 641, decide the contrary, I respectfully differ from its conclusion, which appears to me to be inconsistent with the cases to which I am about to refer.

I am unable to accept the contention of the learned Senior Government Pleader for the Secretary of State, that a sale cannot be set aside until the certificate has been set aside, and that a certificate can only be set aside on

some or one of the grounds stated in the sub-section (b) of s. 8 of Act VII (B.C.) of 1880. That view appears to me to be inconsistent with the decision of the Privy Council in the case of *Baij Nath Sahai v. Ramgut Singh*, (1896) I. L. R., 23 Cal., 775, with that in the case of *Mahomed Abdul Hai v. Gujraj Sahai*, (1893) I. L. R., 20 Cal., 826, and with the decision to which I was myself a party in the case of *Saroda Charan v. Kista Mohun*, (1897) 1 C. W. N., 516. The case of *Bajinath Sahai v. Ramgut Singh*, (1896) I. L. R., 23 Cal., 775, indicates how important it is in cases of this class that the requisites preliminary to a sale should be strictly complied with. In neither of the Privy Council cases, to which I have referred, was it suggested that a regular suit would not lie to set aside the sale, or that the judgment-debtor's only remedy was an appeal under s. 2 of Act VII (B. C.) of 1868. As regards the argument under s. 8 of Act VII (B. C.) of 1880, the plaintiff's case is that it is the sale and not the certificate he wants to have set aside, and he claims to have it set aside, on the ground that the provisions of s. 10 were not complied with, and that, until he was served with the notice under that section, the certificate did not bind his immoveable property, and that, as he was never [702] served with such notice, his immoveable property never became bound by the certificate, and in this view he says it is immaterial to him whether or not the certificate is set aside, so long as the sale is. I do not think there is anything in s. 8 which prevents his instituting this suit. I may add that s. 8, which only refers to a suit to contest his liability to pay the amount stated in the certificate and to have the certificate cancelled, pre-supposes service under s. 10. I am unable, therefore, to accept the view of the law as laid down by the Lower Appellate Court, but, as the Secretary of State asks for it, there will be a remand on the point I have mentioned. The respondents, however, must pay the costs of this appeal.

Banerjee, J.—I am of the same opinion. The plaintiff-appellants brought this suit to set aside the sale of the property in dispute under a certificate made under Act VII (B. C.) of 1880 on certain grounds, one of which was that no notice of the certificate had been issued to the plaintiffs. The Lower Appellate Court, while finding that no notice under s. 10 of the Act had been proved, has nevertheless dismissed the suit, as it is of opinion that the plaintiffs were not entitled to maintain the suit, because they did not make any application under s. 12 of the Public Demands' Recovery Act, and further because they failed to show, as required by s. 8 before any certificate could be set aside by the Civil Court, that the debt covered by the certificate was not really due, or that it had been paid or discharged.

The plaintiff-appellants contend that the Court of Appeal below is wrong in holding that the suit was not maintainable, and that it ought to have held that when no notice under s. 10 of Act VII (B. C.) of 1880 was proved, all proceedings had for the enforcement of the certificate were void; and in support of this contention the decision of the Privy Council in the case of *Bajinath Sahai v. Ramgut Singh*, (1896) I. L. R., 23 Cal., 775, and the case of *Saroda Charan v. Kista Mohun*, (1897) 1 C. W. N., 516, are relied upon.

The cases cited bear out the appellants' contention, and the only way in which the learned Senior Government Pleader attempts to meet that contention and to support the judgment [703] of the Court below, is by arguing that s. 12 of the Public Demands Recovery Act contemplates the possibility of execution proceedings being taken, notwithstanding that no notice under s. 10 is duly served, and that s. 20 of the Act by implication shows that a sale of immoveable property can be set aside

by the Civil Court only where the certificate is set aside by such Court, and as no cause has been made out for the setting aside of the certificate under s. 8 of the Act, the Courts below are right in holding that the suit cannot succeed.

Now with reference to s. 12 it will be enough to say that, although it contemplates the possibility of a debtor under a certificate applying to the Collector to set aside the certificate upon becoming aware of its existence not by a notice under s. 10, but by the issue of any process of execution, it does not show that notwithstanding the absence of a notice under s. 10, the certificate is as valid and has as much force, as if such notice had been issued. On the contrary, there are express provisions in the Act, in ss. 10 and 18, to the effect that a certificate binds the immoveable property of the debtor, and may be enforced as a decree only after service of the notice mentioned in s. 10. And there is every reason why that should be so, because the certificate is altogether an *ex parte* document; it only professes to certify that a certain debt is due, and it is only by the service of the notice under s. 10 that the party against whom the debt is certified to be due becomes aware of the existence of the certificate.

Then as for s. 20 all that that section enacts is, that where a certificate is set aside by a competent Civil Court, the sale held in enforcement of the certificate shall also be set aside. But that does not prove that a sale of immoveable property held in enforcement of a certificate can be set aside only when the certificate is set aside. For there may be a class of cases, and an important class, of which the present is an instance, and of which the cases of *Bajinath Sahai v. Ramgut Singh*, (1896) I. L. R., 23 Cal., 775, and *Saroda Charan v. Kista Mohun*, (1897) 1 C. W. N., 516, are also instances in which a cer-[704]tificate may be made, and yet no notice given of it to the debtor as required by s. 10 of the Act, and, in any such case, if the property of the debtor is sold before he had any notice of the certificate against him, he may well "although the debt is due and has not been paid off, and although, therefore, say, I am not in a position to have the certificate cancelled, yet I am entitled to have the sale of my property, held under such a certificate, cancelled for the simple reason that I never had any notice of the certificate, my creditor having no power under the Act, unless he complies with its provisions, to sell my property to realise his dues." It is only after the notice under s. 10 is issued that the certificate acquires the force and effect of a decree which may be enforced and satisfied by the sale of the debtor's property.

It was lastly contended by the learned Senior Government Pleader that where a sale has been held in enforcement of a certificate, then, if the debtor is not in a position to have the certificate set aside, his proper remedy is to apply to the Commissioner for setting aside the sale. That may be so where the only ground for setting aside the sale is irregularity in publishing or conducting it. But where what is impugned is the authority of the Collector to hold the sale on the ground of there being no valid warrant for the sale in the form of a perfected certificate, that is, a certificate perfected by the issue of a notice under s. 10, which alone can give it the force of a decree, there, although there may be no irregularity in publication or the conduct of the sale, the sale should be set aside as having been made altogether without authority, and there the right of bringing a civil suit is not in my opinion taken away by any of the provisions of the Public Demands' Recovery Act. The view I take is, as I have said above, supported by the cases of *Bajinath Sahai v. Ramgut*

Singh, (1896) I. L. R., 23 Cal., 775, and *Saroda Charan v. Kista Mohun*, (1897) 1 C. W. N., 516.

S. C. G.

Appeal allowed, case remanded.

[705] *The 26th April, 1900.*

PRESENT :

SIR FRANCIS W. MACLEAN, K. C. I. E., CHIEF JUSTICE
AND MR. JUSTICE BANERJEE.

Somesh.....Judgment-debtor

versus

Ram Krishna Chowdhry.....Decree-holder.*

Transfer of Property Act (IV of 1882), ss. 86 and 87—Order for possession absolute—Order for foreclosure absolute—Mortgagor's right to apply for extension of time, before an order for foreclosure absolute—Redemption of mortgage before order absolute.

Until an order for foreclosure absolute in proper form is made under section 87 of the Transfer of Property Act, the mortgagor can, upon a proper application, redeem the mortgaged property.

Poresh Nath Majumdar v. Ramjadu Majumdar, (1889) I. L. R., 16 Cal., 246, and *Narayana Reddi v. Papayya*, (1898) I. L. R., 22 Mad., 133, referred to.

THIS appeal arose out of an application for redemption of a mortgage. A preliminary decree for foreclosure was made in accordance with the provisions of section 86 of the Transfer of Property Act on the 26th May 1898. On an application by the mortgagee (decree-holder) on the 26th January 1899 the following order was passed : "As the judgment-debtor has not paid the decretal amount within the time fixed the order for sale of the mortgaged property is hereby made absolute." It did not appear from the application that the mortgagor asked the Court to postpone the date appointed for payment, or that the mortgagor was served with a notice of this application. On the 8th March 1899 the judgment-debtor deposited the decretal amount in Court and the Court accepted the money. On the 26th April 1899 the decree-holder made an application to the Court which was in effect to amend the order of the 26th January 1899. The Munsif allowed the amendment and passed the following order—

"It appears that the order by which the decree has been made absolute was erroneously recorded. The order should have been for possession and not for sale, as the suit was for foreclosure and not for sale. Let the error, which [706] is only a clerical one, be amended in the original record which should be called for, the judgment-debtor cannot take advantage of the error on the order making the decree absolute. Objection disallowed. Let the execution case proceed."

On appeal to the District Judge the order of the lower Court was confirmed. Against this decision the judgment-debtor appealed to the High Court.

* Appeal from Order No. 328 of 1899, against the order of F. F. Handley, Esq., District Judge of 24-Pergunnahs, dated the 8th of July 1899, confirming the order of Babu Bepin Chunder Chatterjee, Munsif of Diamond Harbour, dated the 26th of April 1899.

Babu Shyama Prosonno Mazumdar for the Appellant.—There was no order in this case that the mortgagor was absolutely debarred from redeeming the property mortgaged. The only order passed was in effect for possession absolute. That would not prevent the judgment-debtor from depositing the decretal amount after the time fixed by the decree, and redeeming his property. Section 87 of the Transfer of Property Act provides for an order for foreclosure absolute. It also provides that the Court may extend the time for redemption on sufficient cause being shewn by the judgment-debtor. It does not appear in this case that the judgment-debtor was allowed an opportunity to redeem. Until an order absolute for foreclosure is obtained the judgment-debtor is not debarred from redeeming the mortgaged property. See the cases of *Narayana Reddi v. Papayya*, (1898) I. L. R., 22 Mad., 133, and *Poresh Nath Majumdar v. Ramjadu Majumdar*, (1889) I. L. R., 16 Cal., 246. There was no such order obtained in this case. When the mistake was rectified the order of the 26th April could not have a retrospective effect. Before an order for foreclosure absolute was made the judgment-debtor deposited the decretal amount, therefore he was entitled to redeem the properties.

Babu Narendra Chundra Bose for the Respondent.—The mistake being only a clerical one it was properly amended, and the amendment should be taken to have a retrospective effect. By looking at section 60 of the Transfer of Property Act it appears that the mortgagor can deposit the mortgage debt in Court only before the suit is instituted, and after it is instituted he cannot do so. He does not remain a mortgagor then, but he becomes a judgment-debtor. By section 86 of the Transfer of Property Act, on the expiry of the period of grace, the right of redemption [707] is extinguished. Therefore in this case the right of redemption did not exist on the date that the money was deposited.

Babu Shyama Prosonno Mazumdar in reply.

The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows.—

Maclean, C. J.—This appeal must be allowed. The question arises in a suit to enforce a mortgage. On the 26th of May 1898, a preliminary decree for foreclosure was made and we are told, for we have not seen the decree itself, that in terms it followed the provisions of section 86 of the Transfer of Property Act. There was an appeal from that decree, but the decree was confirmed on the 13th August 1898. Nothing turns upon that appeal. On the 6th January 1899, upon an application made by the mortgagee, the following order was made, "as the judgment-debtor has not paid the decretal amount within the time fixed, the order for sale of the mortgaged property is hereby made absolute." In point of fact there had been no order for sale. There is nothing to show whether or not, on that application, the mortgagor asked the Court to postpone the day appointed for payment. Whether the mortgagor was served with this application, or what were the actual terms of the application, does not appear. It will be noticed that the order was not that the defendant do stand debarred of all right to redeem the said mortgaged premises in accordance with the form of decree in schedule IV of the Code of Civil Procedure. After that order was made, the judgment-debtor, on the 8th March 1899, deposited the mortgage money in Court and the Court accepted the money. How this was done does not appear. It is not suggested that the amount deposited was insufficient. On the 26th April 1899 an application was made by the mortgagee in effect to amend the order of the 6th January 1899, upon the footing that it was made under some mistake; and the Court seems to

have taken that view, and treating the expression "order for sale," occurring in order of the 6th January 1899, as if it ought to have been "order for possession", held that there had been a clerical error only, and that the judgment-debtor could not take advantage of that error, and directed that the order as amended on the 26th April should relate back to, and be treated [708] as having been made on the 6th January 1899. There was an appeal from the order of the 26th April 1899 to the District Judge, and he, on the 8th July in the same year, confirmed the decision. Hence the present appeal.

The question we have to decide is whether having regard to the language of the order of the 6th January 1899, and to the provisions of sections 84 and 87 of the Transfer of Property Act, inasmuch as the mortgagor, in the interval between the 6th January and the 26th April, paid the mortgage money into Court, and the Court accepted the money, the mortgagee is now entitled to treat the mortgage as absolutely foreclosed. I think not. Apart from the question of whether there was any mistake in the drawing up of the order of the 6th January 1899, and if there was that mistake, whether the order of the 26th April ought to have the retrospective effect given to it by the lower Courts when the mortgage money in the interval had been paid into Court, the authorities appear to me to establish, and I think rightly,—I allude to the cases of *Poresh Nath Majumder v. Ramjadu Majumdar*, (1889) I. L. R., 16 Cal., 246, and *Narayana Reddi v. Papayya*, (1898) I. L. R., 22 Mad., 133,—that until an order for foreclosure absolute has been made under section 87 of the Act, the mortgagor may be allowed, upon a proper application, to redeem the mortgaged property. These decisions are consistent with the old practice in Chancery in England, and with the present practice in the Chancery Division of the High Court in England, and it is, I think, reasonably clear that sections 86 and 87 of the Transfer of Property Act are modelled on that practice and view of the law, or, perhaps I should say, recognized principles of equity. Now, whether or not, the Court was right on the 26th April in saying that there was a mistake in the terms of the order of January 6th, 1899, and that, when the mistake was rectified, the order of April 26th had the retrospective effect, I have mentioned, I do not think it can be said to be an order for foreclosure absolute, so as to debar the mortgagor from the opportunity of redeeming the mortgaged property. The order of the 6th January, as amended by that of the 26th April [709] 1899, was one for possession being made absolute; it says nothing about the right of redemption being barred; and it was not in conformity, as I have pointed out, with the form given in schedule IV of the Code of Civil Procedure, nor with the language of section 87 of the Transfer of Property Act. It may be said that an order for possession absolute is inconsistent with the idea of any right to redeem still subsisting, and there is perhaps some force in that view, but the mortgagor may retort that the mortgagee elected to take an order only for possession absolute, and did not ask for an order of foreclosure absolute, as he might have done, and that, until he has obtained an order for foreclosure absolute, the mortgagor is not absolutely barred from redeeming. I am, further, by no means satisfied that the order of the 26th April could be regarded as retrospective to the prejudice of the mortgagor, who, in the meantime, had paid in the mortgage money, and, if this view be well founded,—it is not necessary for me to express a final opinion upon it—the respondent's case would fail on this ground too.

Upon these grounds, I think that the order of the Court below must be discharged with costs. It must be taken that the payment into Court by the mortgagor, on the 8th of March, the sufficiency in amount not being disputed,

was a good payment, and that the mortgage must be taken to be satisfied and the mortgagor must be restored to possession.

Banerjee, J.—I am of the same opinion.

S. C. G.

Appeal allowed.

NOTES.

[This was followed in (1909) 25 All., 231 ; (1905) 3 C.L.J., 533 ; 18 I.C., 397 (Cal.)]

[27 Cal. 709]

The 3rd April, 1900.

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,
AND MR. JUSTICE BANERJEE.

Sariatoolla Molla.....Judgment-debtor

versus

Raj Kumar Roy and another.....Decree-holders.*

Execution of decree—Step in aid of execution—Limitation Act (XV of 1877)
sch. ii, art. 179, cl. (4)—Application by the decree-holder to be put in
possession of property which he purchased in execution of his decree.

[710] An application by a decree-holder to be put in possession of the property which he purchased in execution of his decree, is a step in aid of execution of that decree within the meaning of cl.(4). sch. ii, art. 179† of the Limitation Act.

Moti Lal v. Makund Singh, (1897) I. L. R., 19 All., 477, followed.

THIS appeal arose out of an application for execution of a decree, dated the 12th May 1888. The application was made on the 6th August 1898. Previous to this application several other applications for execution were made, and amongst them one was made on the 16th October 1893, and the other on the 20th September 1897. The result of the application of the 16th October

* Appeal from Order No. 346 of 1899, against the order of B. C. Mitter, Esquire, Officiating District Judge of Faridpur, dated the 1st of August 1899, reversing the order of Babu Akhoy Kumar Bose, Subordinate Judge of that District, dated 20th of March 1899.

† [Art. 179, cl.(4) :—

Description of Application.	Period of limitation.	Time from which period begins to run.
For the execution of a decree or order of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure, Section 230.	Three years ; or where a certified copy of the decree or order has been registered, six years.	4. (Where the application next hereinafter mentioned has been made) the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution, of the decree or order, or

1893 was, that certain immoveable properties of the judgment-debtor were sold and purchased by the decree-holders. That application was eventually dismissed by the Court on the 22nd September 1894. On the 20th July 1895 the decree-holders applied to be put in possession of the properties purchased by them. The application of the 20th September 1897 was also dismissed on the 13th November 1897, the decree-holders not having taken any step in aid of the execution. The defence of the judgment-debtor was that the application of the 20th September 1897 when made, was barred by limitation, therefore the present application was also barred by limitation. The Court of First Instance dismissed the application holding that it was so barred. On appeal the District Judge reversed the decision of the First Court, on the ground that the application made by the decree-holders on the 20th July 1895, to be put in possession of the properties purchased by them was a step in aid of execution, therefore the present application for execution was within time.

Against this decision the judgment-debtor appealed to the High Court.

Babu Sharoda Churn Mitter for the Appellant.—An application for delivery of possession of property purchased by the decree-holder could not be considered to be a step in aid of execution. As soon as the sale is confirmed, so far as that decree is concerned, it comes to an end, therefore it cannot be said that such an application is one to take some step in aid of the execution [711] of that decree. It is not necessary for the decree-holder to apply for delivery of possession. An application to receive poundage fee from the decree-holder has been considered to be not an application to take some step in aid of execution. See *Aghore Kali Debi v. Prosunno Coomar Banerjee*, (1895) I. L. R., 22 Cal., 827. As long as the poundage fee is not paid, and the Court does not accept it, nothing further in the way of execution could be done, still their Lordships held that an application to receive poundage fee was not a step in aid of execution. An application by the decree-holder to be allowed to set-off the purchase money against the decree, instead of paying it into Court, is not a step in aid of execution. See *Ananda Mohan Roy v. Hara Sundari*, (1895) I. L. R., 23 Cal., 196. [C. J.—Here the application is to give effect to the sale, which is the result of the decree.] An application to take out of Court certain monies, the sale proceeds realized by the sales of certain properties of the judgment-debtor, is not a step in aid of execution of the decree. See *Fazal Imam v. Metta Singh*, (1884) I. L. R., 10 Cal., 549, and *Hem Chunder Chowdhry v. Brojo Soondury Debee*, (1881) I. L. R., 8 Cal., 89.

Babu Brojendra Lal Mitter, for the Respondent, was not called upon.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.)

Maclean, C. J.—The question we have to decide is a very short one, whether the application by the decree-holder of the 20th of July 1895 to be put into possession of the property which he had purchased under the execution proceedings is an application made in accordance with law to the proper Court to take some steps in aid of execution within the meaning of sub-section 4 of art. 179 of the second schedule to the Limitation Act. If the question be answered in the affirmative the present application, of the 6th of August 1898, is admittedly not out of time, but, if it be answered in the negative, the present application is time barred.

[712] There is no authority, so far as we know, or so far as our attention has been directed, in the High Court of this province bearing directly upon the question. We have, it is true, been referred to various decisions, which lay down what does, and what does not in certain cases, and under the particular circumstances of those cases, constitute such an application. For my own

part, however, inasmuch as each of those decisions depends upon the particular circumstances of the case, and the particular nature of the application which was made, I do not think that they afford a very useful guide to the present case.

There is a direct decision of the Allahabad High Court in the case of *Moti Lal v. Makund Singh*, (1897) I. L. R., 19 All., 477, that an application such as the present is within cl. 4 of art. 179 of the second schedule of the Limitation Act, as an application to take some steps in aid of execution. That decision, it is true, is not binding upon this Court, but it is a decision which is entitled to every attention and to every respect at our hands, and it is one in which I agree with the conclusion arrived at. It is somewhat difficult to say that such an application, as we are considering, does not fall within the language of the statute read literally. It has not been disputed that the application was made to the proper Court and in the execution proceedings, and that, in those proceedings, the Court had power to make an order for possession.

The object of the application was to complete the matter : to complete, by giving possession, the purchase which the applicant had made. It is said that this was not a step in aid of execution, as upon the confirmation of the sale those execution proceedings came to an end. There was nothing more to be done. That is the argument. We are invited to read the expression 'execution' as applying, not to what has taken place, but only to that which is about to take or is in course of taking place. I am not disposed to put so narrow a construction upon the language of the article, and there are cases in this Court which tend to show that, in circumstances not so strong as the present, applications have been held to be applications to take a step in aid of execution, from which I infer that the Courts are disposed to place, and I think rightly, a somewhat broad and liberal construction upon [713] the article rather than a limited or confined one. Here it was a step in aid of execution, in the sense that it was a step to make that which had been done final and complete, and, in this sense, to aid the execution, which can hardly be said to have terminated, as, admittedly, the application was properly made in the execution proceedings, which must thus be regarded as still pending, and, if properly made in those proceedings, it is difficult to see, if it were not a step in aid of execution, what sort of a step it was, or what was its object.

Upon the best consideration, which I can give to the case, I think the application of the 20th July 1895 was such a step, and the appeal, consequently, must be dismissed with costs.

Banerjee, J.—I am of the same opinion. I think that, unless the contention that has been raised on behalf of the judgment-debtor-appellant, can be pushed to this extent, that the words "applying in accordance with law to the proper Court to take some step in aid of execution of the decree" in cl. 4 of art. 179 of the second schedule of the Limitation Act, refer to the taking of some step in aid of execution in the future and not in aid of execution commenced and carried out in the past, an application like the one under consideration in this case, that is the application of the 4th of July 1895, must be held to be one coming within the clause of the article referred to above; and I am not prepared to hold that the words of the clause are used in the limited sense of referring only to steps in aid of execution to be had in the future. There is no case in point in this Court that we are aware of; and though some of the cases cited by the learned vakil for the appellant may lend some support to his contention, arguing by analogy, I feel bound to say with all deference to the learned Judges who decided those cases that I am unable to

assent to the proposition therein laid down. But I do not think they stand in the way of our deciding the present case in the way we think it ought to be decided, or render it necessary for us to refer it to a Full Bench.

S. C. G.

Appeal dismissed.

NOTES.

[I. When the execution-purchaser is the decree-holder, his application for possession is a step in aid :—(1900) 24 Mad., 185 ; (1904) P.R., 18 ; (1909) 11 C.L.J., 357 ; (1909) 13 C.W.N., 694 ; see also (1904) 8 C.W.N., 382 ;

II. The question whether an application by such a person falls within the C.P.C., 1908, sec. 47 is exhaustively discussed in (1913) 18 C.W.N., 27 ; see also (1908) 31 All., 82 ; (1911) 35 Bom., 452.]

[714] *The 23rd and 25th March and 18th April, 1900.*

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,
AND MR. JUSTICE BANERJEE.

Surnomoyi Dasi.....Defendant No. 1

versus

Ashutosh Goswami and others.....Plaintiffs.*

Claim—Civil Procedure Code (Act XIV of 1882), ss. 278, 281 and 283—Claim preferred by a defendant's predecessor in title—Claim disallowed but no suit brought within one year to set aside the order—Effect of such an adverse order as against the defendant in a suit, and how far binding—Limitation Act (XV of 1877), Sch. ii, Arts. 11 and 15.

In a suit brought by the plaintiff to recover possession of certain lands by virtue of a purchase by the father, at an execution sale held by a Civil Court, it was found by the Court below that the vendor of the defendant had purchased the said lands at a sale held by a Deputy Collector for arrears of road cess, and had preferred a claim to the disputed property in the execution proceedings, which led to the sale at which the plaintiff's father purchased, but which was disallowed, and no suit was brought by him (the defendant's vendor) within one year to set aside the order disallowing the claim.

Held, that the vendor of the defendant not having brought a suit within one year to set aside the order disallowing the claim, the defendant was concluded by that order, even if she was not the plaintiff in the suit, to establish her right to the property in dispute.

Namagauda v. Paresha, (1897) I. L. R., 22 Bom., 640, referred to.

THIS appeal arose out of an action brought by the plaintiffs to recover possession and mesne profits of certain rent-free lands. The allegation of the plaintiffs was that in June 1880 one Dwarka Nath Banerjee in execution of a decree against defendant No. 2 attached the disputed property, and on the 18th February 1882 the father of the plaintiffs purchased it in the *benami* of defendant No. 3, at a sale held in execution thereof ; that the sale was confirmed on the 3rd June following ; that on the 14th November 1882 their father died, and on the 15th February 1883 their mother took formal possession from the Civil Court of the said property ; that on the 26th September 1883 their

* Appeal from Appellate Decree No. 400 of 1898, against the Decree of A. E. Staley, Esq., District Judge of Hooghly, dated 27th of November 1897, reversing the decree of Babu Kali Prasanna Mukerjee, Subordinate Judge of that District, dated the 21st of December 1896.

[715] mother executed an agreement to sell the said property to defendant No. 2 in the name of defendant No. 1, and it was agreed between the parties on receipt of a portion of the consideration money that the balance would have to be paid by the defendant within a year, failing which the agreement would be *null and void*; that by virtue of that agreement they relinquished possession of the property in favor of the defendants; that the defendants having failed to pay the balance of the consideration money within the stipulated time, they (the plaintiffs) were entitled to recover possession of the disputed property. The suit was brought on the 31st December 1894. The defence of defendant No. 1 was that the suit was barred by limitation; that the plaintiffs never had possession of the lands in dispute; that she never entered into an agreement with the plaintiff's mother to purchase the property; that the property in dispute was purchased by one Umesh Chunder Chatterjee, a pleader, on the 6th February 1882, at a sale held for arrears of road cess, and from whom she purchased the said property.

It appeared from the evidence that on the 13th February 1882 Umesh preferred a claim in the Subordinate Judge's Court in the execution case of Dwarka Nath Banerjee. The Subordinate Judge disallowed the claim. Umesh did not bring any suit within a year to set aside the order disallowing the claim. On the 15th April 1882 Umesh got confirmation of the sale from the Deputy Collector, and on the 22nd of the same month he executed an agreement to sell the property to defendant No. 1, wife of defendant No. 2. On the 15th August 1882 Umesh took formal possession, and on the 25th April 1883 he executed a deed of sale in favor of defendant No. 1, declaring her entitled to full right, and giving her possession from the date thereof. The Court of First Instance dismissed the suit of the plaintiffs. On appeal the District Judge reversed the decision of the first Court, and decreed the plaintiffs' suit, holding that it was not barred by limitation; that the sale at which the vendor of defendant No. 1 purchased was ineffectual in transferring any property as it was not held by a competent authority; that Umesh Chunder Chatterjee having preferred a claim to the disputed property in the execution proceedings, which led to the [716] sale at which the plaintiffs' father purchased and the claim having been disallowed, and no suit having been brought within one year, to set aside the order disallowing the claim, the defendant No. 1 was concluded by that order under s. 283 of the Civil Procedure Code.

Against this decision defendant No. 1 appealed to the High Court.

MARCH 23 and 25, 1900. The *Advocate-General* (Mr. J. T. Woodroffe) (with him Babu Lal Mohun Das, Babu Dwarka Nath Chuckerbutty and Dr. Ashutosh Mookerjee), for the appellant. The question in this case is what is the effect of a sale of a property under a certificate issued for arrears of road cess, when that property was under attachment in execution of a decree of a Civil Court. The sale certificate was granted by a Deputy Collector.

Arrears of road cess is a public demand. Collector has been defined in the Public Demands Recovery Act (Bengal Act VII of 1880), and the question is whether a Deputy Collector in charge of road cess comes within the definition of Collector. By Act I of 1891 (B. C.) all certificates issued by a Deputy Collector prior to this Act have been validated.

[BANERJEE, J.—Still the question remains whether the certificate issued by the Deputy Collector was in the capacity of a Collector as defined in s. 4 Act VII of 1880 (B. C.)]

Effect of a sale of a property by an inferior Court, while that property has already been sold in execution of a decree of a superior Court, has been considered in the case of *Bykant Nath Shaha v. Rajendro Narain Rai*, (1885) I. L. R., 12 Cal., 333, following the case of *Obhcy Churn Coondoo v. Gulam Ali*, (1881) I. L. R., 7 Cal., 410. Their Lordships held, if the sale by the inferior Court was a good sale, the mere fact that the property was previously sold at a sale held in execution of a decree of a superior Court would not have the precedence over the sale by the inferior Court. See also the cases of *Ram Narain [717] Singh v. Mina Koery*, (1897) I. L. R., 25 Cal., 46, *Abdul Karim v. Thakordas Tribhovandas*, (1896) I. L. R., 22 Bom., 88 (93), *Patel Naraonji Morarji v. Haridas Navalram*, (1893) I. L. R., 18 Bom., 458. Section 285 of the Code of Civil Procedure is merely a section for procedure to prevent different claims arising out of the attachment and sale of the same property by a different Court. It has been held in the case of *Kashy Nath Roy Chowdhury v. Surbanund Shaha*, (1885) I. L. R., 12 Cal., 317, that when a property is sold in execution of a decree it cannot be sold again at the instance of another decree-holder, who may have attached it before the attachment effected by the decree-holder under whose decree it is actually sold, and when a judicial sale takes place all previous attachments effected upon the property sold fall to the ground. Therefore conceding that the Court of the Collector was lower than that of the Subordinate Judge, the sale being good, and no attachment subsisting when the sale in execution of the Subordinate Judge's decree took place, the latter sale could not have precedence over the sale held under the certificate. The Court below ought to have held that the suit of the plaintiffs was barred by limitation, inasmuch as they were not in possession within twelve years from the date of the suit. The possession obtained by the plaintiffs in February 1883 was symbolical possession and not actual possession, and thus could not save the suit from being barred by limitation. It could not affect defendant No. 1, who was not a party to the execution proceedings. See the cases of *Joggobundhu Mitter v. Purmanund Gossami*, (1889) I. L. R., 16 Cal., 530, *Ranjit Singh v. Bunwari Lal Sahu*, (1884) I. L. R., 10 Cal., 993. The Court below was wrong in holding that, inasmuch as there was an adverse order in the claim case against the vendor of the defendant, and as no suit was brought within one year to set aside that order, the defendant was debarred from defending the suit: see *Gend Lall Tewari v. Denonath Ram Tewari*, (1885) I. L. R., 11 Cal., 673 (677). That order could not affect the appellant, because he is not the plaintiff in any suit to establish her right to the [718] property in dispute, and also because the order was made without any investigation of possession as section 278 of the Code of Civil Procedure requires: see *Kullar Singh v. Toril Mahton*, (1895) 1 C. W. N., 24.

MARCH 25, 1900. Sir Griffith Evans (with him Babu Nil Madhub Bose and Babu Shib Chunder Palit) for the Respondents.—There is no presumption in favour of a proceeding of this kind, the formalities required by Act VII of 1880 (B. C.) should be strictly complied with. The particulars mentioned in ss. 7 and 10 of the Act should be certified by the hand of the proper officer appointed by the Act for the purpose. If no such certificate is given then the whole basis of the proceeding is gone. See the cases of *Barjnath Sahai v. Ramguit Singh*, (1896) I. L. R., 23 Cal., 775 (786); *Mahomed Abdul Hai v. Guraj Sahai*, (1893) I. L. R., 24 Cal., 826 (829). The defendant's vendor not having instituted a suit within one year to set aside the order disallowing the claim, the defendant was concluded by that order under section 283 of the Civil Procedure Code. See the case of *Nemagauda v. Paresha*, (1897) I. L. R., 22 Bom., 640 (643). The order was passed after investigation. The extent to which the investigation required by section 280 of the Civil Procedure Code should be

carried depends upon the circumstances of the case. See *Sardhari Lal v. Ambika Pershad*, (1888) I. L. R., 15 Cal., 521 (525) : 15 I. A., 123.

MARCH 25, 1900.—Mr. Woodroffe in reply.

Cur. adv. vult.

APRIL 18, 1900.—The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows :—

Maclean, C. J.—This appeal arises out of a suit brought by the plaintiff-respondents, to recover possession and mesne profits of certain rent-free lands. Their case is that, at a sale in execution of a decree against defendant No. 2, the former owner of those lands, the plaintiffs' father purchased the same for Rs. 3,850 on the 18th of February 1882, *benami*, in the name of defendant No. 3 (nothing for present purposes turns upon this); that the sale was confirmed on the 3rd of June following, that the plaintiffs' father having died shortly after, the plaintiffs [719] obtained symbolical possession of those on the 15th of February 1883: that, subsequently, the defendant No. 2, and his wife the defendant No. 1 having entered into an agreement with the mother and guardian of the plaintiffs for the purchase of the lands, the plaintiffs relinquished possession in their favour, and that the defendants Nos. 1 and 2 not having paid the consideration money in full, within the time stipulated, the plaintiffs became entitled, under the terms of the agreement, to recover possession of the property.

The defendant No. 1, who alone contested the suit, says, on the other hand, that the plaintiffs never had possession of the property in dispute, that their suit is barred by limitation; that the answering defendant never entered into any agreement with the plaintiffs' mother for the purchase of the property, and that the land in dispute was purchased on the 6th of February 1882, at a sale for arrears of road cess by Umesh Chunder Chattopadhyaya, a pleader, from whom the answering defendant purchased the same out of her *stradhan*.

The first Court, whilst finding in favour of the auction purchase set up by the plaintiffs, held that their suit was barred by limitation, and, as prior to their purchase, the property had been purchased on the 6th February 1882, at a sale for arrears of road cess by Umesh Chunder Chattopadhyaya, who subsequently sold it to defendant No. 1—it also found that the agreement set up by the plaintiffs was not binding on defendant No. 1.

On appeal by the plaintiffs the Lower Appellate Court has reversed the decision of the first Court and given the plaintiffs a decree, holding that their suit was not barred by limitation, that the sale at which the vendor of defendant No. 1 purchased was ineffectual in transferring any property, as it was not held by a competent authority, and that Umesh Chunder Chattopadhyaya having preferred a claim to the property in dispute in the execution proceedings, which led to the sale at which the plaintiffs' father purchased, and such claim having been disallowed, and no suit being brought within one year to set aside the order disallowing the claim, the defendant No. 1 is concluded by the order under s. 283 of the Code of Civil Procedure.

[720] Against that decree the defendant No. 1 has preferred this second appeal. The learned Advocate-General on her behalf contends that all the grounds for the decision of the Lower Appellate Court are wrong, while, on the other hand, the learned Counsel for the plaintiff-respondents urges, not only that those grounds are well founded, but that the Court of Appeal below ought to have held that, in the absence of any certificate under the Public Demands Recovery Act VII of 1880 (B. C.) being shown to have been filed and duly notified to the debtor, the sale to Umesh ought not to be, and

cannot be regarded as a valid one, and further that the purchase by Umesh was really *benami* for the judgment-debtor, and could not prevail over any subsequent sale in execution of a decree against him.

We may at once point out that, if the latter fact were substantiated, viz., that the purchase by Umesh was *benami* for the judgment-debtor, the other questions raised would not arise. And, although this question, which is an important one, has been touched upon in the lower Court, no decision has been given upon it.

The points which, under these circumstances, now arise for determination are, *first*, whether the suit is barred by limitation; *second*, what is the effect of the order of the 9th of February 1882, disallowing the claim of Umesh; *third*, was the sale, at which Umesh Chunder Chattopadhyaya purchased, a valid sale, and *fourth*, if so, whether it is open to the respondents to raise the question of Umesh Chunder Chattopadhyaya's purchase being *benami* for the judgment-debtor, and, if it is so open to them, whether it was in fact a *benami* transaction.

Upon the first point it was argued by the learned Advocate-General for the appellant, that as the possession obtained by the plaintiffs in February 1883 was not actual but only symbolical possession, it could not affect the defendant No. 1, who was no party to the execution proceedings, and so save the suit from the bar of limitation; and in support of this argument the case of *Juggobundhu Mitter v. Purmanund Gossami*, (1889) I. L. R., 16 Cal., 530, was cited. If the symbolical possession obtained by the plaintiffs had not been followed by actual possession, this argument would no doubt have been [721] well founded but the learned Judge in the Lower Appellate Court has found that the plaintiffs were in possession by placing two durwans in charge of the garden. He says: "I think the evidence of the respectable pleader, Babu Bhagwan Chundra Gossain, should be believed, when he says that the plaintiffs had two durwans in charge till October 1883. No more than this would naturally be done in the way of actual possession, when the land was occupied by tenants, and when the plaintiffs soon agreed to sell their rights." And he adds: "There is nothing to prove that Umesh had more than a formal delivery of possession without right, and he never did any act of possession." The learned Judge refers to other passages in the evidence as showing that the plaintiffs were in possession up to October 1883, and his finding, which is binding upon us on second appeal, must be taken as one to that effect. He sums up by finding there was no adverse possession until 1894. The suit was brought within 12 years from that date, and so it is not out of time.

Upon the second question it was contended for the defendant-appellant that the order of the 9th of February 1882, purporting to reject the claim of Umesh Chunder Chattopadhyaya, could not affect the appellant —

First, because the appellant is not the plaintiff in any suit to establish *hgr* right to the property in dispute.

Secondly, because the order was made without any "investigation" into the claim.

Thirdly, because the application of Umesh was not a claim preferred under s. 278 of the Code of Civil Procedure, and s. 283 of the Code was consequently inapplicable to the case; and *lastly*, because the appellant was claiming under a title acquired by his vendor Umesh subsequent to the order of the 9th of February 1882.

In support of the first ground the case of *Gend Lall Tewari v. Deno Nath Ram Tewari*, (1885) I. L. R., 11 Cal., 673, is relied upon. But that case, apart from other grounds upon which it may be distinguished from this case, was

decided under the old law, s. 246 of Act VIII of 1859, the language of which was different from that of s. 283[722] of the present Code. Section 246 of Act VIII of 1859 simply said: "The order which may be passed by the Court under this section shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order" while s. 283 of the present Code enacts that "the party against whom an order under s. 280, 281 or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive" and by article 11 of the second schedule of the Limitation Act such suit must be brought within one year. The language of the two sections is thus substantially different. If then there was, in this case, an order under s. 281 of the Code rejecting the claim of Umesh, as we think there was, and as no suit was brought within one year to establish the right to the property in dispute which Umesh claimed, such order has by s. 283 become conclusive on the question of Umesh's right as between defendant No. 1, who claims title through Umesh, and the plaintiffs, who derive their title from the auction-purchaser at the execution sale, which followed the rejection of the claim of Umesh; and there is nothing in s. 283 to show that the conclusive effect referred to in it attaches to the order only when the party against whom it is made is plaintiff in the suit, in which it is set up as a bar. This view is in accordance with that taken by the Bombay High Court in *Nemagauda v. Paresha*, (1897) I. L. R., 22 Bom., 640.

In support of the second reason mentioned above, the case of *Kallar Sing v. Toril Mahlon*, (1895) 1 C. W. N., 24, is relied upon as showing that where a claim is rejected without any investigation, s. 283 is inapplicable to it. That is undoubtedly so. But the order in the present case was made so far as one can judge from the materials before us after such investigation as the case admitted of, the extent of the investigation was, perhaps, not great, but then the facts of the case were apparently few and practically undisputed. That, as pointed out by the Privy Council in *Sardhari Lal v. Ambika Pershad*, (1888) I. L. R., 15 Cal., 521, is sufficient to make the order one under [723] s. 281, the Code not prescribing the extent to which the investigation should go.

In support of the third ground it was urged that the Court must look to the substance of the application and of the order, and not merely to their form and language. After carefully considering the petition and the order made upon it on the 9th February 1882, it is reasonably clear that in form as well as in substance the petition was one under s. 278, and the order one under s. 281 of the Code. Rightly or wrongly, the Court held that the alleged title of the then applicant created after attachment by numerous decree-holders could not prevail as against the latter, and relied upon the fact that the sale to the then applicant had not been confirmed ("is not yet *pukkha*"), and that he had not obtained possession of the property in question, and it further held that the sale was bad under s. 285 of the Code, and it accordingly rejected the claim. This may have been right or it may have been wrong, but as the then applicant did not choose to challenge the decision by regular suit within the year, the decision must be taken to be conclusive.

As to the last reason, it is enough to say that though the sale at which Umesh purchased was confirmed after the order of the 9th February 1882, the confirmation of the sale did not create any new right, but only perfected the inchoate right acquired at the sale, and that the Court rejected the claim not

merely because the sale at which the claimant made his purchase had not been confirmed, but also because in the opinion of the Court it was a bad sale.

The effect then of the order of the 9th of February 1882 must, as we have already pointed out under s. 283 of the Code, be held to be conclusive as between the parties to this suit against the contention of defendant No. 1 that her vendor Umesh had a title to the property in dispute, which should prevail against that of the plaintiffs' under their father's purchase at the execution sale which followed the rejection of the claim of Umesh

We have dealt, at perhaps greater length than was absolutely necessary, with the various contentions which were laid before us, [724] and we have done so by reason of the minuteness with which it was deemed necessary to present them to the Court; but, in our opinion, the case is a reasonably clear one, having regard to the provisions of the Code to which we have had occasion to refer.

In this view it becomes unnecessary to consider the third and fourth questions stated above. If it had been necessary, we should have held, upon the third question, that the ground upon which the Lower Appellate Court's judgment is based has been met by the production of the Civil List which shows that the Deputy Collector who held the sale was a duly authorized officer, but at the same time we should, for reasons into which it is unnecessary to enter, have thought it right to remand the case to the Lower Appellate Court to determine whether there had been a certificate duly filed and notified under Act VII of 1880 (B.C.), and upon the fourth question it might have been necessary to direct the Court below to determine whether the purchase by Umesh was not *benami* for defendant No. 2. But as we have observed above, it is unnecessary to say anything more on these two points.

The result then is that the appeal fails, and must be dismissed with costs.

S. C. G.

Appeal dismissed.

NOTES.

[See also (1902) 25 Mad., 721 ; (1906) 4 C L J., 334.

In (1909) 31 Cal., 228, this decision was distinguished on the ground that in 27 Cal., 714, the land attached was in fact sold after the claim had in fact been withdrawn.]

[27 Cal. 725]

The 2nd, 5th and 6th March and 7th May, 1900.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE HARRINGTON.

Lala Surja Prosad and another.....Plaintiffs

versus

Golab Chand.....Defendant.*

Hindu Law—Mitakshara family—Liability of son to pay father's debt incurred during son's minority—Representative capacity of father—Antecedent debt—

Mortgage—Suit for sale on mortgage by father, without joining sons—

Nonjoinder of parties—Transfer of Property Act (IV of 1882),

s. 85—Notice of interest in mortgaged property—Multipli-

city of suits—Civil Procedure Code (Act XIV of

1882), ss. 28, 42, 436, 437, 575.

In the case of a joint *Mitakshara* family consisting of a father and a minor son, where the father executed a mortgage bond hypothecating ancestral family property during the minority of his son, and the mortgagee with [725] notice of the interest of the son in the mortgaged property brought a suit against the father alone to enforce the mortgage, without making the son a party to the suit, and obtained a decree declaring that the mortgaged property was liable to be sold in execution thereof, and where the debt was not proved to have been incurred for illegal or immoral purposes :

Held, Per GHOSE, J.—That the share of the son in the ancestral property was liable for the satisfaction of such decree, notwithstanding the provisions of s. 85 of the Transfer of Property Act (IV of 1882), the father having incurred the debt in his representative capacity and as managing member of the family, and the son having been substantially a party to the suit in which the said decree was passed, through the representation of his father :

Section 85 of the Transfer of Property Act lays down only a rule of procedure ; and the words " all persons " in the section could have hardly been intended to include a *Mitakshara* son—much less a minor son, in a suit where the father is sued in his representative capacity.

Suraj Bansi Koer v. Sheo Persad Singh, (1879) 1. L. R., 5 Cal., 148 : L. R., 6 I. A., 88 ; *Bissessur Lal Sahoo v. Maharajah Luckmessur Singh*, (1879) L. R., 6 I. A., 233 : 5 C. L. R., 477 : *Nanomi Babuasin v. Modun Mohun*, (1885) 1. L. R., 13 Cal., 21 : L. R., 13 I. A., 1 ; *Daulat Ram v. Mehr Chand*, (1887) 1. L. R., 15 Cal., 70 : L. R., 14 I. A., 187 ; *Pursid Narnin Singh v. Honooman Sahai*, (1880) 1. L. R., 5 Cal., 845 ; *Bhagbut Pershad v. Girja Koer*, (1888) 1. L. R., 15 Cal., 717 : L. R., 15 I. A., 99 ; *Mohabir Prosad v. Maheshwar Nath Sahai*, (1889) 1. L. R., 17 Cal., 584 : L. R., 17 I. A., 11 ; *Jagabhai Lalubhai v. Vijbhukan Das*, (1886) 1. L. R., 11 Bom., 37, relied on.

Bhawani Prasad v. Kallu, (1895) 1. L. R., 17 All., 537, dissented from.

Syud Emam Mantazuddin Mahomed v. Raj Coomar Dass, (1875) 14 B.L.R., 408 ; *Ramasamayyan v. Virasanti Ayyar*, (1898) 1. L. R., 21 Mad., 222 ; *Palani Goundan v. Rangayya Goundan*, (1898) 1. L. R., 22 Mad., 207, referred to.

Semble.—(a). In the case of a joint *Mitakshara* family consisting of a father and minor sons, the father is " necessarily " the manager of the joint family and as such, for all purposes, is the representative of the family :

[726] (b) And where the father, the managing member, mortgages family property for an antecedent debt, and a suit is brought and decree obtained against the father, such suit and decree should be regarded as instituted and pronounced against him in his representative capacity :

* Appeal from Original Decree No. 397 of 1898, against the decree of Babu Jadupati Banerjee, Offg. Subordinate Judge of Sarun, dated the 24th of September 1898.

(c) And that if a son, after a decree being obtained against the father upon a mortgage executed by the latter, sues to have it declared that his share is not liable to satisfy the said decree, or after a sale in execution thereof sues to recover possession of his share, he cannot succeed unless he proves that the debt was contracted for an immoral or illegal purpose, or that it was of an illusory character.

Per HARINGTON, J.—That having regard to the provisions of s. 85 of the Transfer of Property Act and those of ss. 28 and 42 of the Civil Procedure Code, the mortgagee was bound to make the plaintiff (the son) a party to the mortgage suit; and that, not having done so, he was not entitled to obtain a decree affecting the plaintiff's interest in the mortgaged property.

Bhawani Prasad v. Kallu, (1895) I. L. R., 17 All., 537, followed.

Rothschild v. Commissioners of Inland Revenue. (1894) L. R., 2 Q. B., 142 (145); *Ramasamy v. Virasami Ayyar*, (1898) I. L. R., 21 Mad., 222; *Palani Goundan v. Rangayya Goundan*, (1898) I. L. R., 22 Mad., 207, referred to.

THE plaintiffs No. 1 and No. 2 are the minor son and the widow of one Chunder Koilash Saran *alias* Lachhanji who died on the 23rd July 1894.

Lachhanji on attaining his majority in 1890, borrowed from time to time various sums of money from the defendant Golab Chand, on mortgage, hypothecating ancestral property for the purpose of meeting certain alleged necessities of his family of which he was the head, and which was governed by the Law of Mitakshara.

On the 4th April 1893 Lachhanji executed a mortgage-bond for Rs. 6,900 in favour of the defendant, while his son (the plaintiff No. 1) was a minor, promising to repay the amount with interest on the 27th August 1893. The alleged purpose for which this liability was incurred was to satisfy certain previous debts, and the decretal amounts due to one Ram Bux Mull and Santa Persad as recited in the said mortgage-bond.

[727] On the 31st August 1893 the defendant instituted a suit against Lachhanji on the mortgage bond of the 4th April 1893 without making the plaintiff No. 1 a party to the suit though the defendant had notice of his (the son's) interest in the mortgaged property, and obtained a decree on the 3rd of October 1893 declaring that the mortgaged property was liable to be sold in execution thereof. This decree was made absolute on the 28th February 1894. It was not proved that the debt incurred by Lachhanji under the mortgage of the 4th of April 1893 was for any illegal or immoral purpose.

On the 28th of September 1893 the plaintiffs instituted a suit against Lachhanji for partition of the ancestral property on the allegation that he was wasting the property through reckless extravagance and debauchery, and had their shares partitioned on the 12th of March 1894.

After the death of Lachhanji, the defendant applied, on the 3rd of September 1894, for execution of the mortgage decree as aforesaid against the plaintiff No. 1 as representative and heir of the deceased judgment-debtor, Lachhanji. The plaintiff objected to this, but his objection was overruled, and he was referred to a regular suit.

The plaintiffs accordingly instituted this suit mainly on the following grounds:—

1. That because the plaintiffs were not made parties to the suit on the mortgage-bond of the 4th of April 1893, the defendant having notice of their interest in the mortgaged property, their shares in the ancestral estate could not be made liable for the satisfaction of the debt.

2. That the debt was contracted by Lachhanji for illegal and immoral purposes, and therefore the shares of the plaintiffs could not be taken in execution of the decree obtained by the creditor (defendant).

3. That the ancestral property having been partitioned, the plaintiffs' shares in the property could not be attached in execution of the said decree.

The defendant pleaded that the mortgage was executed, and [728] the decree obtained thereon during the minority of the son (plaintiff No. 1) when the father was the manager and *karta* of the family, the decree was therefore binding on the son; that the plaintiff No. 2 (the widow) had no right in the family ancestral property; that the debt was incurred for necessary expenses of the family, and not for immoral or illegal purposes; and that the decree for partition relied on by the plaintiffs could not be binding on the defendant, as he was not made a party to the suit for partition, although it was instituted after his suit on the mortgage and that the suit for partition was a collusive one.

The Subordinate Judge held that though there was some evidence of general extravagance and immorality on the part of the father, yet there was no proof that the money raised on the mortgage was applied to immoral or illegal purposes; that the whole amount covered by the bond of the 4th April 1893 should be regarded as an antecedent debt; and that there being a pious duty on the part of the son to pay his father's debts the plaintiffs were not entitled to succeed; and that the decree for partition was not binding on the creditor (defendant), and he accordingly dismissed the suit.

The plaintiffs appealed to the High Court.

MARCH 2, 5, 6, 1900.—Dr. *Rash Behary Ghose*, *Babu Karuna Sindhu Mukerji*, *Babu Akshoy Kumar Banerjee* and *Babu Surendra Nath Ghosal*, for the appellants. Under the provisions of s. 85 of the Transfer of Property Act, the son (plaintiff No. 1) should have been made a party to the suit on a mortgage which the defendant instituted in August 1893, against the father, having notice of the son's interest in the mortgaged property. The defendant having omitted to do so, the mortgaged decree obtained on the 28th February 1894 against the father alone is inoperative as against the share of the son in the property mortgaged by the father: see *Bhawani Prasad v. Kallu*, (1895) I. L. R., 17 All., 537.

The father, in a joint Mitakshara family, cannot be regarded for the purposes of a mortgage suit, as the representative, even of [729] his minor sons. A mortgage decree obtained in the absence of a party interested in the property mortgaged cannot affect his interests in the property: *Montazuddin Mahomed v. Raj Coomar Dass*, (1875) 14 B. L. R., 408. The father when sued alone could not be regarded as sued in his representative capacity, because the defence of the father would not be the same as that of the son. And besides, it was the intention of the Legislature to discourage, by the provisions of s. 85 of the Transfer of Property Act, multiplicity of suits; and therefore the creditor having notice of the interest of the son in the property mortgaged, is bound to make him a party when suing to enforce the mortgage bond executed by the father. And in this case the mortgagee has wilfully disregarded the law by not making the son a party.

The income derived from the ancestral estate being sufficient to meet all legitimate expenses of the family, the money raised on the mortgage must have been applied to immoral purposes by Lachhanji, who led a dissipated life. And considering that Lachhanji, soon after attaining his majority, began contracting debts by executing several bonds at short intervals, such transactions should be regarded as unconscionable, because the lender must have taken undue advantage of Lachhanji's youth and indiscretion.

The plaintiffs had obtained a decree for partition against Lachhanji, and an actual partition having been made, the defendant could not enforce the

mortgage security given by Lachhanji against the property allotted to the plaintiffs on such partition.

Babu *Golap Chandra Sarkar* and Babu *Dwarka Nath Mitter*, for the Respondent.—Section 85 of the Transfer of Property Act does not lay down any new rule of procedure, but embodies a rule which was well recognized before the passing of the Act (see Dr. Rash Behary Ghose's *Mortgage*, 2nd edition, pp. 137, 138).

The case of *Bhawani Prasad v. Kallu*, (1895) I. L. R., 17 All., 537, relied on by the [730] other side, has been dissented from by the Madras High Court in the case of *Ramasamayyan v. Virasami Ayyar*, (1898) I. L. R., 21 Mad., 222, and in *Palani Goundan v. Rangayya Goundan*, (1898) I. L. R., 22 Mad., 207.

In a Mitakshara joint family one member may represent the whole family in transactions with outsiders, and may be sued in his representative capacity; so a decree against him alone, and the proceedings including the sale of family property in execution thereof, are binding on all the members of the family, though they were not made parties to the said suit or proceedings,—specially when the father is the manager and the other members are his minor sons. It was repeatedly held that the managing member of a joint Mitakshara family represented the other members of the family in all transactions and suits, or proceedings against him alone. See *Suraj Bansi Koer v. Sheo Persad Singh*, (1879) I. L. R., 5 Cal., 148; L. R., 6 I. A., 88; *Luchman Dass v. Giridhar Chowdhry*, (1880) I. L. R., 5 Cal., 855; *Nanomi Babuasin v. Morun Mohun*, (1885) I. L. R., 13 Cal., 21; L. R., 13 I. A., 1; *Daulat Ram v. Mehr Chand*, (1887) I. L. R., 15 Cal., 70; L. R., 14 I. A., 187; *Mahabir Persad v. Moheshwar Nath Sakai*, (1889) I. L. R., 17 Cal., 584; L. R., 17 I. A., 11; *Minakshi Nayudu v. Immudi Kanaka Ramaya Goundan*, (1888) I. L. R., 12 Mad., 142.

Cur. adv. vult.

MAY 7, 1900.—**Ghose, J.**—This appeal arises out of a suit by a Mitakshara son, a minor, and his step-mother, the object of the suit being to have it declared that, in execution of a mortgage decree obtained by the creditor, the defendant, against the father, the shares of the plaintiffs in the ancestral property could not be made liable for the satisfaction of such decree. The Court below has dismissed the suit, and hence this appeal by the plaintiffs.

It appears that Lala Chandra Koylas Saran *alias* Lachhanji, [731] father of the minor plaintiff, and the husband of the other plaintiff, was the son of one Lalla Chamroo Lall. The latter died in the year 1875 or 1876. At that time Lachhanji was a minor, and his mother, Mussamut Tapeswar Koer, was appointed his guardian by an order of the District Judge of the 20th November 1876. In November 1890, Lachhanji arrived at majority, and took over charge of the estate left by his father. On the 12th of February 1891, he executed a mortgage bond in favour of Golab Chand, defendant No. 1 and Lall Chand, for the sum of Rupees five thousand, it being stated in the bond that the money was required for the purpose of instituting a suit upon a certain *ekrarnamah*, and for meeting his own marriage and other necessary expenses. It would appear that during his minority, Lachhanji had been married, and a son was born to him, who is the plaintiff No. 1; but he lost his wife; and it is said that the marriage expenses referred to in this bond related to a second marriage which he was then about to contract. On the 10th of August 1891, he borrowed Rupees eight hundred from Golab Chand upon a bond on account of a certain alleged necessity; and this was followed by a mortgage bond, dated the 9th October 1891, for Rupees three thousand in favour of the same individual. This amount included the sum of rupees eight hundred covered by the bond of the 10th August 1891, the necessity recited in this

mortgage bond being (so far as the amount then received was concerned) the payment of certain petty debts due to certain individuals. On the 1st of May 1892, Lachhanji executed another mortgage bond for Rupees fifteen hundred to Golab Chand, the necessity mentioned in this bond being the payment of *putni* rent due in respect of a certain taluk, the interest due upon the mortgage bond of the 9th of October 1891, and other necessary expenses. On the 4th of April 1893, he executed another mortgage bond for Rs. 6,900 to the same individual Golab Chand. This amount included the sum of Rs. 3,000 covered by the mortgage bond of the 9th of October 1891, and the interest due upon the mortgage bond of the 1st of May 1892, the necessity recited in this bond being (so far as the additional amount then received was concerned) the payment of two decrees due to Ram Bux Mull and Sant Prosad for Rs. 1,000 and Rs. 1,700, respectively, and certain petty debts [732] amounting to Rs. 1,146-12-0. A suit was instituted upon this last-mentioned bond, on the 31st of August 1893, against Lachhanji, and a mortgage decree was obtained on the 20th of February 1894. In the meantime, *i.e.*, on the 28th September 1893, the minor plaintiff, through his grandmother as guardian, instituted a suit against his father for a partition of the joint ancestral property. The creditor Golab Chand was not made a party to this suit, and a decree for partition was obtained on the 12th of March 1894. In the next year, that is to say on the 23rd July 1894, the father Lachhanji died; and when in September 1894 the decree-holder Golab Chand, defendant No. 1, applied for execution of his decree against the minor plaintiff as the legal representative and heir of his father, it was objected to on his behalf on the ground that the debts contracted by the father having been for illegal and immoral purposes, and he, the plaintiff, not having been made a party to the suit in which the decree was obtained, the family property could not be sold. This objection was overruled, the plaintiff being referred to a separate suit for the purpose of having such a question determined; and the present suit was accordingly instituted. The main grounds upon which the action is based are: *first*, that the plaintiffs having not been made parties to the suit instituted by the creditor Golab Chand upon the mortgage bond of the 4th of April 1893, the properties allotted to their share under the partition decree, could not be made liable; *secondly*, that the money covered by the said mortgage bond having been spent in immoral and illegal purposes, the shares of the plaintiffs could not be taken in execution of the decree obtained by the creditor; and *thirdly*, that a large portion of the money covered by the mortgage bond in question was deducted by the creditor on account of compensation, *salami*, &c. In answer to this, the creditor Golab Chand pleaded that the mortgage was given, and the decree obtained, at a time when the plaintiff No. 1 was a minor, and the father was the manager and *karta* of the family, and therefore they were binding on him; that the other plaintiff had no right in the property; that the debt was incurred by the father for necessary purposes of the family, and not for any immoral purpose; that no portion of the money covered by the mortgage bond was deducted by way [733] of compensation and *salami*; and that the partition decree of the 12th of March 1894, relied upon by the plaintiffs, could not be binding upon him, and it was collusive.

The Subordinate Judge, in the course of his judgment in this case, has fully discussed the Mitakshara law on the subject, as expounded by the Privy Council, and by this Court in different cases, and has held that, though there is evidence in proof of general extravagance and immoral conduct on the part of the father Lachhanji, and though he would be inclined to infer from such evidence that the money borrowed by Lachhanji was used to satisfy his sensual

habits, yet this is not sufficient, there being no proof that the money was actually applied to immoral purposes; that the whole of the debt covered by the bond of the 4th of April 1893 should be regarded as an antecedent debt *minus* a small amount of Rs. 180, which was twice charged as interest; and that there being a pious duty in the son to pay the debt of his father, the plaintiffs are not entitled to succeed. He has further held that the partition decree is not binding upon the creditor-defendant.

The first question that has been raised and discussed before us on behalf of the plaintiffs-appellants is whether, having regard to the provisions of s. 85 of the Transfer of Property Act (IV of 1882), the mortgage decree obtained by the creditor Golab Chand on the 28th of February 1894 is operative and good in law, so as to affect the interest of the plaintiffs in the property mortgaged, by reason of the omission to include in the suit the minor plaintiff (the son) as a party defendant. That section runs as follows:—"Subject to the provisions of the Code of Civil Procedure, s. 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage; provided that the plaintiff has notice of such interest."

In dealing with the question raised, we have to consider, in the first instance, whether the creditor Golab Chand had notice of the interest of the son. It appears upon the evidence that Lal Chand and Golab Chand, who were related to each other as uncle and nephew, had a *kothi* which apparently was a joint *kothi*, but they had also separate business of their own, at least, [734] so it is alleged. The uncle Lal Chand, however, being the *kurta* of the family, had everything under his control. Golab Chand swears that the money covered by the mortgage bond of the 4th April 1893 belonged to him exclusively, and that he was not aware at the time of the institution of the suit upon his mortgage that Lachhanji had a son, nor did he make any enquiry about it. It appears, however, from the evidence of the defendant's witness Chutto Lal, and who is his general agent, that he had been asked by Lal Chand to make enquiries before money was advanced by him to Lachhanji under the mortgage bond of the 12th February 1891, about the properties belonging to that individual, which were then proposed to be mortgaged; and that he was satisfied on making such enquiries that he, Lachhanji, owned those properties. He also learned that Lachhanji had a son, and he informed Lal Chand about it. It also appears from the evidence of this witness that the negotiation about the loan advanced by the mortgage bond of the 4th of April 1893 was made with Lal Chand, and not with Golab Chand.

In these circumstances it appears to me that, even accepting as true (which may be doubted) the statement of Golab Chand that he was not aware, at the time of the institution of his suit, of the existence of the plaintiff as the son of Lachhanji, it cannot rightly be said that he had not constructive notice of it. I hold that he had notice of the interest of the son.

Then arises the question, whether there has been a violation of the provisions of s. 85 of the Transfer of Property Act, and whether the mortgage decree obtained by Golab Chand against the father only is inoperative and bad in law, so far as the plaintiffs are concerned, and whether they are entitled to succeed in this action simply upon that ground. As regards, however, the lady plaintiff (the step-mother of minor), her rights need not be discussed; for, if the son is not entitled to succeed, she must equally fail, she having no independent interest in herself. This question does not seem to have been dealt with by the Subordinate Judge in his judgment, though it

was raised in the plaint and, substantially, in the issues framed by the Court below.

[735] So far as s. 85 itself is concerned, the exception made therein is as regards persons whose estate may be vested in a trustee, executor, or administrator; and subject to such exception, it prescribes that all persons having an interest in the property must be joined as parties. The question, however, here is, whether the minor plaintiff was not substantially, through the representation of his father, a party in the mortgage suit instituted by the defendant, though his name was not specifically mentioned as such, so that there was no violation of s. 85. With a view to determine this question, it may be useful to consider, in the first instance, what was the state of the law at the time when the Transfer of Property Act was passed, as to the true position of the father in a Mitakshara joint family, and the rights and liabilities of a son, especially of a minor son, jointly interested with his father in ancestral property, when such property is charged by the father for a loan contracted by him, or when it is sold, or is sought to be sold, in execution of a decree obtained against him alone.

In the case of *Suraj Bansi Koer v. Sheo Persad Singh*, (1897) I. L. R., 5 Cal., 148; L. R., 6 I. A., 88, the Judicial Committee, in discussing the rights of a son in an undivided Hindu family governed by the law of Mitakshara made the following observation: "Hence the rights of the co-parceners in an undivided Hindu family governed by the law of Mitakshara, which consists of a father and his sons, do not differ from those of the co-parceners in a like family, which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts, which the Hindu law imposes upon sons (a question to be hereinafter considered), and the fact that the father is in all cases naturally, and in the case of infant sons necessarily, the manager of the joint family estate." And later on, their Lordships, in considering how far the powers and rights of ordinary co-parceners are qualified by the obligation which the Hindu law lays upon a son of paying his father's debts, quote with approbation the following observations made by Chief Justice WESTROPP: "Subject to certain limited exceptions (as for instance, debts contracted for immoral or illegal purposes), the [736] whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father and grandfather." And, then, referring to the case of *Junnuk Kishoree Koonwur v. Raghu Nundun Singh*, (1861) S. D. A., Rep., 213 (June 1861), decided by the late Sudder Dewani Adawlut in 1861, and also to the decision of the Judicial Committee in the case of *Girdhari Lal v. Kantoo Lal*, (1874) 14 B. L. R., 187, they say:—"The decision of this tribunal in the beforementioned case of *Kantoo Lal*, has, however, gone beyond this decision of the Sudder Dewani Adawlut, because it treats the obligation of a son to pay his father's debts, unless contracted for an immoral purpose, as affording of itself a sufficient answer to a suit brought by a son either to impeach sales by private contract for the purpose of raising money in order to satisfy pre-existing debts, or to recover property sold in execution of decrees of Court."

In the case of *Bissessur Lal Sahoo v. Maharajah Luchmessur Singh*, (1879) L. R., 6 I. A., 233; 5 C. L. R., 477, where a question was raised whether, in execution of certain decrees for rent obtained against certain members of a joint undivided Hindu family in respect of properties which stood in their names, the said properties, inclusive of the interest of the other members of the family, could be made liable their Lordships of the Judicial Committee observed as follows: "It appears to their Lordships that acting on the principle which follows from their finding that this family was joint, it must

be assumed that Masahab Dass is sued as a representative of the family and that it must further be assumed that Nath Dass in taking the lease of the *mouza* here referred to, Ramnugger, in respect of which the rent was due, must be assumed to have taken it on behalf of the family, and that the debt must be deemed to be a debt for the family. With respect to the order as to the execution, it appears to their Lordships that the fair construction of it—though it may not be drawn up with much accuracy—is that the decree is not to be executed against the self-acquired property of Masahab, but against the [737] family property which is there described as that left by Nath Dass for the purpose of distinguishing it from the separate property which may have belonged to Masahab. The only difficulty with reference to the second and third decrees arises from certain informalities with which they have been drawn up. It appears to their Lordships that looking to the substance of the case, this second decree is a decree against the representative of the family in respect of a family debt, and it is one which could be properly executed against the joint property of the family, and that Maddanpore was a part of that joint property” and later on, they say: “Their Lordships have therefore come to the conclusion that although there may have been some irregularity in drawing up these decrees, they are substantially decrees in respect of a joint debt of the family, and against the representative of the family, and may be properly executed against the joint family property.” This was a case of a family consisting of undivided brethren, and not of a father and sons; and yet the principle of representation was accepted and followed in dealing with the question of the effect of a sale in execution of a decree obtained against one of the members only.

In the case of *Nanomi Babuasin v. Modun Mohun*, (1885) I. L. R., 13 Cal., 21; L. R., 13 I. A., 1, where, in execution of a decree obtained against the father for mesne profits in respect of a property in which the family was interested, a certain property belonging to the family was sold, and a suit was brought by the minor sons against the purchaser for recovery of their shares in the property, the Judicial Committee made the following observation: “It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their [738] debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority.”

“The circumstances of the present case do not call for any enquiry as to the exact extent to which sons are precluded by a decree and execution proceedings against their father from calling into question the validity of the sale, on the ground that the debt which formed the foundation of it was incurred for immoral purposes, or was merely illusory and fictitious. Their Lordships do not think that the authority of *Deen Dyal's case*, (1877) I. L. R., 3 Cal., 198; L. R., 4 I. A., 247, bound the Court to hold that nothing but Giridhari's coparcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceeding, they ought not to

be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing, unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's co-parcenary interest alone (and in *Deen Dyal's case* there certainly was an ambiguity of that kind), the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale, if the sons had been brought in to oppose the execution proceedings."

No doubt, this was a case, not of a mortgage decree, but a simple money decree, in execution of which the family property was sold; but the principle of representation of the son by the father in the suit was, as I take it, recognised, and the remarks of the Judicial Committee have a more general application than to the case of a sale in execution of a money decree, as the case of *Daulat Ram*, (1887) I. L. R., 15 Cal., 70; L. R., 14 I. A., 187, to be next quoted, would show. It will further be [739] observed that the Judicial Committee evidently treated the decree obtained against the father as binding upon the sons, and without committing themselves to saying that the execution proceedings were not so binding, and that they were entitled, as a matter of right, to have the question of the nature of the debt tried, their Lordships said: "Assuming they have such a right, it will avail them nothing unless, etc."

In the case of *Daulat Ram v. Mehr Chand*, (1887) I. L. R., 15 Cal., 70; L. R., 14 I. A., 187, where the plaintiff, who was the mortgagee, and who, having obtained a decree against his mortgagors, the managing members of a joint family and of the joint business, in which the family was interested, purchased in execution of the decree the mortgaged property, and then sued the other members of the joint family for a declaration that his purchase included their shares in the mortgaged property, and was not limited to the share of the mortgagor; and where the defendants raised the plea—a plea which was accepted by the Court in India as correct—that the decree and execution sale did not affect their interest, inasmuch as they were no parties to either the mortgage or the mortgage suit, their Lordships of the Judicial Committee held that the Court in India was wrong in deciding, as it did, the question upon which the defendants made their stand, "namely, that as they had not been made parties to the action, their share in the property had not been sold;" and observed as follows: "It appears from the cases that have been cited that notwithstanding the defendants were not made parties to the suit, still as the suit was brought on the mortgage to recover the mortgaged property, and the plaintiff in the suit obtained a decree, and executed that decree by seizing the mortgaged property, the question would be whether the mortgage included the interest of all parties or only the right, title and interest of the two parties who were made defendants. In the case of *Pursid Narain Singh v. Hanooman Sahai*, (1880) I. L. R., 5 Cal., 845 (852), Mr. Justice PONTIFEX in giving his decision says: "It has been decided that, if the managing member of a family, the other members of which are at the time minors, having authority (the touchstone of which is [740] necessity) mortgages the whole sixteen annas of the ancestral property, then in a suit by the mortgagee the sale under the decree would pass the whole sixteen annas of the mortgaged property, although the mortgagor alone was made defendant; and the reason for such decision probably is that the sixteen annas having been validly mortgaged to the mortgagee, and his remedy being foreclosure or sale, the decree of the Court would affect what was in the parties

before it, namely, the mortgagee's right validly acquired to have the whole sixteen annas sold ; " and they then quote in support of their decision their remarks in the case of *Nanomi Babuasin*, (1885) I. L. R., 13 Cal., 21 : L. R., 13 I. A., 1, to which I have already referred ; namely : " Their Lordships do not think that the authority of *Deen Dyal's* case bound the Court to hold that nothing but Giridhar's co-parcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing, unless they can prove that the debt was not such as to justify the sale." They then go on to say : " When the plaintiff applied to be let into possession under the certificate of sale, the defendants objected. He thereupon brought this suit, and the defendants had the opportunity of trying whether the mortgage was a valid mortgage which bound the ancestral property. The plaintiff proposed to prove all the facts that were necessary to make the mortgage valid and binding upon them. The defendants had the opportunity of trying that question, but they did not wish to try it. They made their stand upon the ground that they had not been made parties to the suit, and the two mortgagors alone had been sued. But that ground falls under them ;" and so on. In this case also, the principle of representation was fully recognized, and the plea that the mortgage decree was inoperative, so far as the interest of the son was concerned, by reason of his not being made a party to the suit in which that decree was passed, was negatived.

[741] In the case of *Bhagbut Pershad v. Gurja Koer*, (1888) I. L. R., 15 Cal., 717 : L. R., 15 I. A., 99, where three fathers had mortgaged a certain property for debts incurred by them, and where, in execution of the decree passed against them, the property was sold, as the right, title and interest of those individuals, and a suit was brought on behalf of the minor sons and their mothers for recovery of the property, and where it was not proved that the debt was incurred for improper purposes, but that the lender had not made proper enquiries to ascertain whether there was any real necessity for the loan, the Judicial Committee in disagreeing with the High Court in the conclusion that they came to, observed as follows : " It must be borne in mind that this was not a case of a joint family consisting of brothers, but it was one consisting of fathers and children ; and it has been held that sons are liable to pay the debts of their fathers, unless incurred for immoral or illegal purposes." And later on they say : " Now, although at the time of the sale notice was given on behalf of the children that the property was joint ancestral property, and that the fathers had no right to mortgage it, still the question arises whether, under the execution of the decree under which the property was ordered to be attached, it was for the purchaser to shew that there was a necessity for the loan, or whether it was not necessary for those who claimed on behalf of the children to shew that the debt was contracted for an immoral or illegal purpose. If it was necessary to shew that the debt was so contracted the plaintiffs failed to prove the fact, and that is so found by the High Court. It appears to their Lordships that according to the decision in the case of *Suraj Bansi Koer v. Sheo Persad Singh*, (1879) I. L. R., 5 Cal., 148 : L. R., 6 I. A., 88, it was necessary for the plaintiffs to shew that the debt was contracted for an illegal or immoral purpose." And they then refer to the law laid down in the case of *Nanomi Babuasin v. Modun Mohun*, (1885) I. L. R., 13 Cal., 21 : L. R., 13 I. A., 1, and say as follows : " It appears, therefore, from the decisions that in a case like the present, where sons claim

against a purchaser of an ancestral estate under an execution against their father upon a debt contracted by him, it is necessary for the sons to prove that the debt was contracted for an immoral purpose, and it is not [742] necessary for the creditors to shew that there was a proper enquiry, or to prove that the money was borrowed in a case of necessity ; " and they accordingly dismissed the suit of the sons.

In the case of *Mohabir Prosad v. Maheshwar Nath Shahi*, (1889) I. L. R., 17 Cal., 584 : L. R., 17 I. A., 11, where a Mitakshara father had mortgaged a certain property to the defendants, and the latter obtained decrees upon such mortgages against the father, and, in execution of such decrees, the property was advertised for sale, and was subsequently sold, and then the son and wife brought a suit for the purpose of contesting the right of the defendants to bring the property to sale, and in which an issue was raised whether the share of any other person than that of the father was bound by the debt, the Judicial Committee observed as follows : " It has been considered whether the sale was necessary for the benefit of the family estate ; but the question is, whether the plaintiff, who is the son of the judgment-debtor, can set up his right as a co-sharer to impeach a sale decreed against his father for the purpose of defraying the debts of his father and grandfather. He can only do so on condition that he shews the debts to have been contracted for immoral purposes, and that issue has been found against him in this suit." And they then dealt with the question whether the sale meant to convey the entire family property, or only the limited interest of the father, and held that the whole family property passed to the defendant.

The cases to which I have referred are no doubt cases where, in execution, either of mortgage decrees or simple money decrees, obtained against the father or the managing member of the joint family, the family property was sold ; but the question was raised how far proceedings taken against the father or the managing member alone affected the interest of the son, or the other members of the family ; and the principle was never affirmed (rather was disaffirmed), as it is now contended for, that because the son, or a member of the joint family, was not made a party to the suit in which the decree was obtained, he would be entitled to recover his share in the property, irrespective of any other consideration.

[743] From these cases three principles may, I think, be well gathered : *first*, that in the case of a joint Mitakshara family, consisting of a father and minor sons, the father is " necessarily " the manager of the joint family, and as such, for all purposes, is the representative of the family ; *second*, that in the case of a joint Mitakshara family, where the father, the managing member, mortgages family property for an antecedent debt, and a suit is brought and decree obtained against the father, such suit and decree should be regarded as instituted and pronounced against him in his representative capacity ; and *third*, that if a son, after a decree being obtained against the father, upon a mortgage executed by the latter, sues to have it declared that his share is not liable to satisfy the said decree, or after a sale in execution of such a decree, sues to recover possession of his share, he cannot succeed, unless he proves that the debt was contracted for immoral or illegal purpose, or that the debt was of an illusory character.

Such are the principles, as I take it, that were recognized at the time of the passing of the Transfer of Property Act ; and the question here arises, whether it was the intention of the Legislature so to alter the law as to declare, as has been contended for before us, that the father of a joint Mitakshara family cannot be regarded, for the purposes of a mortgage suit, as the representative of his son,

even of a minor son, and that the latter is entitled to succeed in an action against the creditor, as a matter of course, simply because he was not, in terms, made a party to the suit in which the decree was obtained.

Section 85 of the Transfer of Property Act, no doubt, enjoins (save and except in the case of persons mentioned in s. 437 of the Code of Civil Procedure) that all persons having an interest in the mortgaged property must be joined as parties to the mortgage suit; and it is quite possible, if the fact of the existence of the plaintiff as the son of the mortgagor had been brought to the notice of the Court in which the mortgage suit was instituted, and if there arose any question or doubt whether the father was sued in his representative capacity, the Court would have insisted upon the son being added as a party, or would have dismissed the suit upon the ground of non-joinder of necessary parties. But no such question was then raised, and the Court made a decree in favour [744] of the mortgagee, declaring that the mortgaged property was liable to be sold in satisfaction of his claim. If this decree be regarded as one passed against the father in his representative capacity, there was no violation of the provisions of s. 85 of the Transfer of Property Act. That section, as I understand it, lays down only a rule of procedure. The principle embodied in it was for a number of years recognized in our Courts, and it was well understood that a mortgage decree obtained in the absence of a party interested in the property involved in the mortgage could not affect his interest in the property: see *Syud Emam Momtazuddin Mahomed v. Raj Coomar Dass*, (1875) 14 B.L.R., 408, decided by a Full Bench of this Court. But it should be borne in mind that a Mitakshara son, acquiring by birth a joint co-parcenary interest with his father in the ancestral property, but bound at the same time to pay his debts out of that property, can hardly be regarded as occupying exactly the same position as any other person interested in the same property: his position is rather unique in character; for in all transactions—especially if he is a minor—the father represents him, and the father may validly sell or mortgage the ancestral property for an antecedent debt of his, if such debt is not incurred for immoral or illegal purpose. If the mortgage by the father in such a case is valid without the son being made a party to the transaction (and it must be upon the ground of representation), it is rather difficult to understand why a suit upon the mortgage against the father alone should not be regarded as a good suit for the purpose of binding the property, and having a lien declared upon it.

It has, however, been said that a father in a Mitakshara family, when sued alone, cannot be regarded as sued in his representative character, because the defence of the father would not raise the defence which is open to the son. As to this, I desire to say that, as held in the case of *Suraj Bunsu Koer v. Sheo Pershad Singh*, (1879) I. L. R., 5 Cal., 148: I. R., 6 I. A., 88, the father is "naturally" and "necessarily" the manager of the estate, and therefore when the father is sued, he is sued in his representative capacity; and that it is evidently by reason of the consideration that the son is entitled to raise some other defence to the claim of the creditor, [745] than what is open to the father, that the Privy Council have declared that it is open to the son in a suit of his own, or in defence to a suit brought by the purchaser in execution of a decree against the father, to show that the debt incurred by the father was tainted by immorality, or was not otherwise binding upon him. The argument against representation, if correct, would apply not only to a mortgage suit, but also to an ordinary suit for debt instituted against the father alone. If, in execution of a decree for debt against the father, the family property be sold, it could scarcely be contended that the

decree was inoperative against the son, simply because the son was not represented in the suit in which it was obtained, and that therefore the sale did not pass the interest of the son [see *Nanomi Babuasin v. Modun Mohun*, (1885) L. R., 13 I. A., 1: I. L. R., 13 Cal., 21].

The Legislature, in framing s. 85 of the Transfer of Property Act, could hardly have intended to ignore or supersede the law, as it was laid down by the Judicial Committee in so many cases, and to include a Mitakshara son—much less a minor son—in the description of "all persons having an interest in the property comprised in the mortgage," who must be, in terms, made parties to the mortgage suit. And it seems to me that the first portion of the section, where it refers to s. 437 of the Code, does not necessarily mean to lay down that the cases mentioned in that section are exhaustive, and that in no other instance could a suit be regarded as instituted against a party in his representative capacity. This view I think is, to some extent, supported by s. 436 of the Code of Civil Procedure, which allows of a corporation being sued in the name of an officer or trustee when so authorised.

The principle of representation of a Mitakshara son by his father, I observe, has also been recognized in some of the High Courts in India, even after the passing of the Transfer of Property Act. In the case of *Jagabhai Lalubhai v. Vijbhukan Das*, (1886) I. L. R., 11 Bom., 37, where in execution of a decree obtained against a father an ancestral property was attached, and the sons brought a suit to contest the attachment; WEST, J., following the decision of the Judicial [746] Committee in *Nanomi Babuasin v. Modun Mohun*, (1885) I. L. R., 13 Cal., 21. L. R., 13 I. A., 1, observed:—"The father in fact is made the representative of the family, both in transactions and suits subject only to the right of the son to prevent an entire dissipation of the estate by particular instances of wrong-doing on the father's part." And later on he said: "In the present instance the father was really sued as the head of a firm. It seems that the debt was one for which the sons would be liable," etc.

As bearing, however, upon the question, whether a suit instituted by a mortgagee against the father alone, for the enforcement of his mortgage, should not be regarded as brought against him in his representative capacity, the matter for consideration is what may be the nature of the debt for which the mortgage was given. If the debt was contracted for an immoral purpose, it could not be said that the father represented the son, either in that transaction, or in the suit brought for enforcement of such debt; and it would follow from this that the decree was not operative against the son. But if, on the other hand, the debt was not incurred for an immoral or illegal purpose, the son being under obligation to pay his father's debt, and the father being the *kurta* and managing member of the joint family, the suit and the decree would be regarded as having been brought and obtained against him in his representative capacity, the touch-stone in such a case being the validity of the debt contracted:

It has, however, been said that the object of s. 85 of the Transfer of Property Act is to discourage multiplicity of suits, and therefore when a creditor suing to enforce a mortgage security has notice of the interest of the son, he is bound to make him a party to the suit, and that in this respect a suit for a simple debt stands upon a different footing; for in such a case the creditor, if he does not make the son a party, simply incurs the risk of having the fact or the nature of the debt questioned in a separate suit. No doubt s. 85 of the Act contemplates that all questions arising upon the mortgage should be, if possible, determined in one and the same suit, but it does not, I think, necessarily follow from this that a Mitakshara son, especially a minor son, must in

terms, be made a party to the suit, if substantially he was so [747] made a party through the representation of his father. No doubt, if he be specially named as a party, and in the case of a minor son some other guardian than the father is appointed by the Court to represent the minor, the decree would be absolutely binding upon the son; and this certainly has the effect of avoiding a subsequent litigation. But it will be observed that the object which the section has in view cannot be attained when the mortgagee has no notice of the existence of the son, and in that event the question of the liability of the son under the mortgage, though it is so desirable it should be determined in one and the same suit, must necessarily have to be decided in a separate suit, just in the same manner as if the decree was obtained against the father alone for a simple debt. It has again been said that in a case where the mortgagee has notice of the interest of the son, but does not make the son a party, he wilfully disobeys the law, and it would be anomalous to put him in the same position as a person who has no such notice. The whole question, however, is whether the father is sued in his representative capacity: if he is so sued, there is no wilful violation of the directions of the law. If the creditor has noticed, but does not make a minor son (as in this case), in terms, a party, it is probably because he considers that the son is represented by the father: his conduct I think is hardly consistent with any other theory.

But even if we were to hold that there was a violation of the rule of procedure (as I take it to be) prescribed in s. 85 of the Transfer of Property Act, by reason of the minor plaintiff having not been, in terms, made a party to the mortgage suit, is the plaintiff entitled to succeed in this case as a matter of course?

In every instance, which occurred before the Transfer of Property Act was passed (when the same rule of procedure as embodied in s. 85 was thoroughly recognized), where in execution of a mortgage decree against the father alone the family property was sold, and a suit was brought by the son to contest the legality of the sale, or a suit was brought by the purchaser against the son, the Judicial Committee held that the only remedy left to the son was to prove that the debt for which the mortgage was given was not binding upon him, and, unless this was proved, the sale would be binding upon him.

[748] Is there anything in s. 85 of the Transfer of Property Act which compels us to take a course different from that which the Privy Council so repeatedly laid down, and to hold that because the decree is defective by reason of the son being not, by name, made a party to the mortgage suit, he is entitled to relief, on that ground alone, in this case? Can he do so without proving that the mortgage given by the father, upon which the decree was obtained, is not binding upon him? If the decree was a money decree, and property was sold in execution thereof, as it was in the case of *Nanomi Babuasin v. Medun Mohan*, (1885) I. L. R., 13 Cal., 21: L. R., 13 I. A., 1, he could not be heard to say what he now says, but he would be told as the Privy Council said in that case: assuming that you are not bound by the sale, it can avail you nothing, unless you prove that the debt was not such as to justify the sale. Should a different rule be adopted if there be a mortgage, and in execution of the mortgage decree obtained against the father the property is sold, or is sought to be sold? Having regard to the principle which underlies the cases decided by the Judicial Committee of the Privy Council, I am not prepared to answer this question in the affirmative.

Our attention has been called to the case of *Bhawani Pershad v. Kallu*, (1895) I. L. R., 17 All., 537, decided by a Full Bench of the Allahabad High Court, in which a view contrary to that which I adopt, seems to have been

expressed by the majority of the Judges who composed the Full Bench. I am, however, unable to accept the said view. I am rather inclined to follow the view that was adopted by the dissentient Judge, BANERJI, J; and I observe that the decision of the Allahabad High Court has been dissented from by SHEPARD, J., in Madras in the case of *Ramasannayyan v. Vinasami Ayyar*, (1898) I. L. R., 21 Mad., 222, and by SUBRAMANIA AYYAR and MOORE, JJ., in the case of *Palani Goundan v. Rangayya Goundan*, (1898) I. L. R., 22 Mad., 207.

For these reasons I would overrule the point raised before us in regard to the effect of s. 85 of the Transfer of Property Act.

[749] The second point raised before us is as to the nature of the debt for which the mortgage was given by the father, it being contended on behalf of the appellant that the income of the family property was sufficient for the legitimate expenses of the family, and that the mortgage was given with a view to raise money for immoral purposes. There can be no doubt upon the evidence that the deceased Lachhanji led an immoral and extravagant life; but it is by no means clear that the money covered by the mortgage of the 4th April 1893 was borrowed for any immoral purpose. As already said, there were two decrees of Sant Pershad and Ram Buksh, respectively, for the sum of Rs. 1,700. The debt due to Sant Pershad was incurred by the mother during the plaintiff's minority, and in execution of the decree obtained by Ram Buksh, the father of the plaintiff was about to be arrested; and it was to discharge the debts under these two decrees, and also to pay off, as stated in the mortgage bond, certain petty debts, the mortgage in question was given. What those petty debts were, the defendant is not in a position to prove. But the plaintiff has not produced the account books which, it is said by his witness Bikramajit Lal, were kept by him. These account books, if produced, would have shown how the money borrowed by Lachhanji was spent. It was, however, stated by Bikramajit Lal that on the evening of the day when the partition suit instituted on behalf of the son was decreed against Lachhanji, the latter in a fit of wrath destroyed all the account papers. This story is obviously untrue. It may be, as the Subordinate Judge in his judgment states, that Lachhanji kept no accounts; but having regard to the story told by his man of business, Bikramajit Lal, who now comes to support the plaintiff's case, we are bound to say that the destruction of the account books, as alleged, is palpably false. It has also been stated by some of the witnesses on behalf of the plaintiff that out of the sum of Rs. 3,000, which was borrowed under the mortgage bond of 9th October 1891, and which was included in the later bond of the 4th April 1893, Rs. 1,100 was paid to a woman, Ghansbandi, who was in the keeping of the deceased, and that this amount was paid in the *kothi* of the mortgagee, and that the latter knew all about it. I am also unable to accept this story as true.

[750] I therefore hold, upon the evidence, that it has not been proved that the money covered by the mortgage bond of the 4th April 1893 was borrowed for any immoral purpose. The Subordinate Judge seems to be of opinion that it was the duty of the plaintiff to show that any portion of the money raised by Lachhanji was actually applied to immoral purposes. He need not have done so. It would have been sufficient if he could show that the debt was contracted for an immoral purpose.

It has, however, been contended on behalf of the appellant that, having regard to the fact that Lachhanji began contracting debts within a short time after he attained majority, and to the fact that several bonds were executed by him within a short time of each other, the transactions should be regarded as

unconscionable, because the lender evidently took advantage of the youth of the deceased. I am not prepared to accept this view of the matter, when it appears upon the evidence that the father of the deceased left debts to the amount of Rs. 2,000, which so far from being discharged by the mother of the deceased during his minority, augmented to Rs. 5,000, and where we also find that there were decrees outstanding against the deceased, and upon one occasion, that is to say, when the mortgage bond of the 1st May 1892 was executed, a considerable sum of money, Rs. 900, was required to pay the rent due upon one of the family properties.

The last point raised on behalf of the appellant was in regard to the commission said to have been deducted by the mortgagee at the time when the loans were contracted. The evidence no doubt raises a suspicion that some portion of the money was so deducted, but the story told on behalf of the plaintiff that 20 per cent. was deducted in every instance is incredible. But, however that may be, I am not prepared to find on the evidence, such as it is, that any commission was, as a matter of fact, deducted from the money for which the mortgage in question was given, and if deducted at all, what was the amount thereof.

Something was said about the partition decree obtained by the son against the deceased Lachhanji, and that the mortgagee is not entitled to enforce his security against the portion of the family property allotted to the plaintiffs. It will, however, be observed [751] that the partition suit was instituted after the suit by the mortgagee for enforcement of his mortgage security, and yet the mortgagee was not made a party to the partition suit. It is obvious, therefore, that the rights of the defendant under the mortgage cannot be affected by the decree made in the partition suit, supposing that it was a perfectly *bond fide* proceeding.

Upon all these grounds I think this appeal should be dismissed.

MAY 7, 1900. **Harington, J.**—The suit, which gives rise to the present appeal, was instituted by Lalla Suraj Prosad (a minor suing by his next friend Tapesar Koer) and Mussamut Lakh Rani Koer against one Golab Chand, for the purpose of obtaining a declaration that a certain mortgage bond and decree obtained thereon by the defendant were not binding on the plaintiffs, so far as their interest in the mortgaged property was concerned.

The plaintiffs are the son and the widow of one Lachhanji, who died in July 23rd, 1894 : the defendant is a money-lender in the town of Chuprah. On April 4th, 1893, Lachhanji executed a simple mortgage bond in favour of the defendant, and by it mortgaged certain ancestral property alleged to be held by him in proprietary right as security for the repayment of a sum of Rs. 6,900 and interest. The mortgagee instituted a suit on this bond against Lachhanji under Chapter IV of the Transfer of Property Act, and in October 3rd, 1893, obtained a decree directing him to pay to the plaintiff or to deposit in Court the amount claimed with interest, and ordering that in default of payment the mortgaged property should be sold at an auction sale, and the proceeds applied in satisfaction of the decree. The plaintiff No. 1 in the present action objected to the sale, but was referred to a regular suit, which was accordingly brought, and against the decision in that suit the present appeal is preferred by the plaintiff No. 1 together with his mother. The plaintiffs rested their case mainly upon three grounds—

(1) That because they were not parties to the mortgage or mortgage suit, the decree in the mortgage suit was not binding on them.

(2) That the family property has been partitioned, and therefore their two-third share cannot be attached.

[752] (3) That the debts were contracted by the mortgagor for immoral purposes, and therefore are not binding on any members of the family other than the mortgagor.

The learned Subordinate Judge dismissed the plaintiff's suit, and, against that decision the present appeal is brought. The facts leading up to the execution of this mortgage, and the evidence in the case have been fully dealt with by my learned brother. I do not propose therefore to deal with them to any greater extent than is necessary to elucidate the conclusion to which I have come.

The second and third questions present but little difficulty, and inasmuch as I agree in thinking that on neither of these two points has any ground for interfering with the judgment of the Court below been established, they can be very shortly disposed of. I agree that the partition having taken place after a mortgage purporting to bind the whole family property had been validly created by the father whatever property the son or widow could take under that partition would be subject to the mortgage lien created by the father, and would be under a liability which the mortgagee by properly constituted proceedings would be able to enforce. This therefore disposes of the case made by the widow, or raised by the son on the partition. It becomes unnecessary too to discuss the evidence as to whether the debts which are the subject of the mortgage deed in question were contracted for immoral purposes, inasmuch as I agree with the conclusion to which both my learned brother and the learned Judge in the Court below have come on this question. The mortgage formed one of a series of mortgage transactions, and the money, as my learned brother has pointed out, appears to have been borrowed for perfectly legitimate purposes. No doubt the plaintiff has given general evidence of immoral and improper conduct on the part of Lachhanji, but I do not think that that general evidence justifies us in coming to the conclusion that the particular debt in respect of which this mortgage bond was given was in fact incurred for immoral or illegal purposes. I think, therefore, that the plaintiff fails to discharge his liability on the ground that the debts were created for illegal or immoral purposes.

[753] I now pass on the remaining question which is one of considerable difficulty, and has been the cause of much conflict of judicial opinion.

That question is whether, assuming the liability created by the mortgagor to have been created perfectly validly, and to be binding on the ancestral property to the fullest extent, the mortgagee (having notice of the son's interest) is entitled to enforce that liability by a mortgage suit without making the son a party under s. 85 of the Transfer of Property Act, and, if he is not so entitled, whether the son is entitled in the present suit to have the decree so obtained declared void as against his interest. In other words, whether the plaintiff in the present action is entitled to say that that liability, though properly created, cannot at present be enforced against his share of the family property, because at present the mortgagee has not taken the proceedings proper for binding his share, but has chosen to bring his action without making him a party in disobedience to an act which says he shall make him a party.

Shortly summarized, the argument on behalf of the appellants is as follows :

Section 85 of the Transfer of Property Act says that all persons having an interest in the mortgaged property of whose interest the mortgagee has notice must be made parties to a mortgage suit. Golab Chand had notice of

the interest of Lalla Surja Prosad in the property comprised in the mortgage executed by Lachhanji, and therefore Golab Chand was bound to make Lalla Surja Prosad a party in the mortgage suit. This Golab Chand did not do. Lalla Surja Prosad therefore says that Golab Chand's suit was not legally constituted as far as he was concerned, and that he is entitled to claim that his liability which Golab Chand seeks to enforce against his interest in the mortgaged property shall not be enforced unless and until a decree is obtained against him in a suit properly constituted according to law.

The argument for the respondent is shortly this: Before the passing of the Transfer of Property Act there was a recognized rule of procedure by which all persons interested in a mortgaged property should be made parties to a suit relating to that mort-[754]gaged property, unless their interests were sufficiently represented in the suit. Section 85 affirms but does not extend this well recognized rule. It has been held in cases arising before the Transfer of Property Act that a decree obtained against the father of an undivided Hindu family in a suit on a mortgage of the whole ancestral property was binding on the son's interest notwithstanding that they were not parties to the mortgage or to the suit brought thereon, and that the only way in which a son could question the decree was by establishing in a suit of his own, that the debt either did not in fact exist or had been contracted, for illegal or immoral purposes. Under the law therefore, as it has been laid down previous to 1882, Lalla Surja Prosad would have been unable to succeed in the present suit, and therefore, the law not having been altered by s. 85, he is equally disentitled to succeed in the present action on any other ground than that the debts were non-existent or were incurred for illegal or immoral purposes, and that ground he has failed to establish.

If, therefore, the facts that the son is a person having an interest in the mortgaged property, and that the mortgagee had notice of that interest at the time he brought his suit are proved the sole questions in issue will be: (I) Does s. 85 of the Transfer of Property Act compel the mortgagee to make him a party, and (II) what are the consequences of a refusal by the mortgagee to make him a party?

Now, s. 85 of the Transfer of Property Act is in these words that "Subject to the provisions of the Civil Procedure Code, s. 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this Chapter (viz., Chap. IV) relating to such mortgage: Provided the plaintiff has notice of such interest."

Section 437 of the Civil Procedure Code says: "In all suits concerning property vested in a trustee, executor or administrator, when the contention is between persons beneficially interested in such property, and a third person, the trustee, executor, or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit, but the Court may, if it thinks fit, order them, or any of them to be [755] made such parties." "Notice" is defined by s. 3 of the Transfer of Property Act, but it is unnecessary to set out that section for the evidence of Chattu Lal who was acting as agent for Golab Chand shows that he made enquiries as to Lachhanji's position before the money was advanced, and that he ascertained that Lachhanji had a son, and that he reported that fact to Lal Chand who carried on business jointly with Golab Chand: and though Golab Chand denies that he knew Lachhanji had a son, he admits that Lal Chand consulted him about the propriety of making the advance. Clearly therefore the mortgagee had by his authorized agent notice of the interest of the present plaintiff. Indeed it is very improbable that the fact of the plaintiff's

existence, which had been reported to his partner, would not have been brought to the knowledge of the mortgagee in the course of the discussions which the evidence discloses he had with his partner as to lending the money. That being so I think it is clear that the mortgagee had notice of the existence of the plaintiff, and the presumption being that the family is joint, such notice is equivalent to notice of the interest which the plaintiff had in the mortgaged property.

It being established therefore that the mortgagee had notice, does a son in a Mitakshara family, who, on his birth, obtains a co-parcenary interest in the ancestral property, come within s. 85, or is he to be excluded on the ground that the section merely lays down a former rule of procedure, under which he has never been held to be a necessary party to a mortgage suit? This must depend on what the Legislature has expressed in s. 85, for to quote the words of an eminent English Judge, in a case reported a few years ago with reference to the duty of the Court in construing an Act—"our limited function is not to say what the Legislature meant; but to ascertain what the Legislature has said that it meant." * Applying that principle which has been stated in a varying language by numbers of eminent Judges, and is as applicable to a Court here, as to a Court in England, I do not think it is open to the Court to give any meaning to s. 85 [756] other than that which the Legislature has expressed. The words in which the section is couched are the plainest and most explicit known to the English language. It is expressed to apply to "all persons having an interest, except those whose interests are represented by trustee, executor, or administrator, provided the plaintiff has notice of the interest." No authority is needed for the proposition that a son in a Mitakshara family takes on birth an interest in the family property. I do not think it open to the Court therefore to hold that a Mitakshara son does not fall within the section, because to hold otherwise would be to say that the Act had changed, not the law relating to the liability of the son's interest in mortgaged ancestral property, but the constitution of the suit by which that liability is to be enforced.

When the section is couched in ambiguous language and the meaning of the Legislature is not clear, no doubt it is important to consider which out of two constructions the language was intended to bear, but where the words of the act admit of no ambiguity I do not think I am entitled to add to or take from them; I can only construe them according to the ordinary meaning which the words bear in legislative enactments. The word "person" need not necessarily mean individual. It might be used to express a number of individuals, as for example a corporation entitled to sue and be sued in its corporate capacity; but I do not think it could be said that the different members of a Hindu joint family could be described in law as a "person."

It was argued that although the son is not made a party to the mortgage suit by name he is in effect a party or his interests are sufficiently represented by his father, for whose debts, if not immoral, the son's interest in the family properties is liable. But I cannot agree to that contention, and I express my conclusion with diffidence as it differs from that arrived at by my learned brother. The Legislature have provided by a reference to s. 437 of the Civil Procedure Code that certain definite persons shall be treated as representing other persons' interest, but neither by particular description, nor by general words have they authorized the plaintiff in a mortgage suit to treat the father in a Hindu joint family as representing the son's interests, and therefore I do not think it open

* Per MATHEW, J., in *Rothschild v. The Commissioners of Inland Revenue*, 1894, L.R., 2 Q.B., 142 at p. 145.

[757] to the Court to supplement the words of the act, and to say that they are entitled to be considered as represented by their father.

Moreover the defence open to the father would not raise the defences open to the son, for he would be liable on his mortgage even though the money he had raised had been applied to immoral purposes—whereas, if that fact was established on behalf of the son, it would discharge his liability. Having regard, therefore, to the words of the act, and to the fact that the liability of the father and of the son depends on different considerations, I do not think it can be said that the son is in effect a party through his natural representative.

For these reasons, therefore, I came to the conclusion that the plaintiff in the present suit ought to have been made a party to Golab Chand's mortgage suit.

This has not been done and the question arises what is the effect of not making him a party, and as to this I regret that the conclusion I arrive at differs from that to which my learned brother has come. Does it place the present plaintiff in the position he would have occupied, if the mortgagee had had no notice, and therefore had not been bound to make him a party, or does it entitle him to say that the mortgagee, having refused to make him a party as provided by s. 85, is not entitled to affect his interest by a decree obtained in his absence?

This question has never, as far as I am aware, come before the Privy Council: the numerous cases cited from that tribunal deal with the liability of sons for their father's debts, and do not touch the question whether s. 85 of the Transfer of Property Act has rendered it necessary to make the son a party. But it has arisen in three cases in this country. The first is *Bhawani Pershad v. Kallu*, (1895) I. L. R., 17 All., 537, in which it was held in a Full Bench reference by a majority of five Judges to one that where a plaintiff sued on a mortgage against a Mitakshara father as a mortgagor without joining sons of whose interest he had notice, and obtained a decree against the whole family property the sons in a separate suit were entitled to obtain a declaration that the mortgagee was not entitled to sell up their interests. This decision [758] was dissented from in the case of *Ramasamayyan v. Virasami Ayyar*, (1898) I. L. R., 21 Mad., 222, by SHEPHARD, J., although the question did not really arise. The decision in the latter case was undoubtedly right as there was no allegation or evidence that the mortgagee had any notice of the plaintiff's interest, and it is on this ground that DAVIES, J., the other Judge composing the Court, who carefully guards himself against dissenting from the Allahabad case, rests his judgment. The judgment of SHEPHARD, J., in this case has been followed in the case of *Palani Goundan v. Rangayya Goundan*, (1898) I. L. R., 22 Mad., 207, but it is followed without any discussion as to the grounds on which it is to be supported. The learned Judge, who dissented from the opinion of the majority in the case of *Bhawani Pershad v. Kallu*, (1895) I. L. R., 17 All., 537, ruled that s. 85 of the Transfer of Property Act did not lay down any rule of substantive law. For reasons which I have given I do not think it open to me to go outside the words of the section to determine what the Legislature meant, and in my opinion to say that the Legislature did not mean to lay down a substantive rule of law is to attribute to the Legislature a meaning other than that which has been expressed in the very positive language of s. 85.

He is influenced too in his judgment by the anomaly which is said to be created, if it be held that a mortgagee plaintiff is not entitled to sell up the son's interest in the ancestral property, without making the son a party to the suit,

while the holder of a simple money decree is so entitled. I do not think there is any thing anomalous in the supposition, that a plaintiff, who is seeking by foreclosure or sale to extinguish the rights of persons other than his debtor in mortgaged property should be bound (if he have notice) to give those persons an opportunity of being heard in defence of their interests, and that a plaintiff, who is seeking a simple money decree against his debtor personally, should not be bound to make persons parties whose interests may be affected, if the defendant fails to pay the amount of the decree. At any rate, if any anomaly is created, it is due to the fact that the Legislature has given plaintiffs in ordinary suits for money under s. 28 [759] of the Civil Procedure Code a discretionary power as to who they shall make defendants, while it has imposed on them a positive duty under s. 85 in mortgage suits under Chap. IV of that Act.

No general rule has, I believe, been laid down from which one can determine what are the consequences of a non-compliance with any particular statute: those consequences are to be ascertained by a consideration of the words of the statute, and of the mischief at which the statute is aimed. Here the words are imperative to the last degree, and, if it rested on the words alone, I should be inclined to hold that, even supposing the suit were not liable to be dismissed *in toto*, as to which I express no opinion, the Court was only entitled by virtue of s. 31 of the Civil Procedure Code to deal with the right and interest of the person actually before it.

The object of the section appears to be to discourage a multiplicity of suits by compelling a mortgagee to make all persons of whose interest in the mortgaged property he has notice parties to his suit instead of leaving them to enforce their rights by bringing other actions.

If this is the object, it seems to me that it will be defeated, if it is held that the only consequence of non-compliance with it is to expose the mortgagee to other actions. It is to be observed that, in an ordinary action for debt, the plaintiff "may" under s. 28 of the Civil Procedure Code make the sons of a joint Hindu family defendants, if he desires to enforce their liability for a debt contracted by their father: if he does not he runs the risk of having the fact or nature of the debt contested by a separate suit. Under s. 85, on the other hand, he "must" make persons of whose interest he has notice parties to the suit. It seems to me anomalous to hold that the consequences to a plaintiff are the same, whether he neglects to avail himself of the permission accorded by s. 28 of the Civil Procedure Code, or refuses to obey the imperative direction of s. 85 of the Transfer of Property Act.

The two learned Judges, who dissent from the majority of the Allahabad High Court, appear to consider that a suit brought [760] in contravention of s. 85 of the Transfer of Property Act would be liable to be dismissed for non-joinder of parties [per BANERJEE, J., in *Bhawani Prasad v. Kallu*, (1895) I. L. R., 17 All., 537 (550), and SHEPARD, J., in *Ramasamayyan v. Virasami Ayyar*, (1898) I. L. R., 21 Mad., 222 (224)], and one at least considers that a mortgagee so suing runs the risk of having his decree limited to the personal interest of the mortgagor. Now I cannot see how he can be exposed to these risks, excepting on the assumption that "the person having an interest" is a necessary party under s. 85 (if the plaintiff have notice), and that the Court cannot rightly make a decree in the absence of a necessary party affecting his interest in the mortgaged property, and, if it be once conceded that the Court could not rightly pass a decree affecting his interests, because he was a necessary party and not present, it seems to me a very anomalous position to take up to say that he on his part, on proving that he was a necessary party, and

not present, is not entitled to a declaration excluding his interests from the operation of the decree.

Lastly, it is said, that he runs the risk of having to defend another suit in which the nature or fact of the debt may be questioned. But this risk does not depend on the non-observance of s. 85; it must exist where there are sons of whose existence the mortgagee has had no notice, and, who, in consequence he is not bound to make parties under s. 85 and moreover it is a risk which he runs in any simple action of debt, if he elects not to make the sons parties.

For these reasons, in view of the apparent object of the section and on comparing the words of s. 85 of the Transfer of Property Act with those of s. 28 of the Civil Procedure Code, I am led to the conclusion that a mortgagee is not entitled to a decree affecting the interest of any person of whose interest he has notice and whom notwithstanding he refuses to make a party, and that in the present case no decree ought to have been made affecting the interest of Lala Surja Prosad; and that that having been done which ought not to have been done, the plaintiff in the present suit is entitled to a declaration that the mortgage decree does not affect his interest, not [761] on the ground that he is not liable, but on the ground that the mortgagee has not taken proper steps to enforce his liability.

To hold otherwise would land one in this very anomalous position. We must decide that a plaintiff who has notice of other persons, interests, and who wilfully refuses to make them parties, gets, notwithstanding his wilful disobedience to the positive direction in s. 85 a decree binding the interest of those persons to precisely the same extent as it would have been binding, if from want of notice he had not been obliged to make them parties. This involving as it does the proposition that a mortgagee is able to bind the interest of persons not parties to the suit whom the law says he must make parties to precisely the same extent as he can bind the interests of those whom the law does not compel him to make parties, seems to me to involve a far graver anomaly than that involved by holding that s. 85 of the Transfer of Property Act has imposed duties on a mortgagee plaintiff, which are not imposed on a plaintiff in a simple action of debt under s. 28 of the Civil Procedure Code.

It is unnecessary to discuss the judgment, (1895) I. L. R., 17 All., 537, of the Chief Justice and the other Judges of the Allahabad High Court, inasmuch as I agree with the conclusion to which they have come. In my view while it inflicts no hardship on a mortgagee to hold that he must make parties to his suit those whose interests he knows of and desires to bind; it confers a great advantage on the sons in a joint Hindu family to compel a plaintiff-mortgagee to make them parties. For it is in the cases in which the father has borrowed money for immoral purposes that they are entitled to save their property, and it is just in those very cases that we should expect to find (if they were too young to look after their own interests) their rights least safeguarded by their father. To hold therefore that the statute applies will enable the Court to protect the interests of persons who are in many cases unable to protect themselves, and this is consonant not only with the spirit but with the actual words of s. 42 of the Civil Procedure Code, which enjoins that every suit shall be so framed as to prevent further litigation on the subject-matter in dispute.

[762] For these reasons I come to the conclusion that the mortgagee was bound to make the plaintiff a party to the mortgage suit, that not having done so he was not entitled to obtain a decree affecting the plaintiff's interest. I

am therefore in favour of reversing the decision in the Court below and giving the plaintiff the relief he seeks for in this action.

MAY 7, 1900.—**Ghose and Harington, JJ.**—We do not think we are called upon in this case to refer the question, upon which we disagree, to a third Judge; but we prefer to follow the course prescribed by the second paragraph of s. 575 of the Code of Civil Procedure. The appeal will, accordingly, be dismissed with costs.

B. D. B.

Appeal dismissed.

NOTES.

[In *Sheo Shankar Ram v. Jaddo Kunwar*, (1914) 36 All., 383, the Privy Council held in favour of the representative character of the managers of joint Hindu Families even in mortgage suits but the specific point of the rule in the Transfer of Property Act, 1882, sec. 85, did not arise there.

The general tendency however has been to regard that rule as not affecting the case of joint families :—34 Bom., 351; (1912) 18 I. C. 848 (Nagpur); see also (1900) 27 Cal., 762; (1900) 3 Bom. L. R., 322; (1901) 26 Bom. 163; (1901) 3 Bom. L. R., 367; (1907) 34 Cal., 642; (1907) 34 Cal., 735; (1912) 34 All., 549, 572.

The case in 27 Cal., 724 was finally decided in (1901) 28 Cal., 517 where all were required to be made parties, and that decision was followed in (1914) 41 Cal., 727.]

[27 Cal. 762]

The 5th and 6th March and 7th May, 1900.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE HARINGTON.

Surja Prasad and another.....Defendants

versus

Golab Chand.....Plaintiff.*

Hindu Law—Mitakshara family—Alienation of ancestral property by father—Liability of sons for father's debts—Mortgage—Suit by mortgagee against son, for sale of ancestral property—Antecedent debt—Legal necessity—Illegal or immoral purpose—Money-decree—Limitation Act (XV of 1877), Art. 116, Sch. II.

In the case of a joint *Mitakshara* family where the father raised money on a mortgage hypothecating certain ancestral family property, and it was not proved that the money was required for payment of any antecedent debt, or that the money was raised or expended for illegal or immoral purposes, or that any enquiry was made on behalf of the mortgagee as to the purpose for which the debt was incurred :

Held, that the mortgage security could not be enforced against the son (the father having died), unless it could be shown that the debts for which the mortgage was created were antecedent to the transaction in question.

Under the above circumstances the mortgage is not binding on the son ; but the debt not being proved to have been incurred for immoral or illegal purposes, the mortgagee would be entitled to a money-decree against the defendants, not upon the mortgage security, but upon the simple obligation created by the bond ; and a suit for such a relief must, under the Limitation Act, be instituted within six years from the due date of the mortgage bond.

Lachman Dass v. Giridhar Chowdhry, (1880) I. L. R., 5 Cal., 855, and *Khalilul Rahman v. Gobind Pershad*, (1892) I. L. R., 20-Cal., 328, relied upon.

* Appeal from Original Decree No. 456 of 1898, against the decree of Babu Jaduputi Banerjee, Subordinate Judge of Sarun, dated the 24th of September 1898.

THE defendants Nos. 1 and 2 are the minor son and the widow of one Chunder Koilash Saran *alias* Lachhanji, governed by the law of Mitakshara.

On the 21st February 1891, Lachhanji borrowed Rs. 5,000 from the plaintiff and his uncle Lalchand—also members of a joint Mitakshara family, for the alleged purpose of instituting a suit against one Salukah Deo Narain and Ram Narain Singh, and for the purpose of meeting his marriage and other necessary expenses, and executed a mortgage bond in favour of the plaintiff and his said uncle Lalchand. The due date of the bond was the 19th February 1892.

Lachhanji died on the 23rd July 1894 leaving the defendants Nos. 1 and 2 as aforesaid.

Lalchand died on the 14th December 1894 without leaving any issue; and the plaintiff, having succeeded to Lalchand's interest in the said mortgage bond, instituted this suit on the 10th March 1898 (*i. e.*, six years after the due date of the bond), against the defendants for recovery of the amount secured by the mortgage, and claimed, in the first instance, a decree for sale of the mortgage property, and in the second place, the sale proceeds proving insufficient to satisfy the decretal amount in full, for sale of other properties belonging to the defendants.

The defendants alleged, *inter alia*, that Lachhanji was a profligate and a man of intemperate habits, that the debt was incurred for immoral purposes and not for any legal necessity of the family, that Lachhanji never intended to institute a law suit against the aforesaid Salukah and Ram Narain, nor did he perform any marriage ceremony, and that the suit was barred by limitation.

It appears from the evidence adduced before the lower Court that no suit was ever instituted by Lachhanji against the said [764] Salukah and Ram Narain; that there was no sufficient proof of the fact that any money was really required for Lachhanji's marriage (for the second time) which took place some time after the execution of the bond in question; that no inquiry was made by the mortgagee as to the truth of the alleged purposes for which the debt was incurred by Lachhanji, and that the defendants failed to establish that the loan was contracted for illegal or immoral purposes; upon these facts the Subordinate Judge was of opinion that there was a legal necessity for incurring the debt, and gave judgment for the plaintiff.

The defendants appealed to the High Court.

MARCH 5, 6, 1900.—Dr. Rash Behary Ghose, Babu Karuna Sindhu Mookerjee, Babu Akshoykumar Banerjee and Babu Surendra Nath Ghosal, for the Appellants.—The liability incurred under the mortgage bond of the 21st of February 1891 not being one for satisfying an "antecedent debt," within the meaning of the decisions in the cases of *Lachman Dass v. Giridhur Chowdhry*, (1880) 1. L. R., 5 Cal., 855; *Khalikul Rahman v. Gobind Prosad*, (1892) 1. L. R., 20 Cal., 328; *Sadabart Prosad Sahu v. Foolbush Koer*, (1869) 3 B. L. R., (F. B.), 31, the bond cannot be enforced against the defendants, and the debt realized from the ancestral property hypothecated thereby. The bond could only be enforced against them as a simple money-bond, if a suit were instituted within six years from the due date of the bond; but as this suit was instituted after the expiry of six years from the due date, it is barred by limitation under Art. 116, Sch. II, of the Limitation Act.

Babu Golap Chunder Sarkar and Babu Dwarka Nath Mitter, for the Respondent.—The Lower Court is right in finding upon the evidence that there was a legal necessity for the mortgage. Even if there was no legal necessity,

still the debt not being proved to have been incurred for an illegal or immoral purpose, the mortgage should be held binding on the son. The pious liability of the sons to pay the father's debt was for the first time converted into a legal liability by the decision in the case of *Girdharee Lall v. [765] Kantoo Lall*, (1874) 14 B. L. R., 187. No doubt it was laid down in several earlier cases decided by the Privy Council that to support an alienation by the father he must have first contracted a debt and then in order to pay off that debt he might make a valid alienation of the ancestral property. See *Girdharee Lall v. Kantoo Lall*, (1874) 14 B. L. R., 187; *Suraj Bansi Koer v. Sheo Persad Singh*, (1879) I. L. R., 5 Cal., 148 (171); *Deendyal Lall v. Jugdeep Narain Singh*, (1877) I. L. R., 3 Cal., 198. The facts of these cases show that there were "antecedent debts" in all of them, and hence their Lordships formulated the proposition of law necessary for those cases, that the alienations made by the father to pay off the antecedent debts were binding on the sons.

But it is now settled by the later decisions of the Privy Council [see *Nanomi Babuasin v. Modun Mohan*, (1885) L. R., 13 I. A., 1, 17, 81] that a debt contracted by the father, if not tainted with immorality, is binding on the sons from its very inception; then, why should not a mortgage made to secure the payment of such debts be also binding on the sons? There is no reason why the debt should be antecedent to the mortgage in order to make it binding on the sons. The sons are bound to pay all debts whether secured or unsecured, provided they were not incurred for illegal or immoral purposes. See the observations of PIGOT, J., in *Khalilul Rahman v. Gobind Parsad*, (1892) I. L. R., 20 Cal., 328 (347).

Cur. adv. vult.

MAY 7, 1900. The judgment of their Lordships was delivered by

Ghose, J.—This appeal arises out of a suit instituted by Babu Golab Chand against Lalla Surja Narain, minor son of Chunder Kailash Saran *alias* Lachhanji, for enforcement of a mortgage bond, dated the 21st February 1891, executed by the said Lachhanji in favour of the plaintiff and his uncle Lal Chand for the sum of Rs. 5,000.

We have noticed this mortgage bond in our judgment in [766] appeal from Original Decree No. 397 of 1898 (see p. 724). The plaintiff's allegation is that Lalchand died without any male or female issue, and, while living jointly with him (the plaintiff), that he has succeeded to his interest in the mortgage bond in question under the Hindu law, and that he is entitled to enforce the mortgage security against the son of Lachhanji, the latter having died.

The due date of this bond was the 19th February 1892, but the suit was not instituted until the 10th March 1898, that is to say, more than six years after that date. The plaintiff, however, claimed in the first instance, a decree for sale, and in the second place in the event of the sale proceeds of the mortgaged property being insufficient to discharge his dues in full, he asked that the balance of the decretal money might be realised from other properties of the defendant. The mortgage is said to have been given, as has been stated in our judgment in appeal from Original Decree No. 397 of 1898, for the purpose of meeting the expenses of a suit to be instituted against Salukha Deo Narain and Ram Narain Singh, and for the purpose of meeting the marriage and other expenses of the deceased. The evidence, however, shows that no suit was instituted against those individuals, nor is the evidence sufficient to show that any money was then required for Lachhanji's second marriage, his first wife having then died, and what "other expenses" there were to be met, we do not know. A question seems to have been raised in the Court below whether

the second marriage of Lachhanji had not then already taken place, but the Subordinate Judge was unable to find upon the evidence that this was so. He rather held that the marriage did take place subsequent to the execution of the mortgage bond in question, though he came to no finding as to the precise time the event really happened. We agree with the Subordinate Judge in the conclusion at which he has arrived in this respect; but though the marriage may be taken to have occurred, not before, but after, the date of the mortgage bond in question, the evidence in no way satisfies us that any money was really required for the purpose. It is, however, stated by some of the witnesses on behalf of the plaintiff that at the time of the loan in question it was represented that money was required for marriage expenses, as also for meeting the expenses of a suit to be [767] instituted against Salukah Deo Narain and Ram Narain Singh, and that enquiry was made under the orders of the plaintiff's uncle Lalchand, as to the truth of these representations. We have examined the evidence bearing upon this matter, but we are unable to find that any enquiry was made on behalf of the plaintiff and his uncle in this connection, though it is quite possible that representations were made to Lalchand that money was required for the said purposes. The plaintiff seeks to enforce the mortgage security in this case, and he is bound to show that the mortgage is binding upon the defendant. Having regard to the rulings both of the Privy Council and this Court, he could do so by showing that the debts for which the mortgage was given were "antecedent debts," that is to say, antecedent to the transaction in question, but we are unable to find upon the evidence such as it is that this was so. If then the mortgage is not binding upon the defendant, the question is whether the plaintiff is entitled to a decree declaring that the money covered by the bond may be realized out of the whole of the ancestral estate, the debt not being proved to have been incurred for immoral or illegal purposes, and it being antecedent to the suit. If the plaintiff had brought his suit within six years from the time when the bond fell due, there could be no doubt that he would be entitled to the relief which was declared as the proper relief to be granted to a party in the position of the plaintiff in the case of *Luchmun Dass v. Giridhur Chowdhry*, (1880) I. L. R., 5 Cal., 855, decided by a Full Bench of this Court, and in the case of *Khalilul Rahman v. Gobind Pershad*, (1892) I. L. R., 20 Cal., 328. But the suit having been instituted after the expiry of six years from the due date, we do not think, having regard to the principles laid down in those cases, that the plaintiff is entitled to such relief. A decree made, not upon the mortgage security, but upon the simple obligation created by the bond, is but a money decree, and a suit for such a relief is governed by the six years law of limitation as prescribed by the Limitation Act.

Upon these grounds we modify the decree of the Court below, and decree this appeal with costs in both Courts.

B. D. B.

Appeal allowed.

NOTES.

[As regards the rule as to joinder of parties, see the notes to 27 Cal., 724.]

As regards the necessity for there being antecedent debts, see also 34 Cal., 795; 31 All., 176; 7 C. L. J., 195.]

[768] PRIVY COUNCIL.

The 15th February and 2nd March, 1900.

PRESENT :

LORDS HOBHOUSE, DAVEY AND ROBERTSON, AND SIR RICHARD COUCH.

Jaggot Singh.....Plaintiff

versus

Brij Nath Kunwar.....Defendant

On appeal from the Court of the Judicial Commissioner of Oudh.

Regulation XI of 1825, s. 4, sub-ss. 1 and 5—Changes in a river's channel—

Rights of riparian owners—Accretion by alluvion distinguished.

The current of a river changing its course encroached upon either bank alternately, detaching land from one bank, followed by the effect that land was added to the opposite bank.

The river having taken a course more to the east than its original one, the area of the defendant's village (till then only partly on the western side, inasmuch as the river traversed it throughout) appeared entirely on the west bank. Some land of the plaintiff's village on the eastern side was also carried away, the river continuing its eastward tendency.

By another change, in the opposite direction, the current resumed its original channel more towards the west, with the effect that the piece of land that had belonged to the defendant's village, and had been submerged, when on the east bank, during the above change in the river's course emerged in the end on its former site on the east bank. This restored land was identifiable. But the owner of the village on the east bank now claimed it as an accretion by alluvion to his property which it adjoined.

Held, that the right of property remained in the original owner, the defendant. The owner of the adjoining village on the eastern side could not make out a title to it either under sub-s. 1, under sub-s. 5 of s. 4 of Regulation XI of 1825, or in virtue of any known principle. There was no proof of a custom giving this land to him on account of contiguity, and there had been no gain to him from the river by alluvion within the meaning of the Regulation.

APPEAL from a decree (21st November 1895) of the Court of the Judicial Commissioner, reversing a decree (5th September 1893) of the Subordinate Judge of Baraich.

This suit was brought by the appellant, the talukhdar of Chakbari, to whom belonged a half share in a village Murwa, in Baraich, situate where the river Gogra flowing from north to south separates that district from the district of Sitapur. The [769] defendant, respondent, was the widow of the late Raja Raghuraj Singh and was in possession, for her estate as widow, of village Randa opposite to Murwa.

At the time of the settlement the Gogra completely traversed Randa, and touched Murwa only at its extreme south. Afterwards the river, having taken a course more towards the east, submerged land on the east bank, with the result that the whole of Randa for a long period lay on the west bank; and some of the land belonging to Murwa was also detached from that village.

After another change eastward the river returned to its westward course; and the effect was that land that had been part of Randa was again upon the east bank. Upon their former site 2,058 bighas re-appeared. The right to these was now contested. In 1891 an order was made by a Magistrate under

s. 145 of the Criminal Procedure Code that the defendant, who had taken possession of these bighas, should retain possession until the plaintiff should have obtained a decree for the proprietary right to them. On the 27th June 1892 the plaintiff sued for possession.

It was the case of both parties to the suit that the Gogra had until the years 1879-1880, in taking its course southward, gone completely through the village Randa, but reaching the southern extremity of Murwa it exactly divided the two villages for a certain length.

The plaint stated that the current, taking a course more eastward between the years 1880 and 1885, transferred from Murwa on the east bank to the west bank a piece of land of which the owner of Randa took possession, claiming title to it under a custom, compliance wherewith was authorized by Regulation XI of 1825. That in the interval between 1886 and 1889 the river, still shifting its course further towards the east, had detached some more land from Murwa, and had transferred it to the west bank where this piece also, as the plaint alleged, had been annexed by the defendant.

Lastly, it was alleged that when the river, which returned gradually in 1890 and in 1891 to a course more towards the west, had placed on the east bank and against the plaintiff's village [770] the 2,058 bighas now in dispute, the plaintiff became entitled thereto as an alluvial accretion to the land of village Murwa.

The defence was that the defendant had been continuously in possession of the lands in suit, retaining the proprietary right therein.

The issues framed in the First Court were again more clearly stated in the judgment of the Appellate Court, and were : (1) Whether the land in suit was added to the plaintiff's village Murwa by gradual accretion ; (2) if so, whether it ought to be considered an increment to the plaintiff's estate either under the particular rule laid down in cl. 1 of s. 4, or on the general principles of equity and justice made applicable by sub-s. 5.

The Subordinate Judge found that the land was added by accretion to Murwa. He decreed the right to the 2,058 bighas in favour of the plaintiff, and Rs. 500 for mesne profits for the year 1229 Fassi, holding that the plaintiff was entitled under Regulation XI of 1825 ; but he did not specify the particular clause which he considered to be applicable to the case.

On an appeal by the defendant, the Judicial Commissioner and the Additional Judicial Commissioner concurred in a judgment in favour of the defendant. They found upon the first issue that the 2,058 bighas had not been accumulated against the east bank by "gradual accession" within the meaning of Regulation XI of 1825. They referred to cases decided by the Judicial Committee explaining the terms "gradual accession" as a process which seemed to the Commissioners "wholly inapplicable," where, according to the plaint, a recession of the river from east to west, in the course of two years, transferred from the eastern to the western side of the stream two blocks of land, viz., 1,314 bighas belonging to Murwa and 2,058 bighas belonging to Randa." Reversing the decision below they dismissed the suit.

On this appeal, Mr. C. W. Arathoon, for the Appellant, argued that the judgment of the Appellate Court was in error. The Court should have held on a right construction of Regulation XI of 1825, s. 4, sub-ss. 1 and 5, that the claim was maintainable thereunder, and should have found upon the evidence that the land in suit had been gained by the village of Murwa by gradual [771] accretion thereto. As to the explanation of accretion reference was made to *Nogender Chunder Ghose v. Muhammad Esuf*, (1872) 10 B. L. R.,

(P.C.), 406, and to *Lopez v. Muddan Mohun Thakur*, (1870) 13 Moore I. A., 467. It was clearly established by the evidence that the formation of the land against either one bank or the other had been a process occupying long periods of time.

Also, it had appeared that on two occasions the defendant had taken possession of land thrown up by the river over against Randa on the west bank. That fact tended to support an alleged custom or local usage, which would, if prevailing, come in under sub-s. 5. He referred to the usage that the deep stream should be the boundary upon the breaking away of land upon the one side of a river, and the appearance of corresponding land upon the other. There probably would have been further evidence forthcoming as to this usage, had not the defendant obscured the question between the parties by denying that changes had occurred in the course of the current. That question, stated generally, turned upon the fact that the areas, respectively, of the two villages had undergone repeated changes consequent upon alluvion and diluvion. Alluvion seemed to involve accretion rather than the transfer of land, in its integral portions, and in form identifiable. The condition of identity could not be passed over. It could not be assumed. The probabilities supported in this case the theory of alluvion rather than that alleged for the defence, and had not been displaced by the evidence.

Mr. J. H. A. Branson, for the Respondent, was not called upon.

MARCH 2. The judgment of their Lordships was delivered by

Lord Robertson.—So far as the essential facts are concerned the case of the appellant is clearly disclosed in the plaint. He claims a certain piece of land, measuring 2,058 bighas, and his theory is that this land has become his by alluvion. Yet, while the exigencies of pleading make him describe it as "now alluviated land," it is in this same plaint said to be "land of the defendant's" [respondent's] "village." The 2,058 bighas have, indeed, a perfectly definite history, which in their Lordships' judgment entirely excludes the appellant's claim.

[772] The appellant is proprietor of a village called Murwa; and the respondent is proprietor of a village called Randa. In 1866, which is the commencement of both parties' rights, the river Gogra was flowing in a course which intersected Randa, and the portion of Randa which was on the eastern bank lay between the river and Murwa. This description which was true in 1866 is also true now. It is the fact however that, in the interval between 1866 and 1891, the river had first departed from and then substantially resumed the course in which it now runs, so far as concerns those two properties. The appellant's case is entirely founded on this intervening but now obsolete history.

It appears then that, about the year 1885, the river began to work its way eastward, with the result that it came to have on the western bank of its new course, not only all of Randa that had formerly been on its east bank, but also some part of Murwa. It is said, and it may be assumed, that, while this situation of things lasted, the disjointed part of Murwa was taken possession of by the respondent. But the Gogra did not long adhere to this course and soon began to recede to the west; and by 1891 it once more had to its east, not only the whole of Murwa but (intervening between it and Murwa) the 2,058 bighas now in dispute, which the appellant in his plaint admits to be historically part of Randa. For a time, during the wanderings of the river, this land seems to have been submerged; and the appellant says that it emerged in an altered form not capable of being identified. This disguise has fortunately not misled the appellant himself, or prevented his recognising the 2,058 bighas as Randa land.

These being the facts, it is manifest that the case does not fall within the well-known chapter of law which treats of the formation of new land, through the gradual and imperceptible washing up of particles by a river or the sea. Nor have we even to deal with the more complicated case in which a piece of land is first disintegrated by water action, and thereafter reintegrated or reformed by water action. The only note of similarity to alluvion to which the appellant could point was that the process of change was so far gradual; but this means merely that the river took several years to change its course. Now the mere fact that a change in a river's course has placed land belonging to A in [773] contiguity to the lands of B could never deprive A of the lands and transfer them to B. And the proposition maintained by the appellant is by several steps nearer than this to paradox; for he contends that if after temporary aberrations a river at last leaves the land of A *in statu quo ante* it must be held to be an accession to B, his next neighbour. It is superfluous to say that neither the statute law of India nor the general principles of jurisprudence lend the slightest support to such unreasonable conclusions.

The 11th Regulation of 1825, by the first sub-section of section 4, declares land gained by gradual accession to be an increment of the land to which it is thus annexed; and by the fifth sub-s. in all other cases, not specifically provided for in the Regulation, where land is gained by alluvion or by dereliction of a river or the sea, the Court is to be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to the case, or, if not, by general principles of equity or justice. It is perfectly plain that neither the specific provision of the first sub-section nor the general principles of equity and justice lend the slightest support to the pretension of the appellant, which is to land that would be gained not from the river but from a neighbour.

So far as local usage is concerned, it is enough to say that no case of such usage is presented on record. What seems really to underlie the appellant's claim is a crude idea that because the respondent once had possession of that part of Murwa, which for the time was transferred to the west side of the river, therefore the appellant ought now to have in property the 2,508 bighas belonging to Randa. No attempt was made to formulate this as a legal proposition.

Their Lordships are of opinion that the judgment of the Judicial Commissioner, concurred in by the Assistant Judicial Commissioner, was right; and they will humbly advise Her Majesty that the appeal ought to be dismissed. The appellant will pay the costs of the Appeal.

Appeal dismissed.

Solicitors for the Appellant: Messrs. T. L. Wilson & Co.

Solicitors for the Respondent: Messrs. Watkins & Lempriere.

D S

NOTES.

[This was followed in (1907) 5 C. L. J., 47 n; see also (1906) 1 M. L. T., 101.]

[774] APPELLATE CIVIL.

The 23rd May, 1900.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE HARINGTON.

Lala Makhan Lal.....Defendant

versus

Lala Kuldip Narain and others.....Plaintiffs. *

Ejectment—Suit for ejectment—Notice to quit by Post—Bengal Tenancy Act (VIII of 1885), s. 189—Mode of service of the notice under the Act—Bengal Government Rule 3, chap. 1, under s. 189 of the Bengal Tenancy Act.

The plaintiffs served a notice, by post, upon the defendant to quit certain *khud kasht* lands that were alleged to be in his wrongful possession, and subsequently instituted a suit to eject him from those lands :

Held, that the notice was bad in law, and the suit for ejectment based upon such a notice must fail.

Tara Das Malakar v. Ram Doyal Malakar, (1897) 2 C. W. N., 125, referred to.

It appears that a dispute which existed between the plaintiffs and the defendant concerning the possession of about 44 bighas of *khud kasht* lands in mouzah Makhra in the district of Gya, led to the institution of criminal proceedings under s. 145 of the Code of Criminal Procedure in which the defendant's possession was confirmed, and the plaintiffs were referred to the Civil Court. This order under s. 145 was made on the 10th of March 1894.

On the 2nd of March 1895 (20th Falgoun 1302 F. S.) the plaintiffs sent by post, in a registered cover, a notice to the defendant to quit the possession of the said lands in dispute, alleging that the defendant had no right whatsoever to retain possession of the same. On the 5th of March 1895 the said notice was served on the defendant who signed the postal acknowledgment with his own hand, but did not give up the possession of the lands. Thereupon the plaintiffs instituted this suit to eject the defendant from, and to recover *khas* possession of, the said 44 bighas of *khud kasht* lands.

[775] The defendant pleaded that he and his ancestors had been resident raiyats of Makhra for several generations ; that in Assar 1298 F. S. the plaintiffs settled the lands in dispute with him and he has since been peacefully cultivating the same ; that he should be deemed to have become a settled raiyat of the village ; that neither the plaintiffs nor anybody else had any right to eject him unless and until any of the contingencies prescribed by s. 44 of the Bengal Tenancy Act had happened ; and that assuming the plaintiffs' right of suit, no valid and legal notice was served on him in accordance with the provisions of the Bengal Tenancy Act and the rules framed by the Government of Bengal under s. 189 of the Act, and that the suit was therefore premature and untenable.

The Subordinate Judge found that the plaintiffs were raiyats and the defendant an under-raiyat as defined in s. 4, cl. (3) of the Bengal Tenancy Act ;

* Appeal from Appellate Decree No. 1536 of 1898, against the decree of E. G. Drake Brockman, Esq., District Judge of Gya, dated the 4th of May 1898, modifying the decree of Babu Baroda Prasanna Shome, Subordinate Judge of that District, dated the 4th of January 1898.

that no notice would be necessary previous to the suit. And he gave judgment for the plaintiffs.

The District Judge, on appeal, also held that the defendant was an under-raiyat and the provisions of s. 49 of the Tenancy Act would be applicable to this case. He did not, however, agree with the first Court's decision on the issue that notice to quit was unnecessary, but was of opinion that the contention that the notice had not been properly served on the defendant under the rules, was "not of much weight as the defendant received the notice and signed the postal receipt for it;" and he practically upheld the decree of the first Court with some modifications.

The defendant appealed to the High Court.

Babu Digamber Chatterjee, for the Appellant.—This was a suit for ejectment; the notice to quit having been served on the defendant by post was bad in law, the mode of service not being in accordance with the provisions of the Bengal Tenancy Act and the Rules of the Bengal Government made thereunder (see Rule 3, chap. I of the Rules made by the Government of Bengal under s. 189 of the Bengal Tenancy Act); and upon this ground alone the suit ought to fail: *Tara Das Malakar v. Ram Doyal Malakar*, (1897) 2 C. W. N., 125.

Babu Saligram Singh and *Babu Jogendra Chunder Ghose*, for [776] the Respondent.—Because the notice was bad in law, the suit should not wholly fail on that preliminary ground.

MAY 23, 1900. The judgment of their Lordships was delivered by

Ghose, J.—This appeal arises out of a suit for ejectment. It has been found, though the finding has been impeached before us by the learned Vakil for the defendant-appellant as based upon no evidence, that the plaintiffs are raiyats and the defendant an under-raiyat. The plaintiffs gave a notice to the defendant to quit, but this notice seems to have been sent to him by post, and was not served upon him in accordance with Rule 3, chap. I of the Rules framed by the Government of Bengal under s. 189, of the Bengal Tenancy Act. The notice must therefore be taken to be bad in law: See *Tara Das Malakar v. Ram Doyal Malakar*, (1897) 2 C. W. N., 125. It follows, therefore, that the suit, as based upon such a notice, must fail, and the plaintiffs are not entitled to obtain ejectment in this case.

In this view of the matter, we refrain from expressing any opinion upon the question whether the plaintiffs have rightly been found to be raiyats and the defendant an under-raiyat.

The appeal will be decreed, and the suit dismissed with costs in all the Courts.

B. D. B.

Appeal allowed.

[27 Cal. 776]

APPELLATE CRIMINAL.

The 20th and 21st February, 1900.

PRESENT :

MR. JUSTICE MACPHERSON AND MR. JUSTICE HILL.

Anookool Chunder Nundy.....Appellant

versus

Queen-Empress.....Respondent.*

Trade-mark—User of, and property in—Proof of—Importation and sale of articles with particular marks impressed upon them—Succession by one Bank to business of another—Merchandise Marks Act (IV of 1889), s. 3—Penal Code (Act XLV of 1860) ss. 485 and 486.

[777] A mark to be a trade-mark must be a mark used for denoting that the goods are the manufacture or the merchandise of a particular person.

The mere fact that a Bank imported and sold gold bars with a particular mark impressed upon them, a mark which was not originally theirs, but belonged to a Bank that had ceased to exist, and where there was no proof of any transfer or assignment of the mark, or that the new Bank succeeded the other in the sense either that it was a continuation of that Bank under another name, or that it succeeded to the business or acquired the good-will of that Bank, was held not to be sufficient to establish that the mark was the trade-mark of the new Bank.

In this case a search was instituted at the instance of the Sub-Manager of the National Bank of India, who had deposed that gold bars were in circulation bearing a counterfeit of the impression on the gold bars imported by his Bank, and that the accused was suspected of being concerned in this. The accused's shop was searched on the 14th August 1899; nothing, however, was found indicating the commission of any offence in connection with the mark of that Bank, but there was found a bar of gold stamped with the words "Chartered Mercantile Bank of India, London and China" in English and Guzrati character, and other words denoting the touch of gold and the names of the London Bullion Brokers, also a stamp or die, which made an impression similar to the impression on the gold bar. It was alleged on behalf of the prosecution that the Chartered Mercantile Bank of India, London and China, used to import from England gold bars impressed with the name of that Bank, and other words denoting the touch of gold and the names of the London Bullion Brokers, that this impression was a well-known mark in the market, and that when that Bank ceased to do business in 1893, the Mercantile Bank of India, as its successor, continued to import gold bars with a precisely similar mark, that, in fact, this mark which was the mark of the Chartered Mercantile Bank of India, London and China, became by transfer, assignment or succession the mark of the Mercantile Bank of India, and that the latter Bank occupied with reference to it exactly the same position as the Chartered Bank had occupied. There was no proof of any transfer or assignment of the mark, or that the Bank succeeded the other in the sense either that it was a continuation of that Bank under another name, or that it succeeded to the business or acquired the good will of that Bank.

*Criminal Appeal No. 987 of 1899, made against the order passed by Syed Ameer Hossein Presidency Magistrate of Calcutta, dated the 15th December 1899.

[778] The accused was convicted on the 15th December 1899 by the Presidency Magistrate of Calcutta under ss. 485 and 486 of the Penal Code of having in his possession, (a) instruments for the purpose of counterfeiting the trade or property mark of the Mercantile Bank of India, Limited; (b) for sale or trade a gold bar bearing a counterfeit impression of the trade or property-mark of that Bank.

Mr. Hill (with him Mr. Allen, and Babu Boidyanath Dutt) for the Appellant.

Mr. Dunne (with him Mr. W. K. Eddis) for the Crown.

FEBRUARY 21, 1900—The judgment of the Court (Macpherson and Hill, JJ.) was as follows:—

The appellant has been convicted under s. 485 and 486 of the Penal Code of having in his possession, (a) instruments for the purpose of counterfeiting the trade or property mark of the Mercantile Bank of India, Limited; (b) for sale or trade a gold bar bearing a counterfeit impression of the trade or property mark of that Bank.

It appears that, on the 14th August, the appellant's shop was searched under a search warrant issued at the instance of the Sub-Manager of the National Bank of India, who had deposed that gold bars were in circulation bearing a counterfeit of the impression on the gold bars imported by his Bank, and that the appellant was suspected of being concerned in this. Nothing was found indicating the commission of any offence in connection with the mark of that Bank, but there was found a bar of gold (Exhibit G) stamped with the words "Chartered Mercantile Bank of India, London and China," in the English and Guzrati character, and other words denoting the touch of gold and the names of the London Bullion Brokers: also a stamp or die (Exhibit B) which made an impression similar to the impression on Exhibit G. Mr. Fidler, the Manager of the Calcutta Branch of the Mercantile Bank of India, Limited, who was a witness for the prosecution, deposed that the mark on Exhibit G was a counterfeit of the mark on the gold bars imported by his Bank. No one else claimed any interest in that mark. On the 7th [779] November, after all the witnesses for the prosecution had been examined, the appellant was charged under the sections cited with having in his possession instruments for counterfeiting the trade or property-mark of the National Bank of India, Limited, and also a gold bar bearing a counterfeit impression of the trade or property-mark of that Bank. The witnesses for the prosecution were recalled and cross-examined and on the 12th December, after the cross-examination had been concluded, it was discovered that there was what the Magistrate calls a clerical error in the charges, and that the National Bank of India, Limited, had by mistake been inserted for the Mercantile Bank of India, Limited. New charges were then framed with the corrections necessary to meet that mistake. Mr. Fidler was recalled and examined as a witness for the defence, and on 15th December the appellant was convicted on those charges.

It is contended on those facts that there has been no proper trial, and that the conviction is bad on that ground. It must be conceded that the original charges were most carelessly drawn, but there is no reasonable ground for supposing that the appellant was misled by them. The prosecution was based upon the finding of the articles, Exhibits G and B, in his possession; no one ever suggested that any instrument for counterfeiting the mark of the National Bank of India was found in his possession, and Mr. Fidler's evidence went to show that Exhibit G was a counterfeit of the mark, impressed on the gold bars imported by his Bank.

The matter is not, however, of much importance, as we think the conviction must be set aside on another ground, and that is that it is not proved that the mark in question is the trade-mark of the Mercantile Bank of India, Limited, and, unless this is proved, the conviction cannot stand. It is not attempted to support the conviction on the ground that the mark is a property mark.

The case rests almost entirely on the evidence of Mr. Fidler, which in substance amounts to this that the Chartered Mercantile Bank of India, London and China, used to import from England gold bars impressed with the name of that Bank, and other words denoting the touch of gold and the names of the London Bullion Brokers, that this impression was a well-known mark in the market, [780] and that when that Bank ceased to do business in 1893 the Mercantile Bank of India as its successor continued to import gold bars with a precisely similar mark. In other words that this mark which was the mark of the Chartered Mercantile Bank of India, London and China, became by transfer, assignment or succession, the mark of the Mercantile Bank of India, Limited, and that the latter Bank occupied with reference to it exactly the same position as the Chartered Bank had occupied. It is enough, however, to say that, assuming this to have been the trade-mark of the Chartered Mercantile Bank, there is in the present case no proof of any transfer or assignment of the mark, and no proof that the one Bank succeeded the other in the sense either that it was a continuation of that Bank under another name, or that it succeeded to the business or acquired the good will of that Bank.

Assuming however that this mark, being the trade-mark of the Chartered Mercantile Bank of India, London and China, could after that Bank ceased to do business become by user the trade-mark of the Mercantile Bank of India, there is in this case no sufficient proof of the user necessary to effect that. A mark to be a trade-mark must be a mark *used* for denoting that the goods are the manufacture or the merchandize of a particular person and the particular person in this case is according to the charges the Mercantile Bank of India. The prosecution had, therefore, to prove that this mark was used for denoting that the gold bars were the manufacture or merchandize of that Bank. The mark in itself does not denote anything of the kind, and it is not necessary that it should do so. But it was originally used to denote something else, and there is no evidence that it had acquired in the market any other meaning or that it was understood to denote that the gold bars upon which it was impressed were the gold bars imported by the Mercantile Bank of India. Except Mr. Fidler, whose evidence is very vague and does not carry the case far enough, no one who has had anything to do with these gold bars has been examined, and we do not know what the mark was understood by any person other perhaps than Mr. Fidler, to denote. The mere fact that the Mercantile Bank imported and sold gold bars with this mark impressed upon them, a mark which was not [781] originally theirs, is not in the circumstances of this case sufficient to establish that the mark was the trade-mark of the Bank and the case is really carried no further than that.

The conviction must, therefore, be set aside. The result is to be regretted as it is impossible to suppose that the appellant was in the possession of the articles for any honest purpose. He has, however, been charged with and convicted of a particular crime, and that crime must, of course, be strictly proved.

D. S.

Appeal allowed.

[27 Cal. 781]
CRIMINAL REVISION.

The 8th February, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Hari Telang and others.....Petitioners

versus

Queen-Empress.....Opposite Party.*

Security for good behaviour from habitual offenders—Acts committed by persons in performance of duties as burkandazes in zemindari—Habitual Association—Joint Trial—Criminal Procedure Code (Act V of 1898) ss. 110, 112, 117, 118 and 537.

Certain *burkandazes* employed at a *kutchery* of the Bijni Estate, who were alleged to have committed acts of extortion and other acts of oppression in the performance of their duties were called upon to execute bonds for their good behaviour on the grounds :—

(1) That they habitually commit extortion ; (2) that they habitually commit or attempt to commit or abet the commission of offences involving a breach of the peace ; (3) that they are dangerous persons so as to render their being at large without security hazardous to the community.

They were tried jointly by the Magistrate under s. 117 of the Code of Criminal Procedure, and each of them was ordered to execute a bond with sureties for his good behaviour for three years.

Held, that even supposing the Magistrate was right in considering that there was habitual association between these persons in regard to the first and second grounds, there certainly would be no such connection between them in regard to their characters so as to make them dangerous persons, and thus to render their being at large without security hazardous to the community, and that proceedings should have been separately taken against each of them.

[782] Section 110 of the Code of Criminal Procedure is not applicable where certain acts amounting to extortion are committed by certain persons in the performance of their duties as *burkandazes* in a zemindari, as it cannot be said that these persons are in the habit of committing extortion as individual members of the community, because if they were discharged by the zemindar or ceased to be in his employ the acts would no longer be committed, it being no longer to their interests to do such acts in the interest of their employer and they certainly would not be likely to commit them in their own private capacities.

The object of enabling a Magistrate to take security for good behaviour is for the prevention and not for the punishment of offences.

IN this case the petitioners were *burkandazes* employed at the Krishnai *kutchery* of the Bijni Estate. The District Magistrate, while in camp at Krishnai in November 1898, received information from certain persons to the effect that the ryots within the Krishnai Tehsil were subjected to oppression

* Criminal Revision No. 840 of 1899, made against the order passed by F. E. Jackson, Esq., District Magistrate and Deputy Commissioner of Goalparah, dated the 2nd of July 1899.

by the *kutchery* officials. That extortion was constantly practised, and persons were frequently seized by the petitioners and other *burkandazes* and beaten and confined at the *kutchery*. Proceedings were taken against the petitioners under s. 110 of the Code of Criminal Procedure by the District Magistrate who passed orders under s. 112 of the Code calling on the petitioners to show cause why they should not be called upon to execute bonds with sureties for their good behaviour for two years, on the grounds (1) that they habitually commit extortion, (2) that they habitually commit or attempt to commit or abet the commission of offences involving a breach of the peace; (3) that they are dangerous persons so as to render their being at large without security hazardous to the community. Separate proceedings were drawn up in respect of each of the petitioners. They were, however, tried jointly by the Sub-Divisional Magistrate of Goalpara, who, on the 30th of March 1899, ordered each of the petitioners under s. 118 of the Code of Criminal Procedure to execute a bond for Rs. 100 each, with two sureties for Rs. 100 each, for his good behaviour for three years. Against this decision the petitioners appealed to the District Magistrate of Goalpara and contended *inter alia* that they had been prejudiced in having been tried jointly under s. 117 of the Code of Criminal Procedure. The District Magistrate however rejected their appeal on the 2nd of July 1899.

[783] Babu Bycunt Nath Das for the Petitioners.

FEBRUARY 8, 1900. The judgment of the Court (PRINSEP and STANLEY, JJ.) was delivered by

Prinsep, J.—The petitioners have been required to give security for good behaviour and their appeal has been dismissed by the District Magistrate. They were all three tried together in the same proceedings. In consequence of this irregularity and because we had reason to believe, as represented to us, that the evidence did not justify the order, this rule has been granted to consider the case. Proceedings were taken under s. 110 on three grounds, *first* that the petitioners habitually commit extortion; *secondly* that they habitually commit or attempt to commit or abet the commission of offences, involving a breach of the peace; and *third* that they are dangerous persons so as to render their being at large without security hazardous to the community. Although separate proceedings were drawn up in respect of each of these persons, they have been tried jointly. Objection was taken on this ground before the District Magistrate on appeal, and he held that under the terms of s. 117, sub-s. 4, the proceedings could have been jointly conducted against all the three persons, because they were habitually associated together, and acted together in the interests of their Master, the *zomindar*. But even supposing that the Magistrate was right in considering that there was habitual association between the three persons in regard to the first and second points mentioned, there certainly would be no such connection between them in regard to their characters so as to make them dangerous persons, and thus to render their being at large without security hazardous to the community. We think, therefore, that the proceedings should have been separately taken against each of these persons. We have consequently considered the evidence on the record in order to ascertain whether this irregularity, to use the words of s. 537 of the Code of Criminal Procedure “has in fact, occasioned a failure of justice.” From this evidence, however, it seems that s. 110 is not applicable to the case set up. The acts of the petitioners, though they might amount to extortion, would not be such as to make them liable to give security for good behaviour by reason of their habitually com-[784]mitting extortion. The evidence shows that

certain acts amounting to extortion were committed by these persons in the performance of their duties as *burkandazes* in a certain zemindari. No doubt, they may have been liable to punishment on conviction in a regular trial for any of these acts, and we think that that was the proper mode of dealing with the case, but it cannot be said that they have habitually committed extortion, by which, we understand, is meant that they are in the habit of committing extortion as individual members of the community, because, if it should so happen that they were discharged by the zemindar or cease to be in his employ, no doubt the acts of the description stated by the witnesses for the prosecution would no longer be committed by them, for it would no longer be their interest to do such acts in the interest of their employers and they certainly would not be likely to commit them in their own private capacities. We think, therefore, though with some reluctance, that this is not a case in which security for good behaviour can properly be required from the petitioners. It seems to us rather that the proper way of dealing with this case, if the Magistrate wishes to put an end to the unhappy condition of the tenantry in this zemindari, would be to prosecute these servants of the zemindar or possibly those under whose orders they act for specific acts of oppression. We find from the Magistrate's judgment that he has not considered this case except in regard to the point already noticed, and that his order is not founded on the second or third points on which the proceedings were taken. We are informed by the Magistrate's judgment that two persons, apparently in the same service as the petitioners, were at the time of his delivering that judgment under trial for offences of extortion. If this order requiring the petitioners to give security for good behaviour be maintained, as there is nothing to prevent the prosecution of the petitioners for the acts of extortion regarding which this order was passed, the petitioners would in such a trial be very seriously prejudiced, by an order for security for good behaviour against them. The object of enabling a Magistrate to take security for good behaviour is, we may add, for the prevention and not for the punishment of offences. The rule is made absolute.

D.S.

Rule made absolute.

NOTES.

[See also (1905) 9 C.W.N., 898 : 1 C.L.J., 616 ; (1903) 6 Bom. L.R., 34.]

[785] *The 20th April, 1900.*

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE HANDLEY.

Joyanti Kumar Mookerjee.....(1st Party) Petitioner

*versus*J. B. Middleton.....(2nd Party) Opposite Party.⁴

Criminal Procedure Code, s. 144—Dispute in respect of colliery— Order under s. 144—Prohibition to both parties from exercising right of possession— Proceedings under s. 145 of the Code of Criminal Procedure—Date of possession—Code of Criminal Procedure (Act V of 1898), ss. 144, 145, 146.

On the 10th of November 1899, the Magistrate passed an *ex parte* order under s. 144 of the Code of Criminal Procedure by which both parties to a dispute were prohibited from exercising any right of possession in respect of a colliery. Subsequently proceedings under s. 145 of the Code were instituted in respect of the same colliery and between the same parties. On the 29th of January 1900, the Magistrate, having found that the second party had been in possession on the 10th of November 1899, passed an order declaring them to be in possession.

Held, that the proper way of dealing with this case in interpreting the Magistrate's order was to hold that, whereas by reason of the operation of his order under s. 144 of the Code of the 10th of November 1899, no evidence could be offered to show the possession of either party from that date up to the 29th of December, he was consequently obliged to ascertain the possession immediately before this order and to regard his intervention as an attachment suspending the previous possession whatever it might be, but that, at the same time, the former possession continued, and although the lawful exercise of its rights had been forbidden for a time, the possession had never ceased to exist.

That the order of the Magistrate was correct.

ON the 10th of November 1899, the Magistrate of Gobindpur, being satisfied from a police report and from oral evidence that a dispute in respect of a colliery known as Gansadi Mauza existed between the first and second party, and that a breach of the peace was likely to ensue, passed an *ex parte* order under s. 144 of the Code of Criminal Procedure by which both parties were prohibited from exercising any right of possession there and from doing anything likely to cause a breach of the peace. On the 29th of December 1899, the second party presented a [786] petition stating that he was informed of the first party's intention of taking forcible possession of Gansadi on the 10th January 1900, the date upon which the injunction would expire, and praying that he might be excluded from the operation of the order of the 10th of November or, failing that, a proceeding under s. 145 of the Code of Criminal Procedure might be instituted. The Magistrate ordered a proceeding under s. 145 to be drawn up and subsequently on the 29th of January 1900 having found that the second party was in possession of the colliery on the 10th of November 1899, the date when the injunction was issued, ordered that the second party be declared to be in possession of Gansadi Mauza, until evicted therefrom in due course of law, and he forbade all disturbance by the first party, or any one on their behalf of such possession, until such eviction.

Mr. Mehta (with him Babu Nolini Nath Sen) for the Petitioner.

Mr. Garth (with him Babu Jyoti Pershad Sarbadhicari) for the Opposite Party.

⁴ Criminal Revision No. 176 of 1900, made against the order passed by A. J. Chotzner, Esq., Joint Magistrate of Gobindpur, dated 29th of January 1900.

APRIL 20, 1900. The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

Prinsep, J.—The matter before us relates to an order passed under s. 145 of the Code of Criminal Procedure holding that Mr. Middleton was in actual possession of the colliery in dispute and should be so retained in possession until the matter in dispute had been settled by a competent Court.

The objection taken on which the rule was granted was that the Magistrate did not find actual possession on the 29th of December, the date on which he passed an order under s. 145 (1) for taking proceedings under that section, but that he found possession immediately before the 10th of November, the date of the order that he had passed between the parties under s. 144 of the Code of Criminal Procedure.

No doubt under s. 145 it is incumbent on a Magistrate ordinarily to find actual possession at the date of his passing an order under sub-sec. 1 and the proviso to sub-sec. 4 permits a Magistrate to consider previous possession within two months [787] before such date under the circumstances stated therein. It has been contended before us, and we think no objection can be raised to this argument that the circumstances of this case do not come within the terms of that proviso. It cannot be disputed that the Legislature could not have had in contemplation a case such as the present. The Magistrate has found that, by reason of the order under s. 144 passed on the 10th November, the possession of neither of the disputing parties existed from that date up to the date of the proceedings taken under s. 145, and consequently he has proceeded to consider the possession before the date of that order under s. 144, in order to determine who was lawfully in possession at that time, for it may be justly considered that the exercise of any rights on such possession was merely suspended by the order under s. 144. Some recent cases have shown to this Court how disastrously an order under s. 144 may operate in regard to the exercise of private rights of parties and the present case may be added to the list of those cases. Here the order recites that there was a dispute between the parties likely to cause a breach of the peace in regard to the possession of this colliery, and it was, accordingly, ordered that "neither party should exercise any act of possession there or do anything likely to lead to a criminal breach of the peace." The result of that order has been practically an attachment of the property, and it was not until the 29th December that the successor of the Magistrate, who had passed the order under s. 144, realized the necessity for proceedings under s. 145.

We have found in some cases that Magistrates pass orders under ss. 144 and 145 simultaneously. In the present case they were not passed simultaneously but consecutively, and we would draw attention to the terms of s. 145, which, if properly applied, provide a perfect remedy for any disturbance of this description relating to the possession of land, inasmuch as s. 145 permits a Magistrate, who may find the case to be one of emergency, to attach the subject of dispute pending his decision under that section. An order under s. 144, it should be remembered, can be passed *ex parte* also only in a case of emergency, but it remains in force only for two months, at the end of which time the cause of dispute and its probable [788] consequences will still remain. If, therefore, a Magistrate acts at once under s. 145, and, if necessary, attaches the land—the subject-matter in dispute—he acts more effectively than by an order under s. 144, because he puts himself into a position to settle the dispute between the parties, which is likely to disturb the public peace.

Mr. *Mehra*, who appears for the petitioner, contends that inasmuch as the Magistrate could not find actual possession at the time of his order under sub-sec. (1) of s. 145, he was bound under s. 146 to attach the property. We cannot agree in this. The result would be to put out of possession one of the parties at all events, who had held possession at least up to the date of the order under s. 144—an order which is declared to be only of temporary operation, and which could be passed only on an emergency to prevent an imminent breach of the peace. It might so happen that, if proceedings under s. 145 had not been taken, and when the order under s. 144 had, by lapse of time, ceased to have effect, the party in possession would be entitled to exercise his lawful right. But on the argument addressed to us by reason of the proceedings under s. 145, he would not be liable to prove his possession by exercise of such rights at the time that such proceedings were taken, because he had been restrained by the order under s. 144, and on this argument he would consequently be deprived of his possession. Thus it would follow that, by reason of the intervention of the Magistrate to prevent a breach of the peace, lawful possession would be disturbed. That could never be the intention of the Legislature. Section 146 was, in our opinion, intended to apply to a case in which, on the evidence before him, a Magistrate could not find possession with either of the parties. It seems to us that the proper way of dealing with this case in interpreting the Magistrate's order is to hold that, whereas by reason of the operation of his order under s. 144 of the 10th November no evidence could be offered to show the possession of either party from that date up to the 29th December, he was consequently obliged to ascertain the possession immediately before this order, and to regard his intervention as an attachment suspending the previous possession whatever it might be, but that at the same time the [789] former possession continued, and, although the lawful exercise of its rights had been forbidden for a time, the possession had never ceased to exist. In this view we think that the order of the Magistrate is correct and this rule must be discharged.

D. S.

Rule discharged.

NOTES.

[See also (1911) 22 M.L.J., 154 ; (1914) 26 M.L.J., 208.]

The 27th June and 3rd July, 1900.

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE PRATT.

Patit Shahu.....Defendant No. 1

versus

Hari Mahanti and others.....Plaintiffs.*

Landlord and tenant—Sale of tenure for arrears of rent—Act X of 1859—Non-attachment and non-publication of sale proclamation—Civil Procedure Code (Act XIV of 1859), s. 311—Non-registration of purchase in the landlord's sherishta.

There is no provision in Act X of 1859 under which the sale of a *jote* in execution of a rent decree is liable to be set aside on the ground of non-attachment and non-proof of publication of the sale proclamation.

In a case governed by Act X of 1859, it was *held* that a person, who had purchased a transferable *jote*, but who did not get his name registered in the landlord's *sherishta*, had no *locus standi* against a subsequent auction-purchaser of the *jote* in execution of a decree obtained against the recorded tenant, and had no right to impugn the title of the auction-purchaser under the sale.

Sham Chand Kundu v. Brojonath Pal Chowdhry, (1874) 12 B. L. R., 484 : 21 W. R., 94, followed.

A CERTAIN quantity of *tanaian bazasht* land, forming a saleable under-tenure, situate at Basantapatra, in the southern division of the Cuttack District, belonged to one Kulamoni Mahanti, the defendant No. 2. He sold a portion of the land to his relations Rahash Das, the defendant No. 3, and Paramananda Behara, father of Modan Behara, the defendant No. 4.

The defendants Nos. 2 and 3 and the father of defendant No. 4, it was alleged, sold the land to the plaintiffs, Hari [790] Mahanti and Baur Bandhu Das, for Rs. 475, by separate registered *kobalas*, dated the 8th April 1897. The plaintiffs, however, did not get their names registered in the landlord's *sherishta*. The defendant No. 5, who is the Raja of Puri, brought a suit, as landlord, against the defendant No. 2, the recorded tenant, for rent in respect of the land in dispute, and obtained an *ex parte* decree. In execution of that decree, the land was sold and purchased by one Patit Shahu, the defendant No. 1, on the 21st December 1897, for Rs. 75.

The plaintiffs brought the present action for the declaration of their title by purchase to the land in dispute, for the further declaration that the sale of the 21st December was collusive, having been brought about by the suppression of the sale proclamation, &c., and therefore null and void, for confirmation of their possession, for declaration that the plaintiffs were entitled to pay up the decree for rent, and for other reliefs.

The defendant No. 1, amongst other things, alleged that the *kobalas* under which the plaintiffs claimed the land in dispute were *benami* and collusive transactions, that the allegations by the plaintiffs as to the suppression of

* Appeal from Appellate Decree No. 2821 of 1898, against the decree of W. B. Brown, Esq., District Judge of Cuttack, dated the 29th of August 1898; confirming the decree of Babu Kishori Lal Sen, Munsif of Puri, dated the 29th of March 1898.

the sale proclamation, &c., were false, that the sale in execution of the rent decree was not brought about by fraud, and that the said defendant had been duly put in possession of the property after confirmation of the sale.

Upon these pleadings several issues were framed by the Munsif, and amongst them the following :—

Fourth (a) Whether the defendant No. 5 is only the assignee of rent of the village where the disputed holding is situate? What is his status?

(b) If only an assignee, could he bring the tenure in dispute to sale?

(c) And what is the effect of the sale?

The Munsif found that the *kobalas* under which the plaintiffs claimed were *boni fide* transactions, that the land was held under the Raja as landlord, that the Raja was only a co-sharer, and the decree must be taken as obtained by a co-sharer landlord, and as capable of execution under s. 108 of Act X of 1859. He also [791] found that there was no publication of the sale notification on the spot, and that, therefore, the sale in execution of the rent decree was a nullity, and further that the defendant No. 1 was not an innocent purchaser, he having tried to purchase the land at the time the plaintiffs did so, and, having been outbid by the plaintiffs, and having thus a sufficient motive to bring about the sale by suppression of the sale proclamation. Accordingly the Munsif set aside the sale, and directed that the defendant No. 1 should vacate the property, and that, *as between him and the plaintiffs*, the latter should recover possession of it. The Munsif, however, refused to grant the plaintiffs the other reliefs prayed for, *e.g.*, declaration of their title, confirmation of possession, &c., on the ground that they had not got their names registered in the landlord's *sherishta* as required by s. 27 of Act X of 1859.

The defendant No. 1 appealed to the District Judge, who dismissed the appeal, holding that no sale proclamation was published. The District Judge further held that, as the defendant No. 5 was a co-sharer landlord, the rent decree obtained by him should have been executed by the mode prescribed by the Civil Procedure Code, and, as there was no attachment in the present case, the sale would seem to be invalid on that ground also.

The defendant No. 1 thereupon appealed to the High Court. The appeal came on for hearing on the 27th June 1900.

Babu *Umakali Mukerjee* for the Appellant.

Babu *Monmohun Dutt* for the Respondent.

Cur. adv. vult.

JULY 3, 1900. The judgment of the High Court (**Rampini and Pratt, JJ.**) was as follows :—

In this suit the plaintiffs sue to have it declared (1) that a sale under Act X of 1859 of a certain under-tenure, at which the defendant No. 1 purchased it, be declared null and void; (2) that the plaintiffs have a good title to the tenure; (3) and that their possession of the same be confirmed.

[792] The tenure originally belonged to the defendant No. 2, who sold portions of it to defendant No. 3, and the father of defendant No. 4. The plaintiffs subsequently purchased it for Rs. 475, but they never got their names registered in the landlord's *sherishta*.

The landlord, who is the Raja of Puri, then sued the original tenant, defendant No. 2, got a decree, and in execution put the tenure up to sale, at which it was bought by defendant No. 1. Hence this suit.

The First Court found (1) that the plaintiffs were not entitled to a declaration of their right by purchase, for they had not registered their names in the

landlord's *sherishta* ; (2) that the sale, at which the defendant No. 1 purchased was invalid ; (3) that the plaintiffs were not entitled to a decree for confirmation of possession ; and (4) that the plaintiffs could not be declared entitled to pay the decree for rent, which the defendant No. 5 had obtained against the defendant No. 2.

The defendant No. 1 appealed to the District Judge. Before him it seems to have been argued that the sale under Act X of 1859 was a good sale, but the Judge considered it to be null and void (1) because the sale proclamation had not been duly published ; (2) because the decree was one obtained by a co-sharer, and should, therefore, have been executed in the mode prescribed by the Civil Procedure Code, and as there was no attachment in this case, the sale would seem to be invalid on that ground also.

The defendant No. 1 appeals, and on his behalf it has been contended that the want of attachment and sale proclamation are mere irregularities, which do not vitiate the sale. We are inclined to take this view of the matter. The non-attachment and the non-proof of publication of the sale proclamation might be very serious matters, if this were an application under section 311 of the Civil Procedure Code. But this is not such an application, and we do not think that the plaintiffs can have the sale set aside on the ground of such irregularities. There is no provision in Act X of 1859 which entitles them to have the sale set aside on such grounds.

But there is a more serious objection to the suit, and that is that on the Munsif's findings the plaintiffs are nobodies. The Munsif [793] has refused them the declaration sought for by them as to their title by purchase. The plaintiffs have been held not to be tenants of the land, for they have not registered their names in the landlord's *sherishta* and have not been recognized by him. They have, therefore, no *locus standi* and no right to impugn the defendant's purchase of the *jote*. See *Sham Chand Kundu v. Brojonath Pal Chowdhry* (1874) 12 B. L. R., 384 : 21 W. R., 94.

Their suit should therefore be dismissed.

For these reasons we decree this appeal and dismiss the plaintiffs' suit.

This order carries costs in all Courts.

M. N. R.

Appeal decreed.

NOTES.

[This decision was not approved in (1910) 37 Cal., 823. 12 C.L.J., 158, where it was held that want of registration of the purchaser's name as contemplated by section 27 of Act X of 1859 was no bar to his bringing a suit for possession of the property, that it could not throw any doubt upon the validity of the title, and that it could not be said that the purchaser had no *locus standi*.

Under the law as it stood before the Bengal Tenancy Act, 1885, was passed, the landlord was entitled to look to his recorded tenant for all rent until the name of the transferee had been recorded in his books :—(1911) 13 C.L.J., 613.

As regards the case where the sale is said to be affected by fraud or collusion, see also (1908) 16 C.L.J., 141 ; (1911) 10 I.C., 899 (Cal.).]

[27 Cal. 793]

The 5th December, 1899.

PRESENT:

MR. JUSTICE RAMPINI AND Mr. JUSTICE WILKINS.

Raj Narain Mitter, Receiver to the Paikpara Estate.....Plaintiff

versus

Ekadasi Bag... ..Defendant.*

Right of suit—Jurisdiction of Civil Court—Obstruction to public way—Suit by Zemindar for removal of obstruction—Special damage—Special inconvenience—Cause of action.

No suit lies for the removal of an obstruction to a public way, unless the plaintiff proves special damage from the obstruction; and this equally applies, whether the plaintiff is a zemindar or any ordinary member of the community.

THE plaintiff, as receiver of the Paikpara estate, brought this action on the allegation that the defendant, by erecting a pucca wall and a hut on a public road running through Mouza Gopalpore appertaining to the said estate, had almost closed and blocked up the road. The suit was for a declaration that the land encroached on by the defendant was a part of a public road within the said estate, and for recovery of khas possession of the land after removal or demolition of the structures raised.

The defendant, amongst other things, contended that the [794] suit was not maintainable at the instance of the plaintiff, unless any special inconvenience to him was shown.

The Munsif found upon the evidence that the defendant had made the encroachment complained of, and decreed the suit.

Upon appeal, the Subordinate Judge, while agreeing with the Munsif as to the fact of the alleged encroachment, held that the suit was not maintainable, without proof of any special inconvenience to the plaintiff caused by the obstruction complained of. The Subordinate Judge went on to observe:—

"It has been held in the case of *Baroda Prasad Mostafi v. Gora Chand Mostafi*, (1869) 3 B.L.R., A.C., 295 · 12 W.R., 160, that a suit will not lie for obstructing a public road without showing any particular inconvenience to the plaintiff in consequence of the obstruction. Sir BARNES PEACOCK, Chief Justice, observed in this case: 'The plaintiff sues defendant for obstructing a public road, without showing that he has sustained any particular inconvenience in consequence of that obstruction. If he can maintain this suit, any member of the public can do so, and the defendant may be ruined by innumerable actions by persons who have not sustained a farthing of damages. It is said that the plaintiff has a right to sue, because he was one of the persons, who dedicated the road to the public; but it is not because he gave the road to the public that he is necessarily entitled to be the guardian of the public, and to sue whenever there is any obstruction to the public which causes him no inconvenience beyond that which is sustained by every other member of the public.'

"In the case of *Ramtarak Karati v. Dina Nath Mandal*, (1871) 7 B.L.R., A.C., 184, it has been held that a suit for declaration of right of way by a public road will not lie, where there is no allegation of special injury or inconvenience to the plaintiff. In this case, Mr. Justice GLOVER cited the case of *Pyari Lal v. Rooke*, (1869) 3 B.L.R., A.C., 305: 12 W.R., 199, 'in which it was laid down that a Civil Court had no jurisdiction to enquire

* Appeal from Appellate Decree No. 1171 of 1998, against the decree of Babu Chandi Charan Sen, Officiating Subordinate Judge of Midnapur, dated the 10th of March 1898, reversing the decree of Babu Kailash Chunder Sen, Munsif of Tamlukh, dated the 31st of May 1897.

abstractedly into a public right, otherwise than as collaterally to a suit arising out of a private injury; and again, in the case of *Hira Chand Banerjee v. Shama Charan Chatterjee*, (1869) 3 B.L.R., A.C., 351: 12 W.R., 275, it was laid down that any question as to the opening or closing of a public road belongs to the Criminal, and not the Civil Court, and that such question can only be enquired into in a Civil Court as ancillary to the question whether or not any damage has been done to the plaintiff.

[796] "In the case of *Bhugeeruth Dass v. Chundee Churn*, (1874) 22 W.R., 463, it was held by Mr. Justice KEMP that no one has a right to sue in respect of the obstruction of a public road, even if he dedicated that road to the public, without showing that he has sustained particular inconvenience in consequence of the alleged obstruction.

"The High Court of Bombay, in the case of *Satku Valad Kadir v. Ibrahim Valad Mirza*, (1877) I. L. R., 2 Bom., 457, having very exhaustively discussed this question of law, arrived at the conclusion that no person can maintain a Civil suit in respect of obstruction in the public road, unless he can prove some particular damage to himself personally in addition to the general inconvenience occasioned to the public.

"But the High Court of Allahabad, in the case of *Tota v. Sardul Singh*, (1888) I.L.R., 10 All., 553, held that the rule of English law that a member of the public cannot maintain an action for obstruction to a public road without shewing special injury to himself beyond that suffered by any member of the public, does not apply to a zemindar who or whose predecessor in title had dedicated to the public the road over his zemindari land. This ruling is no doubt in conflict with the several rulings of the High Court of Calcutta which I have quoted in the preceding part of this judgment. In the case of *Baroda Prosad Mostafi v. Gora Chand Mostafi*, (1869) 3 B.L.R., A.C., 295: 12 W.R., 160, Sir BARNES PEACOCK, Chief Justice, held that a donor does not by dedicating a thing to the public necessarily become a guardian of the public *quoad* that thing; and in the case of *Bhugeeruth Dass v. Chundee Churn*, (1874) 22 W.R., 463, Mr. Justice KEMP held that no one has a right to sue in respect of the obstruction of a public road, even if he dedicated that road to the public, without showing that he has sustained particular inconvenience.

"In the case of *Tota v. Saradul Singh*, (1888) I.L.R., 10 All., 553, Sir JOHN EDGE, Chief Justice, held that a zemindar in giving the public right of road or way over his land, 'does not give the public or any one else a right to interfere with the soil of the road, as for instance, by building a house upon it * * *'. In such a case the zemindar has, in common with the public, the right to use the road as a road, and over and above it, he has a right to the soil in the road which he had never given to the public. In an action of this kind, the zemindar does not sue as a guardian of the public, but in respect of an interference of his own right of property. But Sir BARNES PEACOCK observed that the persons who dedicate a road to the public have no greater [796] right to the road dedicated by themselves than any member of the public. Sir JOHN EDGE, in his attempt to distinguish the case instituted by the zemindar from the case of *Baroda Prosad Mostafi*, (1869) 3 B.L.R., A.C., 295: 12 W.R., 160, decided by Sir BARNES PEACOCK, observed. 'In the case decided by Sir BARNES PEACOCK that learned Judge seemed to think that if the plaintiff in that case were allowed to maintain his action, all the public would have a general right to maintain an action against the defendant. I think that learned Judge overlooked the distinction between the rights of the public and the rights of the zemindars.' But it does not appear that there is any distinction between the dedication made by the ordinary donor and the dedication made by the zemindar. If an ordinary donor by dedicating a piece of land for the purpose of being used as a public road loses all his rights to it except the right of using it as a road, then there is no reason why in a case of similar dedication by a zemindar it is to be presumed that he reserved to himself a portion of his private rights of property.

"In support of the view taken by Sir JOHN EDGE in the case of *Tota v. Sardul Singh*, (1888) I. L. R., 10 All., 553, His Lordship cited the case of *Dovaston v. Payne*, Smith's L. C., Vol. II., p. 154, in which it has been held that 'the property of a highway is in the owner of the soil, subject to an easement for the benefit of the public.' But it is to be borne in mind that the rights and position of a proprietor of land in England are quite different

from the rights and position of the proprietors of land in India called zemindars. Property in the English sense of the term, that is, a right to the exclusive use and absolute disposal of the soil, can hardly be claimed by the zemindars in this country. Consequently it is doubtful whether the principle laid down in these English cases would be made applicable to a case of this kind. But even if it is conceded that the principle laid down in the case of *Dovaston v. Payne*, Smith's L.C., Vol. II, p. 154, and *R. v. Pratt*, 4 E. and B., 860, is applicable to this case, and that a zemindar grantor or donor in dedicating land for the purpose of being used as a public road reserves to himself the right to the soil, still the case would not be maintainable in consequence of the special law of procedure prescribed for the trial of this class of cases. . . .

"It is for these reasons that I find that the present suit is not maintainable at the instance of the plaintiff and it should therefore be dismissed."

The plaintiff appealed to the High Court.

Babu Mohun Chand Mitter for the Appellant.

[797] Babu Lal Mohun Dass and Babu Sarat Chandra Dutt, for the Respondent, were not called upon.

The judgment of the High Court (Rampini and Wilkins, JJ.) was as follows:—

This is an appeal against a decision of the Subordinate Judge of Midnapur, dated the 10th March 1898.

The suit is one relating to an obstruction on a public road. It is said that the defendant has erected a portion of a wall and a portion of a hut on a public thoroughfare; and the plaintiff sues for their removal.

The Lower Appellate Court has found that the plaintiff has not proved any special damage or inconvenience; and, therefore, the road being a public road, he has his remedy under the Code of Criminal Procedure and is not entitled to sue in a Civil Court.

We think there is no ground for interfering with the decision of the Court below.

The learned pleader for the appellant has argued at very great length that his client, being a zemindar, has a right of ownership in the land; and he has relied upon certain cases decided by the Allahabad High Court and upon certain English authorities. We are of opinion, however, that these decisions of the Allahabad High Court and the English authorities he has cited do not bind us. The law current in this province, and which we are bound to administer, is as laid down in the case cited by the learned Subordinate Judge, namely, that of *Baroda Prosad Mostafi v. Gora Chand Mostafi*, (1869) 3 B.L.R., A.C., 295; 12 W. R., 160. We think that the Subordinate Judge has very correctly laid down the law as current in this province, which is to the effect that in a road which is a public thoroughfare, unless the plaintiff proves special damage from the obstruction, he is not entitled to bring a suit. This equally applies, whether he is a zemindar or any ordinary member of the community.

The only case decided by this Court which can at all be said to be in favour of the contention of the pleader for the appellant [798] is the case of *Jaggamoni Dasi v. Nilmoni Ghosal*, (1882) I. L. R., 9 Cal., 75. But that was a perfectly different case from the present one. That was a case with regard to a bathing ghat in which it was held that the zemindar had only granted an easement to the public, but had not dedicated the ghat to them; and that the ghat was not a public thoroughfare within the meaning of section 521 of the Code of Criminal Procedure (Act X of 1872). That being so, it has no application to

the present case. For these reasons we think there is no ground to interfere with the decision of the Lower Appellate Court and we dismiss this appeal with costs.

M. N. R.

Appeal dismissed.

NOTES.

[The C.P.C., 1908, sec. 91, provides for suits regarding public nuisances even where no special damage has been caused. See also (1914) 22 I.C., 916 (Cal.).]

[27 Cal. 798]

CRIMINAL REVISION.

The 7th May, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HANDLEY.

Jhumuck Jha.....Complainant

versus

Pathuk Mandal and others.....Accused.*

District Magistrate, power of, to pass orders in cases before Subordinate Court, without transfer to his own Court—Judicial enquiry before issue of process, legality of—Code of Criminal Procedure, ss. 192, 202, 203 and 204.

Held, where the complaints were not made to the District Magistrate, nor had the cases based on those complaints been withdrawn to his Court by any order, but were in the Court of a Joint Magistrate, who had examined the complainants, that the District Magistrate was not justified in interposing in the trial of the cases and had no authority under the law to pass any orders in those cases.

That even if the cases had been removed by the District Magistrate to his own Court for trial it was very questionable whether the District Magistrate could pass orders directing a judicial inquiry by another Magistrate before the issue of processes so as to postpone the trial.

IN this case it appeared that several complaints were made to the Joint Magistrate of Durbhanga on behalf of certain landlords against a large body of tenants charging them with [799] offences, which may be described as criminal trespass or assault, or rioting. After examination of the complainants the Magistrate in one, if not more, of these cases ordered process to issue, but immediately afterwards cancelled that order dealing with all these cases by another order referring them all to the District Magistrate, who thereupon ordered a judicial inquiry to be held in each of these cases by Subordinate Magistrates deputed for that purpose.

Mr. Garth (with him Babu *Buldeo Naram Singh*) for the Petitioner.

The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

Prinsep, J.—These rules may be dealt with simultaneously as the matters involved are the same in all of them. It appears that some eight

* Criminal Revision Nos. 274 to 281 of 1900, made against the order passed by H. Wheeler, Esq., District Magistrate of Durbhanga, dated the 27th of March 1900.

complaints were made to the Joint Magistrate of Durbhanga on behalf of the landlords against a large body of tenants charging them with offences, which may be shortly described as criminal trespass or assault and possibly rioting. After examination of the complainants the Magistrate in one, if not more of these cases ordered processes to issue, but immediately afterwards cancelled that order dealing with all these cases by another order referring them all to the District Magistrate. The District Magistrate thereupon ordered a judicial inquiry to be held in each of these cases by Subordinate Magistrates deputed for that purpose. The question is whether the District Magistrate had any authority under the law to pass any orders in these cases, seeing that the complaints were not made to him nor had the cases based on those complaints been withdrawn to his Court by any order, and next whether, even if the District Magistrate had jurisdiction to pass any order on these complaints, he was authorized to pass the order or orders for judicial inquiry, thus suspending the issue of the usual processes for the attendance of the accused and the trials.

We have received a letter from the District Magistrate in explanation of the matters stated in the affidavit, and the petition presented to us on which these rules have been granted. We are unable from that explanation to ascertain clearly with whom [800] the distribution of business within what is known as the *Sudder* Sub-Division of Durbhanga rests. The Joint Magistrate undoubtedly had jurisdiction to receive complaints under s. 191 of the Code of Criminal Procedure, and therefore, we may take it that, unless any complaint so made to him had been withdrawn from his Court, and the case had been made over to another Magistrate by an order under s. 192, the Joint Magistrate would have jurisdiction to deal with the case under ss. 202, 203 and 204. There is no order that has been brought to our notice by which the District Magistrate has withdrawn these cases to his own Court, or has distributed them amongst any other Subordinate Courts. It seems that by some executive order the District Magistrate had directed that all cases between these parties should be sent to him as he wished to see them, and for this purpose it would seem that these cases were sent to the District Magistrate. But this order did not justify the District Magistrate interposing in the trial of these cases, unless he thought it proper to remove them to his own Court, and we cannot find that it has been anywhere stated that such trials have been removed from the Court of the Joint Magistrate. The orders directing a judicial inquiry by another Magistrate before the issue of processes, so as to postpone the trials, were therefore without any authority. In the next place it is very questionable whether such an order could be passed, even if the cases had been removed by the District Magistrate to his own Court for trial. The law ordinarily provides that, after the examination of the complainant, on a complaint made to a Magistrate, process for the attendance of the accused shall issue, and it is only when, in the terms of s. 202, the Magistrate after examining the complainant has reason to doubt the truth of the complaint, that he is authorized to suspend the issue of such process and to hold an inquiry or investigation into the truth of the complaint. The rules, therefore, must be made absolute, and the orders for judicial inquiry set aside, the complaints being placed before the Joint Magistrate, who will proceed in accordance with law.

D. S.

Rules made absolute.

NOTES.

[In (1911) 39 Cal., 119 this decision was distinguished.]

[801] APPELLATE CIVIL.

The 25th and 29th June, 1900.

PRESENT :

MR. JUSTICE RAMPINI AND MR. JUSTICE PRATT.

Dhan Bibi and another.....Defendants Nos. 1 and 5

versus

Lalon Bibi (Plaintiff).....and Parbati Bai and others Defendants Nos. 2 to 4.*

Mahomedan Law—Sunnis—Acknowledgment, effect of—Legitimacy of children—Fornication.

Under the Mahomedan law, where a child is begotten by a Mahomedan father by a Hindu prostitute living with him, no acknowledgment by the father can confer on the child the status of legitimacy.

ONE Khoda Baksh brought one Parbati Bai, a Hindu, from her mother's village and kept her in his house, where she lived as his concubine. The plaintiff, Lalon Bibi, is the issue of that connection. The present suit was instituted by the plaintiff to establish her right to, and to obtain possession of, a 12 annas share of the property left by her deceased father, the said Khoda Baksh. She alleged that her mother Parbati became a Mahomedan and was duly married by Khoda Baksh, and further that she was acknowledged by her father as his legitimate daughter.

The Judge before whom the case came on appeal held that Parbati never became a Mahomedan and consequently any marriage between her and Khoda Baksh would be invalid. With regard to the question of acknowledgment, the Judge found that "Khoda Baksh did formally acknowledge the plaintiff to be his daughter on the occasion of her marriage" and accordingly decreed the suit. On appeal, the High Court remanded the case to the Judge for retrial on the ground that the Judge should have found whether Khoda Baksh had acknowledged the plaintiff as his *legitimate* daughter.

[802] The District Judge, on remand, found that Khoda Baksh had acknowledged the plaintiff as his legitimate daughter, and accordingly allowed the appeal and gave the plaintiff a decree for her 12 annas share of the property, less the portion alienated to one of the defendants, against whom her claim was held barred by limitation.

Thereupon the defendants Nos. 1 and 5 again appealed to the High Court. The appeal came on for hearing on the 25th June 1900.

The *Advocate-General* (Mr. J. T. Woodroffe) (Moulvi Mahomed Yusuf and Babu Manmatha Nath Mitter with him) for the Appellants.—Upon the finding of fact arrived at by the lower Court, the question of acknowledgment does not arise. When the paternity of an illegitimate child is known, no acknowledgment can legitimatise the child. See Wilson's *Digest of Anglo-Muhammadian Law*, pp. 85—88; *Mahammad Allahdad Khan v. Mahammad Ismail Khan*, (1888) I. L. R., 10 All., 289; *Liaquat Ali v. Karimunnissa*, (1893) I. L. R., 15 All., 396; and *Aizunnissa Khatoon v. Karimunnissa Khatoon*, (1895) I. L. R., 23 Cal., 130. There is no reported case in which a contrary view has been

* Appeal from Appellate Decree No. 2297 of 1898, against the decree of W. B. Brown, Esq., District Judge of Cuttack, dated the 2nd and 12th of September 1898, reversing the decree of Babu Kali Kumar Bose, Subordinate Judge of that District, dated the 13th of March 1895.

taken. In the Privy Council case of *Abdul Razak v. Aga Mahomed Jaffer Bindanim*, (1893) I. L. R., 21 Cal., 666, the present question was not decided.

Mr. O'Kinealy (Babu Monmohan Dutl with him) for the Respondent.—The remand order disposes of the present contention, and the only question left open was whether there was any acknowledgment of legitimacy. As to the question of law, a marriage between Khoda Baksh and Parbati Bai was a possible one, as Parbati might have become a Mahomedan. See Amir Ali's *Students' Handbook of Mahomedan Law*, pp. 49, 55. The observations relied upon by the Advocate-General in *Mahammad Allahdad Khan v. Mahammad Ismail Khan*, (1888) I. L. R., 10 All., 289; and *Aizunnissa Khatoon v. Karimunnissa Khatoon*, (1895) I. L. R., 23 Cal., 130, are *obiter* [803] *dicta*. It has been held that where there was no marriage between the parents, the offspring might be legitimated by acknowledgment: *Mahammad Azmat Ali Khan v. Lallu Begum*, (1881) I. L. R., 8 Cal., 422; *Sadakat Hossein v. Mahomed Yusuf*, (1883) I. L. R., 10 Cal., 663; I. L. R., 11 I. A. 31; and *Abdul Razak v. Aga Mahomed Jaffer Bindanim*, (1893) I. L. R., 21 Cal., 666. [RAMPINI, J.—In the last case it was found that there was no acknowledgment.] Else, why did their Lordships in the last cited case go into the question of acknowledgment? As it was found in that case that there was no marriage, their Lordships might have said, as has been contended in this case, that the question of acknowledgment did not arise. See *Nujmooddeen Ahmed v. Beebee Zuhoorum*, (1868) 10 W. R., 45. [RAMPINI, J.—See Amir Ali's *Personal Law of the Mahomedans*, p. 218.] The effect of acknowledgment is to legitimatise a child between whose parents a marriage was possible. It may be said that the principle relied upon by the other side in *Mahammad Allahdad Khan v. Mahammad Ismail Khan*, (1888) I. L. R., 10 All., 289, has been impliedly overruled by the Privy Council in the case of *Abdul Razak v. Aga Mahomed Jaffer Bindanim*, (1893) I. L. R., 21 Cal., 666.

Cur. adv. vult.

JUNE, 20. The judgment of the High Court (Rampini and Pratt, JJ.) was as follows:—

This is a suit brought by one Lalon Bibi to establish her right to obtain possession of a 12 annas share of the property of one Khoda Baksh, now deceased. The plaintiff alleges that her mother Parbati, who was a Hindu, became a Mussulman, and was married by Khoda Baksh, that she is the result of their union and was acknowledged by Khoda Baksh to be his legitimate daughter, and that she is accordingly entitled to the share of the property claimed by her.

The defence is that Parbati never became a Mahomedan, and was never married by Khoda Baksh, and that the plaintiff never was acknowledged by Khoda Baksh to be his daughter.

[804] The first District Judge, before whom the case came, found that Parbati was a Hindu prostitute, who lived with Khoda Baksh as his mistress; she never became a Mahomedan and Khoda Baksh never married her. He found, however, that Khoda Baksh had, before his death, acknowledged the plaintiff as his daughter.

When this case first came before this Court, *viz.*, on the 22nd March 1898, it was considered by it that it was necessary to remand the case to the District Judge to have a more explicit finding as to the nature of the acknowledgment made by Khoda Baksh with regard to the plaintiff and as to whether Khoda Baksh had acknowledged her to be his legitimate daughter. The District Judge, a different Judge from the first, has now found that the acknowledgment of Khoda Baksh with regard to the plaintiff went as far as

this, and that he meant to and did acknowledge her as his legitimate daughter. He affirmed the other findings of his predecessor and gave the plaintiff the same decree as had been given her before the remand.

The defendants again appealed to this Court and on their behalf it has been urged before us that according to the Mahomedan law of the Sunnis, to which sect the parties belong, Khoda Baksh could not legally acknowledge the plaintiff to be his daughter and that no acknowledgment by him could confer on her the status of his legitimate offspring, because Parbati has been found never to have become a Mussulman and so Khoda Baksh could not and did not marry her. The plaintiff is, therefore, it is said, in the position of an illegitimate child, whose paternity is known, and hence she cannot be legitimated. In support of this view the cases of *Mahammad Allahdad Khan v. Mohammad Ismail Khan*, (1888) I. L. R., 10 All., 289; *Liaquat Ali v. Karimunnissa*, (1893) I. L. R., 15 All., 396; and *Aizunnissa Khatoon v. Karimunnissa Khatoon*, (1895) I. L. R., 23 Cal., 130, have been cited.

On behalf of the respondent, on the other hand, the Privy Council cases of *Mahammad Azmat Ali Khan v. Lalli Begum*, (1881) I. L. R., 8 Cal., 422; *Sadakat Hossein v. Mahomed Yusuf*, (1883) I. L. R., 10 Cal., 663; I. R., 11 I. A. 31, and *Abdul Rozak v. Aga* [805] *Mahomed Jaffer Bindarim*, (1893) I. L. R., 21 Cal., 666, have been relied on as showing that an illegitimate daughter in the position of the plaintiff can by the acknowledgment of her father be legitimated and placed in the position of an heir.

On behalf of the respondent it has also been contended that the question raised by the appellants does not properly arise in the appeal, as this Court by its order of remand in this case meant to lay down that, if the plaintiff were found by the District Judge to have been acknowledged by Khoda Baksh to be his legitimate daughter, that was conclusive of her right to succeed in this case.

We will first dispose of this latter plea. As one of the members of the present bench was a member of the bench that remanded this suit, it may be said with confidence that this Court, when it remanded the case, had no intention of deciding, nor did it decide, the important question of Mahomedan law now raised by the appellants. The object of the remand was rather to see, whether it was really necessary to enter into this question: for, if the plaintiff had not been found to have been acknowledged to be the legitimate daughter of Khoda Baksh, then on the other findings of the District Judge, the whole suit would have failed. It is only when the District Judge has found that the plaintiff was so acknowledged by Khoda Baksh, that it becomes necessary to determine what the legal effect of that acknowledgment was. This Court when it passed the order of remand not unnaturally wished to have the full facts of the case clearly before it.

Turning to the cases cited on behalf of the appellants it must be admitted that the case of *Mahammad Allahdad Khan*, (1888) I. L. R., 10 All., 289, fully supports the contention that the plaintiff by Khoda Baksh's acknowledgment could not be legitimated. It is there laid down by MAHMUD, J., that "there is no warrant in the principles of the Mahomedan law to justify the view that a child proved to be the offspring of fornication, adultery or incest could be made legitimate by any act of acknowledgment by the father. The rule is limited to cases of uncertainty of legitimate descent and proceeds entirely upon an assumption of legitimacy, and the establishment of such legitimacy by the force of such acknowledgment."

[806] Mr. Justice STRAIGHT in the same case says:—"Where there is no proof of legitimate birth or illegitimate birth and the paternity of a child is unknown in the sense that no specific person is shown to have been his father,

then his acknowledgment by another, who claims him as his son, affords a conclusive presumption that the child acknowledged is the legitimate child of the acknowledger and places him in that category." From this, it would seem that Mr. Justice STRAIGHT was of the same opinion as Mr. Justice MAHMUD, viz., as expressed in another portion of the latter's judgment, that, "children born of *zina* (which means fornication, adultery or incest) can never be legitimated or entitled to inherit from their father, nor can such children be made legitimate by any kind of acknowledgment where the illegitimacy is proved and established." It must, of course, be admitted that these observations of STRAIGHT and MAHMUD, JJ., are *obiter dicta*, as the decision of this case proceeded on another point. But their views have been followed in two cases, viz., in *Liaquat Ali v. Karimunnissa*, (1893) I. L. R., 15 All., 39, in which case the child was the result of adultery and was accordingly held not capable of being legitimated by acknowledgment, as his father could not have married his mother, the latter being at the time of the child's birth the wife of another man. The second case in which the views of STRAIGHT and MAHMUD, JJ., above quoted, were followed, is the case of *Aizunnissa Khatoon v. Karimunnissa Khatoon*, (1895) I.L.R., 23 Cal., 130, which may be said to be the case of a child whose birth was the result of what would seem to be regarded in Mahomedan law as an incestuous union. It was the case of a Mahomedan marrying the sister of his wife. It was held that such a marriage was void and that the children of such marriage were illegitimate and could not inherit. The Judges who decided that case, PETHERAM, C.J., and BEVERLEY, J., observed:—"The doctrine of acknowledgment is not applicable to a case in which the paternity of the child is known and it cannot be called in to legitimate a child which is illegitimate by reason of the unlawfulness of the marriage of its parents. This was distinctly laid down in the case of *Mahammad Allahdad [897] Khan v. Mahammad Ismail Khan*, (1888) I. L. R., 10 All., 289." The learned Judges proceed to refer to Mr. Justice AMEER ALI's *Personal Law of the Mahomedans*, at p. 218 of which the following passage occurs: "A child whose illegitimacy is proved beyond doubt by reason of the marriage of its parents being either disproved or found to be unlawful cannot be legitimatised by an acknowledgment. Acknowledgment has only the effect of legitimation where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty."

Mr. Justice AMEER ALI in his *Students' Handbook of Mahomedan Law*, p. 54, has said "the person acknowledged must be of *unknown* birth. If the parentage is *known* to belong to somebody else, no ascription can take place to the acknowledger."

The present is an instance of the third of the cases referred to by Mr. Justice MAHMUD, viz., where the child is the result not of adultery or incest, but of fornication. It would seem to us that on the authorities cited above, we must hold that the acknowledgment by Khoda Baksh was of no avail and could not confer on the plaintiff the status of a legitimate child or of an heir. The paternity of the plaintiff is quite certain. It is admitted that Khoda Baksh was her father. Her mother is also known. She was Bai Parbati, a Hindu prostitute, whom Khoda Baksh did not marry and could not marry, for she was a Hindu at the time of Khoda Baksh's death.

The lower Courts rely on a passage at p. 277 of Mr. Justice AMEER ALI's *Lectures* as showing that the plaintiff might be legitimated by acknowledgment. The passage in question is to the effect that "when a Mahomedan marries a Hindu woman, the marriage is only invalid and does not effect the legitimacy

of the offspring. I have already described the reasons which led to the prohibition of inter-marriages between Moslems and idolatrous females and also between non-Moslems and Moslemahs. In either case as already related though the marriage is invalid, the issues of the union are legitimate."

This passage has, however, in our opinion no application to the present case; for, in this case, there is now no question of [808] marriage. It has been found that Khoda Baksh never married plaintiff's mother.

There appears to us to be no direct authority against the above cited cases and views. The Privy Council cases quoted by the learned counsel for the respondents do not deal directly with the questions arising in the appeal. The case of *Mahammad Azmat Ali Khan*, (1881) I.L.R., 8 Cal., 422, appears to us to contain no passages directly in point. In the case of *Sadakat Hossein*, (1883) I. L. R., 10 Cal., 663, their Lordships of the Privy Council considered they were relieved by the view they took of the evidence "from offering any opinion upon the very important question of law which was raised by the counsel for the appellant, namely, whether, if there had been this marriage (i.e., between the mother of the claimant and a third person, subsisting at the time of her connection with the acknowledged and of the conception of the claimant) the offspring of the adulterous intercourse could have been legitimated by any acknowledgment. Their Lordships therefore expressly declined to decide the point subsequently decided in *Liaquat Ali v. Karimunnissa*, (1893) I.L.R., 15 All., 396.

The third case is that of *Abdul Razak v. Aga Mahamel Jaffar Bindann*, (1883) I. L. R., 21 Cal., 666. This case has some points of similarity with the present case. It was a case in which the question was of the legitimacy of a son born to a Mahomedan by a Burmese woman. In this case, as in the present, the Court below found that the Burmese woman had never been converted to the Mahomedan religion and that no marriage of the parents had ever taken place. But it was further found that no acknowledgment of the son's being of legitimate birth had taken place and that a mere recognition of sonship was insufficient to effect the son's legitimation. On this ground the suit was dismissed. Now, in this case no question as to whether the father could have entered into a valid marriage with the mother, without her having relinquished Buddhism, arose, or was decided. Hence, it appears [809] to us that that case affords no assistance to us in deciding the present one. But the learned Counsel for the respondent contends that this question was impliedly decided, and that if their Lordships of the Privy Council had not thought that the son could in the circumstances have been legitimised by acknowledgment by the father, they would not have considered and decided whether he had acknowledged him.

We are, however, unable to concur in this view. Whatever may have been passing in their Lordships' minds, they have, in their judgment, said nothing which can be any guide to us in deciding the present case.

The learned counsel for the respondent further urges that, as there was no insurmountable obstacle to the marriage of the parents of the plaintiff, that is to say, as the plaintiff's mother, Parbati, might have been converted to Mahomedanism and as Khoda Buksh might then have married her, the plaintiff's acknowledgment by Khoda Buksh could effect legitimation. But the learned counsel has cited no authority for this proposition, except the general rule laid down in the text books and in many cases of the Courts that children of unknown paternity can be legitimated by acknowledgment. But this does not seem to us to have any direct bearing on the question raised by the appellant in this appeal.

For these reasons we feel constrained to set aside the findings of the lower Court, and to hold that the plaintiff could not in the circumstances be legitimized by Khoda Baksh's acknowledgment. She is therefore not one of his heirs, and cannot succeed in this suit.

The appeal is accordingly decreed and the suit dismissed with costs.

M. N. R.

Appeal decreed.

NOTES.

[This was followed in (1905) 32 Cal., 871 : 9 C.W.N., 1003 : 2 C.L.J., 97 ; (1908) P.L.R., 190 ; (1909) 11 Bom. L.R., 1117 ; see also (1904) 9 C.W.N., 352.]

[810] *The 21st March, 1900.*

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE, AND MR. JUSTICE BANERJEE.

Set Umedmal and anotherPetitioners

versus

Srinath Ray and another.....Decree-holders.*

Civil Procedure Code (Act XIV of 1882), ss. 108, 244 and 314--Sale in execution of an ex parte decree and purchase by the decree-holder—Confirmation of the sale—Subsequent setting aside of the ex parte decree—Application by a subsequent purchaser in execution of another decree, to set aside the sale on the ground that the ex parte decree had been set aside.

Certain immoveable properties were sold in execution of an *ex parte* decree and were purchased by the decree-holder himself. After the confirmation of the sale, the decree was set aside under s. 108 of the Civil Procedure Code at the instance of some of the defendants in the original suit. On an application under s. 244 of the Civil Procedure Code having been made by a prior purchaser of the said properties in execution of another decree, to set aside the sale held in execution of the *ex parte* decree the defence was that the application could not come under s. 244 of the Civil Procedure Code, and that the sale could not be set aside, as it had been confirmed.

Held, that the case was one under section 244 of the Civil Procedure Code ; and that the *ex parte* decree having been set aside the sale could not stand inasmuch as the decree-holder himself was the purchaser.

Doyamoyi Dasi v. Sarat Chunder Mozumdar, (1897) 1. L. R., 25 Cal., 175 ; *Beni Persad Koeri v. Lakhi Rai*, (1898) 3 C. W. N., 6 ; *Durga Charan Mandal v. Kali Prasanno Sarkar*, (1899) 1. L. R., 26 Cal., 727 ; *Nawab Zainal ud-din Khan v. Muhammed Asghar Ali*, (1887) L. R., 15 I. A., 12 (15) ; 1. L. R., 10 All., 166 ; and *Mina Kumari Bibee v. Jagat Sattani Bibee*, (1883) 1. L. R., 10 Cal., 220, referred to.

* Appeal from Order No. 221 of 1899, against the order of Babu Rajendra Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 17th of April 1899.

THIS appeal arose out of an application by the representative of the judgment-debtors to set aside a sale of certain immoveable properties. The facts are shortly these: An *ex parte* decree was passed in favour of one Rajah Srinath Ray and others on the 13th February 1896, in a suit to enforce an equitable mortgage. Some of the mortgaged properties, which were sold in execution thereof, [811] were purchased by the decree-holders themselves on the 19th January 1897. The sale was confirmed on the 22nd February 1897. Subsequently to the sale two of the defendants, in the mortgage suit, who were minors, through their mother as guardian, applied to set aside the *ex parte* decree, which was set aside by the High Court on appeal, on the 8th September 1898. On the 27th February 1899, the present petitioners applied to set aside the sale. Their case was that in execution of a money decree obtained by certain persons against the defendants in the mortgage suit, the said properties were purchased partly by one Chuni Lal and partly by one Sarup Kasturi for their benefit, on the 11th June 1896, and that therefore they were entitled to apply under s. 244 of the Civil Procedure Code to set aside the sale held in execution of the *ex parte* decree, inasmuch as the said decree was set aside. The Court below rejected the application. Against this decision the petitioners appealed to the High Court.

Dr. Ashutosh Mookerjee (with him Babu Sarat Chunder Ghose) for the Appellants.—In execution of an *ex parte* decree certain immoveable properties were sold and were purchased by the decree-holders themselves. Later on the *ex parte* decree was set aside. Now the question is whether the sale should be set aside. The present petitioners are the representatives of the judgment-debtors, and as such they are entitled to come under s. 244 of the Civil Procedure Code and to ask to set aside the sale: See the cases of *Bem Persad Koeri v. Lakhi Bai*, (1898) 3 C. W. N., 6, and *Durga Charan Mandal v. Kali Prasanno Sarkar*, (1899) I. L. R., 26 Cal., 727. When a decree-holder in execution of his decree purchases certain property, if the decree is subsequently set aside, the sale also falls to the ground. See the cases of *Nawab Zainul-ab-din Khan v. Muhammed Asghar Ali*, (1887) I. L. R., 15 I. A., 12; I. L. R., 10 All., 166, and *Mina Kumari Bibee v. Jagat Sattani Bibee*, (1883) I. L. R., 10 Cal., 220.

Dr. Rash Behari Ghosh (with him Babu Bussunt Kumar Bose, [812] for the Respondents.—It has been said that the question which has been raised is a question under s. 244 of the Civil Procedure Code, but the appellants do not appear on the record, as the representatives of the judgment-debtors, and they cannot now be treated as the representatives. Is the question, which the other side is seeking to raise now, a question in execution of the decree? I submit not. It is a question of restitution. I refer to s. 583 of the Civil Procedure Code to show that the Legislature has recognized the well-known distinction between *execution* and *restitution*. Although the *ex parte* decree was set aside, the suit was set down for hearing, and the result of it was the affirmation of the old decree. The Full Bench case of *Ram Ghulam v. Dwarka Rai*, (1884) I. L. R., 7 All., 170, lends support to my argument that the question raised in this case is not a question "relating to the execution, discharge or satisfaction of the decree." The case of *Nawab Zainul-ab-din Khan v. Muhammed Asghar Ali*, (1887) I. L. R., 15 I. A., 12; I. L. R., 10 All., 166, is distinguishable. The decision in that case was passed upon a regular suit. This is really a proceeding for restitution and not one for setting aside a sale. The appellants are not entitled to question the sale simply because the *ex parte* decree has been set aside, on the ground of non-service of summonses on the minor defendants, see *Gowree Boyjo v. Jodha Singh*, (1873) 19 W. R., 416.

Dr. Ashutosh Mookerjee in reply.

The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows:—

Maclean, C.J.—This is an appeal by the representatives of the judgment-debtors against the decision of the Subordinate Judge of the 24-Pergunnahs, dated the 17th of April 1899, refusing to set aside the sale of certain property which had been sold under a decree, and which was purchased by the respondents, who were themselves the decree-holders, but who had liberty to bid.

The facts may be shortly stated. The decree for sale was dated the 13th of February 1896, and was made in a suit to enforce an [813] equitable mortgage. The property in due course of execution was ultimately sold, and, as I have already said, the decree-holders became the auction-purchasers. The sale was confirmed on the 22nd of February 1897. On the 8th of September 1898, the decree was at the instance of some of the defendants set aside under s. 108 of the Code of Civil Procedure. On the 22nd of February 1899, the present application was made by the representatives of the judgment-debtor and the learned Subordinate Judge refused to set aside the sale. I may add, though in my opinion it does not affect the matter for present purposes, that on the 16th of December 1899, the same decree was again made in the presence of all the parties.

Upon this state of facts two questions have been argued, first that the case does not fall within the provisions of s. 244 of the Code of Civil Procedure, and that the present appellant ought to have instituted a separate and independent suit to set aside the sale, and, secondly, that as the sale has been confirmed, it cannot now be set aside. Upon the first question the tendency of the decisions in this Court, a tendency which has met with the approval of the Judicial Committee of the Privy Council, is to place a wide and liberal construction on s. 244 of the Code, and not to drive the parties to an independent suit, unless the case be clearly outside the scope and purview of the section. In support of this view I may refer to the cases of *Doyamoyi Das v. Sarat Chunder Mozoomdar*, (1897) I. L. R., 25 Cal., 175; *Maharani Beni Prosad Koeri v. Lakhi Rai*, (1898) 3 C. W. N., 6, and to *Durga Charan Mandal v. Kali Prasanno Sarkar*, (1899) I. L. R., 26 Cal., 727. These cases appear to me to establish that the case falls within s. 244 of the Code, as I consider it does.

As regards the second point, viz., whether, notwithstanding the confirmation, the sale ought to be set aside, the fact that the decree-holder is himself the auction-purchaser is an element of considerable importance. The distinction between the case of the decree-holder and of a third party being the auction purchaser is pointed out by their Lordships of the Judicial Committee in the [814] case of *Narab Zainal-ab-din Khan v. Mahommed Asghar Ali*, (1887) L. R., 15 I. A., 12 (15); I. L. R., 10 All., 166. and also in the case of *Mina Kumari Bibee v. Jagat Sattani Bibee*, (1883) I. L. R., 10 Cal., 220, which is a clear authority for the proposition that where the decree-holder is himself the auction-purchaser, the sale cannot stand, if the decree be subsequently set aside. I am not aware that this decision, which was given in 1883, has since been impugned.

I ought perhaps to refer to the case of *Gowree Boyjo v. Jodha Singh*, (1873) 19 W. R., 416, as some reliance was placed upon it by the learned vakil for the respondent. It is sufficient to say that the circumstances of that case were very different from those of the present, and that it cannot be regarded as an authority against setting the sale aside.

I have now dealt with the points which have been urged before us, and for the reasons I have stated, I consider the view taken by the Court below cannot be supported, and that the appeal must be allowed with costs.

Banerjee, J.—I am of the same opinion.

S. C. G.

Appeal allowed.

NOTES.

[As regards the construction of sec. 47 C.P.C., 1908, see also (1904) 9 C.W.N., 134 (liberal construction); (1907) 35 Cal., 61. 11 C.W.N., 1011; 6 C.L.J., 320 (cases to set aside sale as contravening sec. 99 T.P.A., 1882); (1907) 6 C.L.J., 102;

When the auction-purchaser is the decree-holder and the *ex parte* decree under which the sale was held is set aside, the sale may be set aside, (1903) 27 Mad., 98, but when the order setting aside the *ex parte* decree is reversed, the sale may be valid, (1907) 6 C.L.J., 92. See also (1904) 31 Cal., 499; (1907) 5 C.L.J., 328.

In (1909) 13 C.W.N., 710, after an exhaustive review of the case-law, it was held that when a sale took place on the basis of a satisfied decree, the satisfaction of which had been certified to the Court, the sale was void and ineffective to pass any title even to a *bona fide* purchaser for value without notice.]

[27 Cal. 815]

The 17th July, 1900.

PRESENT

SIR FRANCIS W. MACLEAN, K. C. I.E., CHIEF JUSTICE, AND
MR. JUSTICE BANERJEE.

Surendra Kumar BasuDefendant

versus

Kunja Behary Singh.....Plaintiff.*

Limitation—Presentation of a plaint, insufficiently stamped—Plaint not rejected, but the Court ordered to put in the deficit Court fee within a certain time—

Effect of such an order—Court Fees Act (VII of 1870), s. 28—Civil Procedure Code (Act XIV of 1932), s. 54—Interest Act (XXXII of 1859)—

Whether a Court is to allow interest from the date of the debt, where there is no contract to pay, and no demand made for payment of interest.

[815] *Held.* that where a plaint was presented in the proper Court with insufficient stamp and the Court, without rejecting it (the plaint), allowed a certain time to put in the deficit Court fee which was done within the time allowed, for the purposes of limitation the suit should be considered to have been instituted on the date when the plaint was first presented.

Huri Mohun Chuckerbutty v. Naimuddin Mahomed. (1892) 1 L. R., 20 Cal., 41, and *Moti Sahu v. Chhatri Das*, (1892) 1 L. R., 19 Cal., 780, followed.

Yakutunmissa Bibee v. Kishoree Mohun Roy, (1891) 1 L. R., 19 Cal., 747, and *Venkat-ramayya v. Krishnayya*, (1897) 1 L. R., 20 Mad., 319, distinguished.

Held also, that on a suit for money lent without any written instrument, where it was found that there was no express contract to pay interest, but it was not found that any demand of payment was made in writing, and that there was any demand giving notice to the debtor that interest would be claimed from the date of the demand, in such a case the creditor was not entitled to any interest before suit.

THIS appeal arose out of a suit brought by the plaintiff to recover a certain sum of money as balance of principal with interest due from the defendant on account of money advanced to him from time to time. The allegation of the plaintiff was that the defendant had requested him (the plaintiff) to advance a

* Appeal from Appellate Decree No. 2257 of 1898, against the decree of Babu Mohim Chundra Ghose, Subordinate Judge of Hooghly, dated the 17th of August 1898, modifying the decree of Babu Khetra Nath Dutta, Munsif of Howrah, dated the 6th of December 1897.

certain sum of money with which the defendant would carry on a colliery business, stipulating that he would give the plaintiff within three or four months coal at a rate lower than the *bazar* rate, and take the price thereof, and that he would also give him a share in the business in lieu of interest; that according to the said contract the defendant took from him from 7th Assar 1299 B. S. up to 25th Assin various sums of money; that the defendant did not give him any coal, nor did the defendant specify the amount of his share; that notwithstanding repeated demands the defendant did not pay the amount due to him and hence the suit. The defence mainly was that the suit was not maintainable in the form it was brought; that it was barred by general and special law of limitation; and that the defendant was not liable for the amount claimed. It was found that the defendant gave an acknowledgment in writing of the debt on 11th June [816] 1894. The plaint was presented on the 7th June 1897 in the Munsiff's Court, but it was insufficiently stamped. The plaint was not rejected, but the Court ordered the plaintiff to put in the deficit Court fee within fifteen days. The additional Court fee was paid on the 15th June 1897. The Court of First Instance holding that the plaintiff could not get a definite amount from the defendant, without a settlement of the accounts of the concern, dismissed the suit. On appeal the Subordinate Judge reversed the decision of the First Court, and allowed the plaintiff's claim with interest. As to interest the learned Subordinate Judge said as follows:—

"Then on the question of interest I have to say that there is no express contract to pay interest on the sum advanced, save and except, on a sum of Rs. 1,000 which has been already paid off. However, I would allow the plaintiff to recover interest, as he has been so long deprived of his use of the money at 6 per cent. per annum from the 1st January 1893, and I allow him a sum of Rs. 250 on this account."

Against this decision the defendant appealed to the High Court.

JULY 16, 17. Babu Jogendra Chunder Ghose (with him Dr. Ashutosh Mookerjee, Babu Sanat Kumar Pal and Babu Atul Chunder Bose) for the appellant:—

The suit was barred by limitation inasmuch as, although the plaint was presented on the 7th June 1897, within three years from the date of the acknowledgment, it was not sufficiently stamped and the deficit Court fee was not paid until the 15th June 1897, and that was the date when the plaint should be considered to have been presented. See the cases of *Venkatramayya v. Krishnayya*, (1897) I.L.R., 20 Mad., 319, *Jinti Prasad v. Bachu Singh*, (1893) I.L.R., 15 All., 65 (66). The case of *Yakutunmisa Bibee v. Kishoree Mohun Roy*, (1891) I. L. R., 19 Cal., 747, is in my favor as there is no distinction between an appeal and a suit. They stand on the same footing. The observation of Mr. Justice BANERJEE in the case of *Durga Charan Naskar v. Dookhram Naskar* (1899) I.L.R., 26 Cal., 925 (930), go to support my contention. In the case of a suit s. 5 of the Limitation Act does not apply and time cannot be extended. IL [817] the present case what was done by the Court was to grant time to put in the deficit Court fee, and the order was purported to have been made under s. 54 of the Civil Procedure Code. There was no *bond fide* presentation of the plaint in the present case. The Court below was not justified in allowing interest, not only under the provisions of Act XXXII of 1839, but also upon the finding of the Court itself. Here there was no written instrument, no demand of payment, and no time fixed, and therefore the plaintiff was not entitled to any interest, prior to suit. See the case of *Abdool Kureem Khan v. Shuakh Meah Jan*, (1866) 6 W. R., 288.

1900, JULY 17. Babu Shiba Prosunno Bhattacharyya for the Respondent.— There was demand for interest in the case. The plaintiff is entitled to get

interest at least on equitable principles. See the case of *Surja Narain Mukhopadhyaya v. Pratap Narain Mukhopadhyaya*, (1899) I. L. R., 26 Cal., 955.

The judgments of the High Court (MACLEAN, C.J. and BANERJEE, J.) were as follows :—

Maclean, C.J.—Two points only have been raised upon this appeal. The question of whether or not the plaintiff and defendant were partners, has very properly not been pressed before us. The first point we have to determine is a question of limitation, and it arises in this way. There had undoubtedly been money transactions between the plaintiff and the defendant, and the former had undoubtedly lent the latter Rs. 1,000 for which he now sues, and on the 11th of June 1894 the defendant gave an acknowledgment in writing of the debt, which admittedly would take the case out of the Statute, if the suit were instituted within 3 years from that date.

The question then is, when was the suit instituted? The plaintiff says on the 7th June 1897, the defendant says on the 15th June 1897. If on the former date, the suit is not barred; if on the latter, it is. What then are the facts?

On its face, the plaint purports to have been filed on the 7th [818] June 1897 and this is what happened. The plaint was undoubtedly presented in the Court of the Munsif on the 7th of June 1897, but it was insufficiently stamped. The plaint was not rejected but the Munsif made, as I think he had power to do, under s. 28 of the Court Fees Act, this order: "The plaintiff to put in the deficit Court fee within 15 days." The further Court fee was paid on the 15th June 1897. Which then is the date of the institution of the suit, the 15th or the 7th of June 1897? I am satisfied that the date must be taken to be the 7th June; not the 15th.

Various authorities have been cited to us upon the point, but there are two authorities, in this Court, which are distinctly in point, namely, the cases of *Huri Mohun Chuckerbutty v. Naimuddin Mahomed*, (1892) I. L. R., 20 Cal., 41, and *Moti Sahu v. Chhatr Das*, (1892) I.L.R., 19 Cal., 780. I agree with the reasoning and the conclusion of these cases, and I propose to follow them. They are consistent with the purview of s. 28 of the Court Fees Act, with s. 54 of the Code, and I think I may add with common sense. The other cases in this Court do not deal with the precise question now under discussion, and I, therefore, do not think it necessary to deal with them in detail. I decide this point of limitation which apparently was not raised in the Court below against the appellant.

The second point is that the defendant ought not to have been charged with interest before suit and I think the appellant is right upon this point. It is clear that this case does not fall within Act XXXII of 1839, the debt does not fall within the description in the first alternative of the section, nor does it come within the second alternative, for there was no demand of payment made in writing, least of all was there any demand giving notice to the debtor that interest would be claimed from the date of the demand. The case, therefore, is not within the Act, nor has any argument been addressed to us based upon s. 73 of the Contract Act. It is difficult then, to see upon what ground interest has been allowed on the debt before suit, and it must be disallowed. The plaintiff, however, is clearly entitled to [819] interest from the date of the institution of the suit, and this has not been disputed. The decree, therefore, of the Court below must be varied by omitting therefrom any order for payment of interest before suit.

As the victory is a divided one, there will be no costs in this Court. Each party will pay his own. In the lower Court the costs will be proportionate.

Banerjee, J.—I am of the same opinion. I only wish to add a few words with reference to the question of limitation. Of the cases in this Court bearing upon the point, the two that have been referred to in the judgment of the learned Chief Justice quite support the view in favour of the respondent, that s. 28* of Act VII of 1870 saves the case from being barred by limitation, as the second paragraph of that section provides, that upon a document insufficiently stamped having been received through mistake or inadvertence, if the deficiency in the stamp is supplied within a time to be fixed by the Court, the document and every proceeding relative thereto shall be as valid, as if it had been properly stamped in the first instance. There is only one case in this Court which was referred to in the argument of the learned vakil for the appellant, namely, the case of *Yakutunnissa Bibee v. Kashore Mohun Roy*, (1891) I. L. R., 19 Cal., 747, as lending support to his contention. But that case is distinguishable from the present. That was a case in which a memorandum of appeal had been presented on insufficient stamp: then the deficiency was ordered to be supplied within a certain time; it was not supplied within the time first allowed: then an extension of time was granted; and the deficiency was supplied before the expiry of the extended time. But at the hearing of the case the Lower Appellate Court held that the memorandum of appeal was presented out of time. Against that decision there was a second appeal proferred to this Court; and this Court held, having regard to the circumstances of that case, and no doubt also to the fact of the Lower Appellate Court having held that the appeal was presented out of time, that the case did not come within either the spirit or the letter of s. 28 of the [820] Court Fees Act. That case is no authority for saying that in this particular case in which the plaint was entertained in the first instance and the deficiency in the Court fee was allowed to be supplied, and the case was tried on its merits, we must hold in second appeal that the Courts below were wrong in entertaining the suit, and that the Lower Appellate Court was wrong in holding that the suit was not barred by limitation. That case was decided with reference to its own facts, and is not really in conflict with the two other cases to which reference has been made by the learned Chief Justice. As for the case of *Venkatramayya v. Krishnayya*, (1897) I. L. R., 20 Mad., 319, that also is distinguishable from the present, because there the plaint was returned in order that it might be presented again upon a proper stamp and the learned Judges held that the case was one that could not come within the scope of s. 28 of the Court Fees Act.

S. C. G.

Decree modified

NOTES.

I. The G.P.C., 1908 sec. 149 confers a wide discretion as regards extension of time. In (1909) 32 Mad., 305 P.B., it was held that the suit was not barred by limitation if the deficiency was supplied within the time fixed by the Court though after the expiry of the limitation period. See also, to the same effect, (1912) 21 I. C., 866 (Cal.); (1907) P. R., 123; (1903) 31 Cal., 75.

II. In (1913) 25 M. L. J., 531, interest before suit was awarded on the distinguishing ground of fraud.]

Stamping documents
inadvertently received.

* [Sec. 28:—No document which ought to bear a stamp under this Act shall be of any validity, unless and until it is properly stamped.]

But if any such document is through mistake or inadvertence received, filed or used in any Court or office without being properly stamped, the presiding Judge or the head of the office, as the case may be, or, in the case of a High Court, any Judge of such Court, may, if he thinks fit, order that such document be stamped as he may direct; and on such document being stamped accordingly, the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance.]

[27 Cal. 820]
CRIMINAL REVISION.

The 30th November, 1899 and 9th January, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Durga Das Rukhit and another.....Petitioners
versus
Queen-Empress.....Opposite-Party.*

Sanction, application necessary for --Court--Collector under Land Acquisition Act, whether --Power of such Collector to administer oath or require verification --Deputy Collector under Land Acquisition Act--Judicial Officer--Revenue Court--Overestimate of value of land--False Statement--False Evidence--Forgery--Revision--Rule, hearing of --Discretion of High Court to decide matters for which rule prayed for, but not granted-- Criminal Procedure Code (Act V of 1898), ss. 190, 195, 439, 476 and 526-- Penal Code (Act XLV of 1860), ss. 193, 196,

199, 467, 468 and 471--Land Acquisition Act (I of 1894), Part VIII, s. 53.

Sanction under s. 195 of the Code of Criminal Procedure should be given only on application made for it by some person, who may desire to complain [821] of the particular offence and whose complaint could not be entertained without such sanction. *In the matter of Banarsi Das*, (1896) I.L.R., 18 All., 213, and *Baperam Surnia v. Gouri Nath Dutt*, (1892) I. L. R., 20 Cal., 474, referred to.

The expression "the Court" in the Land Acquisition Act does not include a Collector, nor is there any authority given to the Collector to administer an oath or to require a verification.

It is a false statement made under a verification that constitutes an offence under s. 193 of the Penal Code, not a verification oath or solemn affirmation.

The Deputy Collector acting under the Land Acquisition Act is not a Judicial Officer, he cannot properly be regarded as a Revenue Court within the terms of s. 476 of the Code of Criminal Procedure, his proceedings under the former act are not regulated by the Code of Civil Procedure, nor is he right in requiring a petition put in before him to be verified in accordance with that Code so as to make any false statement punishable as perjury.

The Deputy Collector is not in a position to pass any final order in the matter of value of the land or the right to claim the price fixed, a party dissatisfied can claim a reference to the Civil Court whose duty it is to settle the matter in dispute judicially, therefore, to subject parties, who claimed the right to such a reference to a criminal prosecution, when the matters on which the Deputy Collector had formed an opinion as a Revenue Officer under the Land Acquisition Act must be submitted to the determination of a Court is obviously premature and improper, and is almost certain to operate very prejudicially towards them in the trial before the Civil Court of the same matter.

In proceedings under the Land Acquisition Act what may be found to be an exaggeration or over-estimate of the value of land cannot properly constitute a false statement, which

* Criminal Revision No. 719 of 1899, made against the order passed by C. Faulder, Esq., District Magistrate of Midnapur, dated the 11th of September, 1899.

would demand a prosecution for perjury and the fact that some years before the land was offered for sale at a much lower price is no sufficient ground for imputing such an offence.

Discretion of the High Court in revision at the hearing of a rule to consider, and decide matters in respect to which a rule had been prayed for, but not granted.

In this case the petitioners put in claims to compensation for certain lands taken under the Land Acquisition Act before the Land Acquisition Deputy Collector of Midnapur. The Deputy Collector was very dilatory and unfavourably disposed in respect to these claims and he abstained from making any award or reference to the Civil Court, although pressed to do so by the petitioners. The petitioners moved the District Collector, who [822] was also the District Magistrate, by whom the records were sent for and the prosecution of the petitioners suggested. On the 9th of September 1899, the Deputy Collector passed orders under s. 195 of the Code of Criminal Procedure sanctioning the prosecution of the petitioners under ss. 193, 196, and 199 of the Penal Code for giving false evidence, in making statements before him on oath, knowing such statements to be false, and for intentionally fabricating false evidence by making documents containing false statements and using them as true, these offences having been committed in or relating to the proceedings taken by him under the Land Acquisition Act, and he at the same time reported the matter to the District Magistrate "for necessary action."

The District Magistrate issued warrants for the arrest of the petitioners and made over the cases to be tried separately to various Magistrates, and directed in respect to one of these cases that the Magistrate "should commit to the Court of Session, if he finds the evidence sufficient," and by another order he directed that bail should not be accepted "as the offences are not bailable."

The petitioners moved the High Court to quash these proceedings as void and contrary to law, and also asked in the alternative that the cases might be transferred to another district. A rule was granted only to consider the matter for transfer of the cases, but at the hearing of the rule upon the application for quashing the proceedings being renewed the Court decided to consider all the matters raised.

Mr. Jackson (with him Bahu Sarasi *(Churn Mitter)* for the Petitioners.

JANUARY 9. The judgment of the Court (PRINSEP and STANLEY, JJ.) was delivered by

Prinsep, J.—The matter before us relates to proceedings before the Magistrate, which have arisen out of proceedings before a Deputy Collector under the Land Acquisition Act (1 of 1894).

The two petitioners put in claims to compensation for certain [823] lands taken under that Act, and they have now been charged with offences which may shortly be described as forgery and perjury in making and attempting to substantiate those claims. The Deputy Collector was unusually dilatory in those proceedings, and apparently was unfavourably disposed in respect to those claims, and he abstained from making any award or reference to the Civil Court, although he was pressed to do so by the petitioners. The petitioners then moved the District Collector who sent for the record, and it would seem that the orders for the prosecution of the petitioners, though subsequently passed by the Deputy Collector, were at the suggestion of the District Collector. The Deputy Collector, on 9th September, passed orders under s. 195 of the Code of Criminal Procedure giving sanction to the prosecution of the petitioners for certain offences set out in his order, those offences having been committed in or relating to the proceedings taken by him under the Land Acquisition Act, and he at the same time reported this to the District Magistrate "for necessary action." The District Magistrate then took cognizance of these offences.

He issued warrants for the arrest of the petitioners for certain specified offences ; he made over the cases to be tried separately to various Magistrates subordinate to him ; he directed in respect to one of these cases that the Magistrate "should commit to the Court of Session, if he finds the evidence sufficient," and by another order of the same date he directed that bail should not be accepted "as the offences are not bailable." The petitioners then moved this Court to quash these proceedings as void and contrary to law, and they also asked in the alternative that the cases might be transferred to another District away from the influence of this District Magistrate.

A rule was granted only to consider the matter of transfer of the cases.

Mr. Jackson, who appeared for the petitioners in placing the facts of this matter before us, has renewed this application for quashing the proceedings. We propose to consider all the matters raised, and we find no difficulty in doing so, as although there is no appearance against the rule, the District Magistrate in an explanation submitted deals *seriatim* with all the objections raised in the petition on which the rule was granted.

[824] Now as regards the rule for a transfer of the trial of these cases to another District we may at once say that we think that no sufficient grounds are shown for supposing that the Magistrates in whose Courts they are, will not try them fairly on their merits. The District Magistrate, both in that capacity and also as District Collector, has no doubt taken a prominent part in these proceedings. As we have already stated, as District Collector he has, we think, had some share in instigating the order passed by the Deputy Collector sanctioning the prosecution of the petitioners. After that sanction had been given under s. 195 of the Code of Criminal Procedure the copy of the order was sent to the same officer, who held both the offices of District Collector and District Magistrate "for necessary action." Now this was a very unusual proceeding, and it was also very irregular. Sanction under s. 195 of the Code of Criminal Procedure should be given only on application made for it by some person who may desire to complain of the particular offence, and whose complaint could not be entertained without such sanction. We need only refer to *In the matter of Banarsi Dass*, (1896) I.L.R., 18 All., 213, and *Baperam Surma v. Gouri Nath Dutt*, (1892) I. L. R., 20 Cal., 474, amongst several authorities for this, if any authority be necessary for such an obvious practice. We cannot find that any application for sanction was made. Indeed, the order of the Deputy Collector of 9th September and his subsequent order of 18th *idem* indicates that he acted *proprio motu*. The latter order passed after his report of the 9th September to the District Magistrate "for necessary action" shows that he had a doubt whether that order was a proper order under s. 195, Code of Criminal Procedure, and it also shows his desire by referring to s. 476 to legalise "any necessary action" that the Magistrate might take. But action had already been taken by the District Magistrate, and this could not be affected by any subsequent order of the Deputy Collector. It will be necessary again to refer to this matter. It is sufficient at present to repeat that sanction under s. 195 was given *proprio motu* by the Deputy Collector, and without application for it by any person desiring to make a complaint regarding these offences. [825] As to what followed we do not mean to say that the District Magistrate was not competent under s. 190 (1) (c) to take cognizance of the offence, but as the matter was then before him he was competent to do so only on sanction properly given, and there was no proper sanction. Consequently he was not in a proper position to act. That, however, would affect the validity of the proceedings, which will be hereafter considered. But taking it that he was competent to institute the prosecution

and to make over the cases for inquiry or trial to certain Subordinate Magistrates, is there sufficient ground for holding that the proceedings before such Magistrates will not be fairly and properly conducted, that they are so far dominated by the opinion recorded by the District Magistrate, and the part he has already taken in this matter, as to lead us to believe that these Magistrates will not exercise a fair and independent judgment in dealing with the evidence given before them? The District Magistrate has, no doubt, improperly dictated to one of these Magistrates that he should "commit one case to the Court of Session, if he finds that the evidence is sufficient," and he has refused to admit the petitioners to bail. In both instances the order was erroneous. In the first case, as one of the charges was triable by a Magistrate, as well as the Court of Session, commitment would not necessarily follow, if a *prima facie* case had been established. In the other case the offences were all bailable, but in this respect on application made to him the Sessions Judge has under section 498 of the Code of Criminal Procedure admitted both of the petitioners to bail. At any rate we are not prepared to say that with this expression of opinion these Magistrates would so far fail in their duty as Judicial Officers as to be biased in their judgment so as to show incapacity to fill their offices. We may add that there is nothing on the record to show that they have in any way acted in these cases. We, therefore, see no sufficient ground to transfer these cases to another District.

And now to consider the matter on its merits.

Sanction under s. 195 of the Code of Criminal Procedure, we have already stated, was improperly granted by the Deputy Collector *proprio motu*. In the next place the matter could not be dealt with under s. 476. A Deputy Collector acting [826] under the Land Acquisition Act is not a Judicial Officer. He cannot be properly regarded as a Revenue Court within the terms of s. 476. The District Magistrate is wrong in maintaining that the proceedings of the Deputy Collector under the Land Acquisition Act are regulated by the Code of Civil Procedure, or that the Deputy Collector was right in requiring the petition put in by the petitioners now before us to be verified in accordance with that Code, so as to make any false statement punishable as perjury. Section 53 of the said Land Acquisition Act sufficiently indicates this. It declares that the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under that Act. But the context clearly shows that by this expression "the Court," a Collector is not included. The whole of Part VIII of the Act in which s. 53 appears distinguishes between orders and proceedings by or before a Collector and those by or before a Judge or Court. There is no authority that we can find given to a Collector to administer an oath or to require a verification. The nature of his duties also shows this. He can pass no final order of any sort save with the consent of the parties. We observe that amongst the matters charged is the making of a false verification. It is a false statement made under a verification that constitutes an offence punishable under s. 193, not a verification on oath or by solemn affirmation. We may also point out here that what may be found to be an exaggeration or over-estimate of the value of land cannot properly constitute a false statement denounced as an attempt to cheat, which would demand a prosecution for perjury, and the fact that some years before the land was offered for sale at a much lower price is no sufficient ground for imputing such an offence. The Deputy Collector, not being a Judicial Officer, when acting under the Land Acquisition Act, could not as a judicial officer take cognizance of any of the offences mentioned in his order. .

There is also another objection to the present proceedings. The Deputy Collector is not in a position to pass any final order in the matter of value

of the land or the right to claim the price fixed. A party dissatisfied can claim a reference to the Civil Court, whose duty it is to settle the matter in dispute judicially. The petitioner's claimed the right to such a reference [827] and to subject them to a Criminal prosecution when the matters on which the Deputy Collector had formed an opinion as a Revenue Officer under the Land Acquisition Act must be submitted for the determination of a Court was obviously premature and improper. Such a proceeding was almost certain to operate very prejudicially towards them in the trial before the Civil Court of the same matters.

If the District Magistrate had acted under s. 190 (c) of the Code of Criminal Procedure—and that is not the case before us—it would have been for us to consider whether, having regard to the fact that the Civil Court will be called upon to adjudicate on these matters, his action was sustainable.

For all these reasons we are of opinion that the trials ordered by the District Magistrate do not proceed on proper grounds in point of law, and also that there are at present no sufficient grounds for such trials. We accordingly declare the order of the Deputy Collector of the 9th and 18th September to be null and void, and we set aside the order of the District Magistrate, dated 9th September, which is based on those orders.

D. S.

NOTES.

I. As regards the question when the Collector is a judicial officer, see also (1902) 30 Cal., 36; (1905) 8 O. C., 118; (1905) P. R., 44 Cr. (under the Income Tax Act); (1910) 38 Cal., 230; (1910) 38 Cal., 368 (Bengal Land Registration Act).

II. As regards the question to whom sanction should be granted, see also (1905) 32 Cal., 351; 9 C. W. N., 277; (1911) 13 I. C., 97, in which this was followed; 10 C. W. N., 222; and (1905) 8 Bom. L. R., 32, in which this was not followed.]

[27 Cal. 827]

FULL BENCH.

The 9th March, and 25th May, 1900.

PRESENT:

SIR FRANCIS WILLIAM MACLEAN, K. C. I. E., CHIEF JUSTICE,
MR. JUSTICE MACPHERSON, MR. JUSTICE BANERJEE,
MR. JUSTICE HILL AND MR. JUSTICE STEVENS.

Srish Chunder Bose.....Plaintiff

versus

Nachim Kazi and others.....Defendants.*

Provincial Small Cause Courts Act (IX of 1877), Schedule II, cl. (8)—Suit by an assignee of arrears of rent after they fall due, whether cognizable by the Small Cause Court—Bengal Tenancy Act (VIII of 1885), section 3, sub-s. 5—Rent.

Held, by the Full Bench, (BANERJEE, J., dissenting) that a suit brought by an assignee of arrears of rent after they fell due, for the recovery of the amount due, is a suit for rent, and therefore excepted from the cognizance of the Court of Small Causes.

* Full Bench Reference in Appeal from Appellate Decree No. 1886 of 1897.

[828] THIS case was referred to a Full Bench by MACLEAN, C.J., and BANERJEE, J., on the 5th September 1899 with the following opinion :—

BANERJEE, J.—This appeal arises out of a suit brought by the plaintiff-appellant, to recover a sum of Rs. 362 6 annas 9 pie on the allegation that the said amount was due from defendants Nos. 1 to 7 as rent, cesses and interest for the period from 1299 to the Pous or 4th kist (instalment) of 1302, on account of a *jama* of Rs. 75 12 annas held by them under the defendants Nos. 8 to 25 who are called in the plaint *pro forma defendants*, and that the plaintiff was entitled to recover that sum as he had on the 17th of Magh 1302 purchased from the *pro forma defendants* their right to recover the same, and had given notice of his purchase to the tenant-defendants.

The tenant-defendants in their defence raised various objections of which it is necessary for the purposes of this appeal to refer to only one, namely, that the suit was not cognizable by the Munsif's Court. The First Court overruled this objection, and finding for the plaintiff on the other questions raised, it gave him a decree. On appeal by the tenant-defendants the Lower Appellate Court has reversed that decree, holding that the suit was cognizable by the Court of Small Causes and not by that of the Munsif, and it has directed the plaint to be returned to the plaintiff for presentation to the proper Court.

Against that decision the plaintiff has preferred the present appeal. It is contended on his behalf that the suit is one for rent, and as such is excepted from the cognizance of the Small Cause Court and is triable by the Civil Court, and in support of this contention the cases of *Shama Sundari Dassi and others v. Brindaban Chunder Mazumdar*, (1862) Marshall's Rep., 199; *Kishen Koommar Mitter and others v. Mohesh Chunder Banerjee*, W. R., 1864, Act X, Rul. 3; *Hurri Nath Muzoomdar and others v. Messrs. Moran & Co.*, W. R., 1864, Act X, Rul. 127; *Reedoy Monee Burmonee v. [829] Hugh Sibbold*, (1871) 15 W. R., 344, and an unreported decision of this Court in appeal from Appellate Decree No. 1193 of 1898 are relied upon.

On the other hand, it is argued for the defendants, respondents, that the plaintiff having purchased merely the landlord's rights to recover a certain amount of rent after the whole of it had accrued due, could not claim the same as rent due to him; that certain provisions of the Bengal Tenancy Act, namely, s. 3, sub-s. (5) and s. 148, clause (h), go to show that a mere assignee of the landlord's right to arrears of rent is not entitled to have his suit for the arrears assigned to him treated as a suit for rent; that the cases cited are distinguishable from the present; and that the case of *Lalla Bhugwan Sahoy v. Sungessar, Chowdhry*, (1873) 19 W. R., 431, supports the view taken by the Lower Appellate Court.

I am of opinion that the appellants' contention is not correct. It is true that what is claimed by the plaintiff under the assignment in his favour was originally due as rent from the tenant-defendants to the plaintiff's vendors. But is it due to the plaintiff as rent? The answer to this question must be in the negative, for this simple reason that rent [see the definition of the term in s. 3, sub-s. (5) of the Bengal Tenancy Act] can only be due from the tenant to his landlord, and the plaintiff has not in any sense acquired the position of landlord to the defendants. The case might have been different, if the plaintiff had been the assignee of rent accruing due after the assignment, as in that case the assignment might be regarded as in effect a lease, but that is not the case here. The only right in which the plaintiff can make the present claim is as assignee of a debt, which was due to the assignor as rent.

It might be said that the money now claimed was due from the principal defendants as rent, and so far as they are concerned, its character could not be changed by any dealing with it to which they were no party. But the question whether a suit for money should be treated as one for rent or not depends not upon the ground on which the defendants' liability originally arose, but upon the ground on which the plaintiff's [830] right to the relief claimed rests. The former might have arisen from the relation of landlord and tenant, but the latter arises merely from assignment of a debt without any assignment of the landlord's interest in the land.

There is another way in which the matter may be viewed. If the right of the plaintiff and the liability of the defendants were still a right to and a liability for rent, the former could be satisfied, and the latter discharged only on payment of the whole rent that was due. But having regard to the provisions of s. 135 of the Transfer of Property Act and the price stated in the plaintiff's *kobala*, the defendants were entitled to a discharge on payment of a much smaller amount. This shows, that the nature of the original liability is materially altered by the assignment.

The provision in clause (h) of s. 148 of the Bengal Tenancy Act also goes to show that it is not the policy of our law to treat a claim by an assignee of rent as one for rent. For if a landlord after obtaining a decree for arrears of rent cannot assign the decree so as to empower his assignee to execute it as a decree for rent, it would be anomalous to hold that an assignee of arrears of rent before any suit is brought can claim the same as rent.

It may be argued that, if a suit like the present is not to be treated as one for rent, the result will be that the landlord may, by assigning over his claim for arrears of rent to a third party, deprive the tenant of his right of appeal from any decree that may be passed against him, and may also deprive him of his right to deposit rent under s. 61 of the Bengal Tenancy Act. The answer to such an argument is shortly this: As regards the right of appeal from an adverse decree, if the tenant loses that, he gains two compensating advantages; for in the first place, the period of limitation for a suit by an assignee of arrears of rent, if such a suit is treated as one not for rent, is shorter than that for a suit for arrears of rent, time running not from the end of the year in which an instalment falls due but from the date of its falling due; and in the second place, by s. 135 of the Transfer of Property Act, the tenant becomes entitled to release from liability on payment of the price paid by the assignee and incidental costs, which must generally be less than the [831] amount of the arrears due. Moreover the reason for allowing an appeal in certain cases in rent suits not exceeding one hundred rupees in value, as indicated by s. 153 of the Bengal Tenancy Act does not apply to a suit by an assignee of the arrears of rent. No adverse decree in such a case even when it decides a question of the amount of rent payable, being admissible in evidence in a subsequent suit for rent by the landlord. And as regards the right of depositing rent, no tenant would be likely to claim it as against an assignee of the arrears due, when by s. 135 of the Transfer of Property Act, he can generally obtain his discharge on payment of a lesser amount than what he has to deposit under s. 61 of the Bengal Tenancy Act.

The view I take that a suit like the present should be regarded as one for an ordinary debt and not as one for rent, is supported by the case of *Lalla Bhugwan Sahoy v. Sungessur Chowdhry*, (1873) 19 W. R., 431, in which COTCH, C.J., observes:—

"In this case there appears to be two causes of action. One for two years' rent by the plaintiff as the purchaser of the arrears of rent due in respect of

those years, the purchaser in fact of a debt for which he must sue in the Civil Court, and it is not a suit for rent due to the plaintiff."

It remains now to consider the cases cited for the appellant. They are more or less distinguishable from the present. The first case, *Shama Sundari Dassi v. Brindaban Chunder Mazumdar*, (1862) Marsh. Rep., 199, was decided with reference to Act X of 1859, and Sir BARNES PEACOCK in his judgment observes: "There is nothing in the Act to show that it was not intended to apply to such a case as the one now before us." The rent law now in force in the district in which this case arose is not Act X of 1859 but the Bengal Tenancy Act; and I have shown above that there are provisions in the last mentioned Act which show that it is not intended to apply to a case like this. The same remark applies to the other three reported cases cited, which in effect follow the first mentioned case. As for the unreported case, that also was not decided with reference to the Bengal Tenancy Act, [832] as the case came from Sylhet to which that Act did not apply. But as there are certain general observations in these cases which might be construed to apply to the present, and as, with all respect for the learned Judges who decided those cases, I am, for the reasons given above, unable to concur in those observations, I think the following question must be referred to a Full Bench for determination, namely,—

Whether a suit brought by an assignee of arrears of rent after they fell due, for recovery of the amount due, is a suit for rent and therefore excepted from the cognizance of the Court of Small Causes, or whether it should be treated as an ordinary suit for money and therefore not so excepted.

And as the question arises in an appeal from an appellate decree, the whole case must according to the rules regulating Full Bench references, be referred for decision to a Full Bench.

MACLEAN, C.J.—I concur in thinking that this case should be referred to a Full Bench, reserving my opinion upon the question in controversy.

1900, MARCH 9. Babu *Surendra Chunder Sen* for the Appellant.—The question in this case is whether the suit is one cognizable by the Court of Small Causes. It is a suit for recovery of a sum of money by an assignee of arrears of rent after they fell due; in other words it is a suit for recovery of a sum of money which was payable by the tenant to his landlord, therefore it is a suit for rent. By the assignment the nature of the suit is not changed, the assignee stands in the shoes of the landlord. The question which is to be considered in this case is whether the amount claimed is or is not rent within the meaning of the Provincial Small Cause Courts Act. I submit it is rent, therefore excepted from the cognizance of the Provincial Small Cause Courts Act. Clause (8), sch. II of the Small Cause Courts Act is silent as to who is to bring the suit, therefore, it is to be understood that the suits contemplated by that article are suits irrespective of the question as to whether they are brought by a landlord or not. But there is a limitation in cl. 13. The word rent should be taken in its ordinary sense, and the cases under the whole Act will apply to the present case. See *Shama* [833] *Sundari Dassi v. Brindaban Chunder Mazumdar*, (1862) Marsh. Rep., 199; *Kishen Koommar Mitter v. Mohesh Chunder Bannerjee*, W. R., 1864, Act X, Rul. 3, *Hurri Nath Mozoomdar v. Moran & Co.*, W. R., 1864, Act X, Rul. 127; *Reedoy Monee Burmonee v. Hugh Sibbold*, (1871) 15 W. R., 344, and the case of *Sheik Munsar v. Lokenath Roy*, (1899) 4 C. W. N., 10, is in all fours with the present case. If by assignment of rent its character is changed, and if it becomes a suit of the nature cognizable by the Small Cause Court, the tenant by an act of the landlord loses the right of appeal, and also he is

prevented from depositing the rent under s. 61 of the Bengal Tenancy Act. Such a result would be anomalous.

Moulvi *Syed Samsul Huda* for the Respondent.—The present case is governed by the Bengal Tenancy Act. Rent is defined in the Act, as what is payable by the tenant to the landlord for the use and occupation of the land. In this case the assignee is not a landlord, and no sooner the rent is transferred to a third person, its character is changed, and it becomes an ordinary debt. The defendant is not the tenant of the assignee. There was no definition of the term rent in the old rent law and therefore the cases cited by the other side are not applicable to the present case. The case of *Lalla Bhugwan Sahoy v. Sungessur Chowdhry*, (1873) 19 W. R., 431, supports my contention.

Babu Surendra Chunder Sen in reply.

Cur. adv. vult.

1900, MAY 25. **Maclean, C.J.**—The question submitted is, "whether a suit brought by an assignee of arrears of rent after they fell due, for recovery of the amount due is a suit for rent, and therefore excepted from the cognizance of the Court of Small Causes, or whether it should be treated as an ordinary suit for money, and therefore not so excepted."

The question is a short one, and, but for the view entertained by my learned colleague Mr. Justice BANERJEE, I should have thought not a very intricate one.

[834] The question after all is only as to the Court in which the suit is to be brought, and in the interest of litigants it is desirable that, as regards this Province at any rate, the matter should, as far as possible, be definitely settled. It is clear that the assignor could not have sued for these arrears of rent, in the Small Cause Court, and I fail to understand, upon what principle the assignee, who stands in the assignor's shoes, should be entitled, or bound to do so. The debt, in its inception, was clearly in respect of that which is known as "rent," and if the assignor had sued for it, he must have sued in the Civil Court, and if the assignee had sued in the name of the assignor, assuming that by the contract between them he was entitled so to do, the suit must have been brought in the Civil Court. If this be so and it must be so, when and how is the Small Cause Court substituted for the Civil Court? It is said that this is not rent because the assignee is not the landlord of the tenant, and rent, under the definition in the Bengal Tenancy Act (s. 3, sub-s. 5) is only that which is lawfully payable by a tenant to his landlord for the use or occupation of the land held by the tenant. But as between the assignor and the tenant, the money due was clearly for rent, and as the assignee in respect of this debt, which was rent, stands in the shoes of the landlord, is it unreasonable to say that what he is seeking to recover is the rent which was due to his assignor, and if so, why is it not a suit for the recovery of rent, and so excepted from the jurisdiction of the Small Cause Court? I think there is much force in the reasoning of the learned Judges in the unreported cases—Special Appeal No. 1193 (and analogous cases) of 1898, where those learned Judges say, "what was assigned in this case was the right to receive from the tenant the rent then due to the assignor, and it seems to us that the suit brought by the assignee against the tenant is a suit to recover the rent within the meaning of Article 8. The money was due as rent at the time of assignment, and the assignment did not deprive it of that character, so far at all events as the tenant was concerned. If it were not so, and rent which had become due ceased, when assigned, to be rent it would follow that an assignment, to which the tenant was not a party, would have the effect of changing the tribunal to which the contracting parties [835] subjected

themselves at the time of the contract with reference to the subject-matter of it, and depriving the tenant of rights to which he was entitled; for example, the right of an appeal, the right of making a deposit, and possibly other rights. It would not, we consider, be right to construe Article 8, as limited to suits brought by the landlord and so as to exclude suits brought by a person who represented the landlord, whether the representation was by an assignment or otherwise."

The bulk of the authorities cited in the reference appear to me to support this view, which on principle seems to me to be sound, nor do I think that the case of *Lalla Bhuqwan Sahoy v. Sungessur Chowdhry*, (1873) 19 W. R., 431, is an authority against it, for, if carefully examined, the passage from the judgment in that case, cited in the reference, appears to be scarcely consistent with a later passage in the same judgment. Besides the precise point, now before us, was not then before the Court in that case. It may be that the view I take may lead to certain anomalies; but take which view we may, some anomalies must result, so that any argument to be deduced from possible anomalies may perhaps with prudence be eliminated from the discussion.

In my opinion this suit is one for the recovery of rent, and excepted from the cognizance of the Small Cause Court. The appeal must be allowed, and the case remitted to the lower Court for decision on the merits. The respondent must pay the costs before the referring Court, and of this reference.

Macpherson, J.—I agree. I see no reason to change the opinion which I formed in the unreported case, special appeal No 1193 of 1898, and other analogous cases, and I have nothing to add to what I said in that case and to what has been said by the learned Chief Justice in the present case, beyond this that a suit may be a suit for rent and yet not a suit to which all the provisions of the Tenancy Act would apply. A suit by a co-sharer for his share of the rent is a suit for rent, but it is not a suit of the kind contemplated or provided for by the Tenancy Act.

Hill, J.—I agree in what has been said by the learned Chief Justice.

[836] Stevens, J.—I agree with the learned Chief Justice.

Banerjee, J.—I regret very much that I am unable to agree with my learned colleagues in this case.

The question for the determination of which the case has been referred to a Full Bench is,—

"Whether a suit brought by an assignee of arrears of rent after they fell due, for recovery of the amount due, is a suit for rent, and therefore excepted from the cognizance of the Court of Small Causes, or whether it should be treated as an ordinary suit for money and therefore not so excepted."

The answer to this question must depend primarily upon the provisions of the Small Cause Courts Act (Act IX of 1887).

By clause 8 of the second schedule of that Act—"A suit for the recovery of the rent," is, subject to certain qualifications not necessary to be considered here, excepted from the cognizance of a Court of Small Causes, and the question then is whether a suit by an assignee of arrears of rent brought for recovery of the amount due is "a suit for recovery of rent" within the meaning of that clause, the assignment having been made after the arrears of rent fell due, and not including any part of the landlord's interest in the land in respect of which the rent was due. The Act does not define rent, but according to the ordinary signification of the term, it means (I confine my remarks to money rent) money payable by one person for use and occupation of land to another person under whom he holds the land. That the qualifying words "under whom he holds

the land " or some other words to the same effect, must form a necessary part of the definition, will be evident from the consideration that money may be payable by one person to another for the occupation of land, as for instance a municipal rate on a holding, which is not rent. An arrear of rent is a debt, but there are two characteristics which distinguish it from other kinds of debts, (1) it is due for the use and occupation of land, and (2), it is due to the person under whom the land is held. This is not disputed; but it is argued for the appellant that as the debt in question had both these characteristics when it fell due, and is claimed by an assignee of the landlord, it continued [837] to be an arrear of rent notwithstanding the transfer by the landlord to the plaintiff of the right to recover it; and a suit by the transferee for the amount due must be regarded as a suit for the recovery of rent. This argument no doubt requires consideration. But after considering it carefully, I am unable to accept it as correct. The argument is based on the assumption that the transferee claims the amount in the same right as the landlord, an assumption which is not wholly correct. If the landlord had transferred to the plaintiff not only his right to the arrears of rent, but also his interest in the land, it was then only that the transferee could be said to be claiming the amount in the same right as the landlord. But as the landlord's interest in the land has not been transferred to the assignee of the arrears of rent, the claim for the amount ceased to be one for rent after the assignment, by reason of the second characteristic, namely, that of the debt being due to the landlord no longer attaching to it, and it became reduced to a claim for an ordinary debt.

There is another way in which this matter may be viewed. A person can claim rent only from his tenant. The defendant is not a tenant of the plaintiff. The present suit cannot therefore be considered as a suit for rent. As I have said in the referring order, the question whether a suit for money should be treated as one for rent or not, is to be answered, not with reference to the ground upon which the defendants' liability originally arose, but with reference to the ground on which the plaintiff's right to the relief claimed rests.

The letter of the law (clause 8 of the second schedule of Act IX of 1887), therefore is, in my opinion, in favour of the respondents' view and against that of the appellant.

Let us next see which view the spirit, that is the reason, of the law favours. As far as one can gather from the provisions of the Provincial Small Cause Courts Act, and especially from the second schedule to it, the reason why certain suits though of small value are excepted from the jurisdiction of the Court of Small Causes, is, that either on account of their involving complicated questions for determination, or on account of their involving important consequences to the parties, or on account [838] of both, it is undesirable that they should be tried by a Court of summary jurisdiction. Among the excepted suits, a suit for rent often involves complicated questions such as those of title to land, and always involves important consequences to the parties such as *prima facie* fixing the rate of rent for future years (see s. 51 of the Bengal Tenancy Act), and creating liability to ejectment, if the tenant is a non-occupancy ryot (see s. 66 of the same Act). But the same thing does not hold good when an assignee of arrears of rent brings a suit for the amount assigned over. Such a suit may involve questions of title, but it can never in its result carry with it any of the important consequences to the parties, that a suit for rent by a landlord does. A decree in such a suit is no evidence against the landlord suing for arrears of rent for subsequent years; nor can any decree

for ejectment of the tenant be made on the basis of a decree made in such a suit.

It was argued that, if a suit like the present be held to be cognizable by a Court of Small Causes, the defendant will be deprived of his right of appeal by an act of his landlord, to which he was no party. That no doubt is an apparent anomaly. But an explanation of the anomaly is furnished by the fact that one cogent reason for allowing an appeal in a rent suit, namely, that founded on the importance of its result to the parties, is, as I have shown above, wanting in the case of a suit by an assignee of arrears of rent. But while the anomaly arising from the view I take is capable of explanation, a greater and a more inexplicable anomaly would result from the opposite view. For if a suit by an assignee of arrears of rent for the amount due be held to be excepted from the cognizance of a Small Cause Court, an appeal and also a second appeal will always lie in such a suit, whereas if the suit had been brought by the landlord, an appeal would lie in such a suit only to the extent allowed by s. 153 of the Bengal Tenancy Act. Thus in a suit for any amount, however small, brought by an assignee of arrears of rent, an appeal and a second appeal will always lie even where the suit involves no question of rate of rent or title to land, though, if the landlord had brought the suit, not even one appeal could lie.

As regards the argument that, upon the view I take, assign-[839]ment of arrears of rent by the landlord will deprive the tenant of his right to deposit rent under s. 61 of the Bengal Tenancy Act. I may observe in addition to what I have said in the referring order, that it is by no means clear that the tenant will be deprived of this right in cases coming under clause (d) of sub-s. (1) of s. 61.

Weighing the considerations for and against the two views, I think those in favour of the respondent's view preponderate.

With regard to the cases cited, I will only add to what I have said in the referring order, that, on a question like the one before us, the determination of which does not affect any vested rights of parties, there is not the same reason for not departing from a current of decisions shown to be erroneous that there is where such departure may be likely to unsettle titles.

For all these reasons I would say in answer to the question stated in the reference that a suit like the present is not excepted from the cognizance of a Court of Small Causes, and I would dismiss this appeal.

S. C. G.

Appeal allowed ; case remanded.

NOTES.

[This was followed in (1900) 4 C. W. N., 605. See also (1906) 4 C. L. J., 402.]

[27 Cal. 839]

The 14th and 15th May, 1900.

PRESENT :

SIR FRANCIS W. MACLEAN, K. C. I. E., MR. JUSTICE PRINSEP,
MR. JUSTICE GHOSE, MR. JUSTICE RAMPINI AND MR. JUSTICE HARRINGTON.

In the Matter of Abdur Rahman and Keramat.....Petitioners.*

*Charges—Joinder of—Offences of same kind not within year—Failure of
Justice—Application of s. 537 of the Code of Criminal Procedure—
Power of Full Bench to send case back to referring Bench for
final disposal—Rules of the High Court, Calcutta, Appellate
Side, Chap., V, Rule 5—Code of Criminal Procedure (Act
V of 1898), ss. 233, 234 and 537.*

Held, that s. 537 of the Code of Criminal Procedure can be applied to any case in which the trial has been held on charges joined together contrary to s. 234 of that Code.

In the matter of Luchminarain, (1896) I. L. R., 14 Cal., 128 ; *Queen-Empress v. Chandī Singh*, (1887) I.L.R., 14 Cal., 395, and *Itaj Chunder Mozumdar v. Gour Chunder Mozumdar*, (1894) I. L. R., 22 Cal., 176, overruled.

[840] *Held*, further, that the language of Rule 5 of chapter V of the Rules of the High Court, Appellate side, relating to References to the Full Bench in criminal matters, was sufficiently wide to enable the Full Bench to send the case back with the expression of their opinion upon the point of law raised to the Bench which referred it for final disposal.

In this case it appeared that the complainant, Khako manjhi, who was the ticcadar of the village of Butthana Kal, and several other manjhis who lived in the same village, had been greatly oppressed by the accused, Abdur Rahman, who was the manager of the Maharaja of Gidhour, and his peons, one of whom was the accused Keramat Khan.

The first act of oppression was committed in Magh 1898, when all the cattle of the village of Butthana Kal were taken for the purpose of being put into the pound by certain peons by the orders of the accused Abdur Rahman, although the cattle had done no damage to any property of the Maharaja. The complainant managed to recover the cattle before they reached the pound by promising to pay the accused Abdur Rahman Rs. 37 as a fine, and that sum was subsequently paid up by the complainant in two instalments.

The second act of oppression took place in the beginning of 1899, when the complainant was severely beaten with shoes by the orders of the accused Abdur Rahman and was ordered to pay Rs. 3 as diet money, which he did on the following day.

The third act of oppression was committed on the 7th February 1899, when all the cattle of the village of Butthana Kal were, by the orders of the accused, Abdur Rahman, seized by the accused Keramat Khan and others and placed in the pound ; they also seized two of the manjhis who followed the cattle and took them to the cutcherry of the Maharaja at Nagree, where they were severely beaten by both the accused and others and made to execute a bond for Rs. 200.

The accused were tried by the Joint Magistrate of Monghyr. Abdur Rahman on a charge (1) under s. 384 of the Penal Code of extortion committed on 1st February 1898 ; (2) under s. 384 of the Penal Code of extortion committed on 7th February 1899 ; (3) under s. 323 of the Penal Code of voluntarily causing

* Full Bench Reference in Criminal Revision No. 231 of 1900.

hurt on the same date. Keramat was tried only on a charge of the last two [841] offences. Abdur Rahman was acquitted of the offence committed on 1st February 1898.

Both accused were convicted by the said Joint Magistrate on the 28th of February 1900 of the offences committed on 7th February 1899. Abdur Rahman was sentenced to undergo rigorous imprisonment for one year and eight months and to pay a fine of Rs. 500; Keramat to undergo rigorous imprisonment for ten months. The accused appealed to the Officiating Sessions Judge of Bhagulpur, and *inter alia* contended that as it was not certain that all the occurrences happened within one year, and as all the persons accused were not charged with each offence, they should not have been tried jointly. On the 14th March 1900 the appeal was dismissed and the convictions and sentences under ss 323 and 384 of the Penal Code were affirmed. On revision it was contended under the authority of *In the matter of Luchminarain*, (1886) I. L. R., 14 Cal., 128, and *Queen-Empress v. Chandi Singh*, (1887) I.L.R., 14 Cal., 395, that the trial was altogether illegal and void by reason of the addition of the charge for the offence committed on 1st February 1898, and that as held in *Raj Chunder Mozumdar v. Gour Chunder Mozumdar*, (1894) I. L. R., 22 Cal., 176, this could not be cured by s. 537 of the Code of Criminal Procedure. The Judges composing the Criminal Bench of the High Court (PRINSEP and HANDLEY, J.J.) doubting the correctness of these decisions referred the matter to a Full Bench on the 3rd May 1900.

The ORDER OF REFERENCE was as follows:—

In this case two persons were tried by the Magistrate. Abdur Rahman was tried on a charge—(1) of extortion committed on 1st February 1898; (2) of extortion committed on 7th February 1899; (3) of voluntarily causing hurt on the same date. Keramat was tried only on a charge of the last two offences. So far as the first-mentioned offence, it could not properly be tried in the same trial (s. 234, Code of Criminal Procedure) with the other offences as they were not committed within one year. Abdur Rahman was acquitted of that offence, but the accused were both of them convicted of the other offences committed on 7th February 1899. On their appeal to the Sessions Court the case was restricted to those offences.

Objections have been taken on revision under the authority of *In the matter [842] of Luchminarain*, (1886) I.L.R., 14 Cal., 128 and *Queen-Empress v. Chandi Singh*, (1887) I.L.R., 14 Cal., 395, that the trial was altogether illegal and void by reason of the addition of the charge for the offence committed on 1st February 1898; and that as held in *Raj Chunder Mozumdar v. Gour Chunder Mozumdar*, (1894) I. L. R., 22 Cal., 176, this could not be cured by s. 537, Code of Criminal Procedure. We venture to doubt the correctness of these cases. It seems to us that there was an irregularity such as it is the object of s. 537 to meet, and that s. 537 applies to such a case. As the learned pleader relies on *Raj Chunder Mozumdar v. Gour Chunder Mozumdar*, (1894) I. L. R., 22 Cal., 176, and as we believe, it has been generally understood, the learned Judges held that by reason of the words in s. 537, "subject to the provisions hereinbefore contained," that section was inapplicable to matters, such as the present, dealt with in previous parts of the Code. It seems to us that by such an interpretation s. 537 would practically be inoperative. On the other hand, if those words be interpreted as referred to the previous sections of the Code contained in the same chapter (chapter XLV) which expressly deals with the same subject, providing for orders which are void, and not necessarily void for some reason stated, s. 537 would be useful, and we are inclined to think that this was the object and intention of the Legislature.

The matter which we therefore submit for consideration to a Full Bench is, whether s. 537, Code of Criminal Procedure, can be applied to any case in which the trial has been held on charges joined together contrary to s. 234.

There are several points which arise and have to be decided should the decision of the Full Bench be in the affirmative, which we do not think it necessary to set out.

Sir Griffith Evans (with him Mr. Mahmud-ul-Huq and Maulvi Mahomed Ishfaq) for the Petitioners. I submit this case belongs to a class of cases in which your Lordships would have to infer a failure of justice from the nature of the case itself. With regard to the joinder of charges s. 233 of the Code of Criminal Procedure is the substantive section, the sections mentioned therein are in the nature of exceptions to that section. Unless this case can be brought within the provisions of s. 239 of the Code, which I submit, it cannot, Keramat could not have been tried with Abdur Rahman and there has been a distinct contravention of s. 233. The words "subject to the provisions hereinbefore contained" in s. 537 refer to the provisions [843] hereinbefore contained in this Code and not only to those in that chapter.

I submit that where there is an appointed method of trial and the prisoner is deprived of it there is a failure of justice. I must, however, admit no objection was taken until the appeal.

Before Keramat was called upon to plead the Magistrate added a charge against Abdur Rahman with respect to an occurrence in 1898 and both accused were tried together and Keramat got the benefit of the evidence given against Abdur Rahman. The Magistrate should have charged each separately and tried them separately. Section 537 does not cure the defect of persons tried jointly where they should have been tried separately.

Section 195 of the Code says that no Courts shall take cognizance of certain offences except with previous sanction or on complaint, the prohibition is also express under ss. 196 and 197. There is express provisions in s. 537, cl. (b), that want of sanction under s. 195 shall not invalidate any sentence or finding, but the prohibitions in the other two sections are not covered by s. 537, and want of sanction or complaint with regard to them would be fatal and not cured by s. 537.

Take the proviso to s. 452, if the person not being an European British subject desires to be tried separately under that proviso and is tried jointly with an European British subject, would the Court on revision read the evidence to see whether he was rightly convicted or not? Would they not rather say he ought to be tried according to law?

In s. 461 a separate trial is provided for, and s. 537 does not cure any defect there, whereas in this case, where a certain kind of trial is provided and the accused is tried in some other way, it is an illegality and the words "error, omission or irregularity" in s. 537 do not cure the defect. *In the matter of Luchminarain*, (1886) I. L. R., 14 Cal., 128; *Queen-Empress v. Chand Singh*, (1887) I. L. R., 14 Cal., 395; *Raj Chunder Mozumdar v. Gour Chunder Mozumdar*, (1894) I. L. R., 22 Cal., 176; *Bishmi Banwar v. Empress*, (1896) I. C. W. N., 35; *Ekram Ali v. [844] Queen-Empress*, (1897) 2 C.W.N., 341; *Queen-Empress v. Ramji Sojabara*, (1885) I. L. R., 10 Bom., 124; *Empress v. Murari*, (1881) I. L. R., 4 All., 147; *Thomas Castro v. The Queen*, (1881) L. R., 6 App. Cas., 229, 244; *Makin v. Attorney-General for New South Wales*, (1893) L. R., App. (1894), 68; *The Attorney-General for the Colony of New South Wales v. Henry Lewis Bertrand*, (1867) L. R., 1 P. C., 520, 534.

Where the essential of a trial are wanting, the defect cannot be cured by s. 537, *Queen-Empress v. Imam Ali Khan*, (1895) I. L. R., 23 Cal., 252.

The cases against me are the following: *Queen-Empress v. Kutti*, (1888) I. L. R., 11 Mad., 441; *Queen-Empress v. Ramanna*, (1889) I. L. R., 12 Mad., 273, 276; *Queen-Empress v. Mulua*, (1892) I. L. R., 4 All., 502; *Reg. v. Hanmanta*, (1877) I. L. R., 1 Bom., 610.

1900, MAY 15. **Maclean, C.J.**—The question submitted for our consideration upon this reference is “whether s. 537 of the Code of Criminal Procedure can be applied to any case in which the trial has been held on charges joined together, contrary to s. 234 of the Code of Criminal Procedure.” From the statements on the reference, it would appear that the petitioner Abdur Rahman, was tried on a charge (1) of extortion committed on 1st February 1898, and upon two other charges, whilst the other petitioner Keramat was tried only upon the two latter charges. The reference states—and this has not been contested—that so far as the first-mentioned offence, it could not properly be tried in the same trial (s. 234, Code of Criminal Procedure) with the other offences, as they were not committed within one year; and the petitioners contend that the trial was illegal and void by reason of the addition of the charge for the offence committed on 1st February 1898, and that this illegality could not be cured under s. 537 of the Code.

[845] Put shortly, the case raised by the petitioners is that inasmuch as, under s. 233 of the Code, for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately (saving the exceptions mentioned), and that, inasmuch as that course was not pursued in the trial of the present petitioners, what was done was illegal, and, if illegal, the illegality cannot be regarded as a mere error, omission, or irregularity under s. 537 of the Code; and, if so, that the latter section has no application to the case. That contention is admittedly based upon three decisions of this Court. *In the matter of Luchminarain*, (1886) I. L. R., 14 Cal., 128; *Queen-Empress v. Chandi Singh*, (1889) I. L. R., 14 Cal., 395; *Raj Chunder Mozumdar v. Gour Chunder Mozumdar*, (1894) I. L. R., 22 Cal., 176, cases, however, which are at variance, so far as the principle is concerned, with those which have been cited to us, and which are *Queen-Empress v. Kutti*, (1888) I. L. R., 11 Mad., 441; *Queen-Empress v. Ramana*, (1889) I. L. R., 12 Mad., 273; *Queen-Empress v. Mulua*, (1893) I. L. R., 14 All., 502; and *Reg. v. Hanmanta*, (1877) I. L. R., 14 Bom., 610. But for the views expressed by the Judges of this Court, and which are entitled to every respect, I should scarcely have thought the point was open to very serious argument. The failure to try the charge separately was certainly an error, omission, or irregularity in the proceedings before or during the trial, an irregularity, however, to which no exception was taken by the accused at the time of trial. It might then have been taken. But, unless such error, omission or irregularity has occasioned a failure of justice, it is cured by s. 537. I am unable to accept the view suggested by the learned Counsel for the petitioner, that the error or irregularity was not in proceedings before or during trial, but in some proceeding *dehors* the trial altogether. I dare say it is my own want of appreciation, but I have not been able to follow that line of argument.

[846] To proceed to the cases upon which this application is based, I may point out, with regard to the first case of *In the matter of Luchminarain*, (1886) I. L. R., 14 Cal., 128, that the observations made by the late Chief Justice, Sir COMER PETHERAM, were not necessary for the purposes of the case then under consideration. It was a mere *obiter dictum*. But in the later case in the same volume the same learned Judge says at page 397: “Under these circumstances we think that the trial was illegal, it having been a trial which is prohibited by the terms of the law as contained in s. 233, and we do not think that s. 537, which cures errors, omissions or irregularities, is intended to cure, or does cure, an absolute illegality.”

But, if this view be well founded, s. 537 might as well be struck out of the Code, for every error or irregularity, in so far as it contravenes the provisions

of the Code, is, in a sense, illegal, but it was to provide against these illegalities vitiating the proceedings that s. 537 was enacted, with, of course, the important reservation that, if the error or irregularity occasioned a failure of justice, then the section was not to apply. If an Act of the Legislature prescribes that a certain thing is to be done in a particular way, and it is not done in that way, the error, omission or irregularity in so acting is illegal, for the act has not been done as the law prescribes, but then s. 537 steps in and says the proceedings are not to be regarded as vitiated by such error, omission or irregularity, unless a failure of justice has been occasioned. It must be a question of degree in each case. If the error be such as to have occasioned a failure of justice, then s. 537 does not cure the defect; but, if it was not of such a nature, then it does. The question of whether or not the act was illegal or not cannot be the true test. The illustration given to the section itself exemplifies this. It says: "A Magistrate, being required by law to sign a document, signs it by initials only, that is purely an irregularity, and does not affect the validity of the proceedings." In not signing with his name, the Magistrate, in strictness, acted illegally; but, though he acted illegally, it is none the less an irregularity which can be cured under s. [847] 537. For these reasons I respectfully decline to follow the decisions in this Court which have been referred to.

Apart from the questions of whether or not the language of s. 233 of the Code is directory only—as to which there may be something to be said—it is quite clear that, in this case, there was merely an error, omission or irregularity in the proceedings within the meaning of s. 537 of the Code, accepting, as I do, for this purpose the argument of Sir *Griffith Evans*, that the words "subject to the provisions hereinbefore contained" appearing at the commencement of the section, apply to all the preceding provisions of the Code, and not merely to the provisions of the chapter in which that section appears.

I do not propose to deal with a variety of cases which have been cited, many of them dealing with questions of criminal practice and procedure in England. They do not appear to me to be very, if at all, pertinent. We have the Code before us, and what we have to do is to construe the Code and ascertain to the best of our ability, what the Legislature meant. I entertain no doubt what it meant, or that the question submitted to us must be answered in the affirmative. I may, perhaps, add that my view appears to me to be strongly supported by the explanation to s. 537, which is a new addition to the Code.

With respect to the procedure we should adopt in disposing of the case, the language of rule 5 of chapter V of the Rules of the High Court, Appellate Side, relating to references to the Full Bench in criminal matters, is sufficiently wide to enable us to send the case back, with this expression of our opinion upon the point of law raised, to the Bench which referred it, for final disposal. And this will be done.

Prinsep, J.—I am of the same opinion. I have no doubt that misjoinder of charges can be dealt with under s. 537 of the Code of Criminal Procedure, and in the consideration of such a matter, the Court will be bound by the terms of the concluding portion of the section and the explanation. It seems to me that s. 233 of the Code does not bar the application of this section. No doubt, it has the appearance of expressing the law as mandatory in this respect, so as to require that every distinct offence of which [848] any person is accused shall form the subject of a separate charge. But this section could not be otherwise expressed, and the fact that the word 'shall' has been used in s. 233 does not bar the application of s. 537 of the Code, if a subordinate

Court should have acted in contravention of the terms of s. 233. I may observe, too, with reference to such a case that the rule we propose to follow is that which has long been the practice of this Court. That practice has been interrupted by the cases in Indian Law Reports, 14 Calcutta. In a case in which on facts found, an offence which has not been charged has been committed, this Court has always considered whether the conviction could be altered to one of that offence. The Court would in such a case, consider whether the accused had had full opportunity to defend himself against such a charge. If he had not, a fresh trial from that point would be ordered. So, in a case like that before us, when there has been a misjoinder of charges, the Court would consider whether, on the evidence in respect of the offences which could be properly charged, the accused could and should be convicted, and whether the misjoinder has so far prejudiced the accused as to have occasioned a failure of justice. In the latter event a fresh trial would be ordered. The proceedings would not, however, be bad in law so as to make them null and void. For these reasons I agree with my lord the Chief Justice in answering the question referred to this Full Bench.

Ghose, J.—I agree in answering the question referred to the Full Bench in the affirmative.

Rampini, J.—I am of the same opinion. The irregularity that has occurred in the trial of this case appears to me not to be an illegality which renders the proceedings altogether null and void, but one which can be cured by s. 537 of the Code of Criminal Procedure.

Harington, J.—I am of the same opinion. The English cases which were referred to are useful as disposing of the contention that the trial of a man on several charges at once was such an essential unfairness as to necessarily involve a failure of justice. It was never so held in England, and to this day, in cases of misdemeanour, it is the common practice to try a man for several misdemeanours on the same indictment. [849] We start, therefore, with the position, that the trial of a man for several offences on one indictment was not such an essential unfairness as to amount to a failure of justice. Has s. 233 of the Code, then, had the effect of making that which is not *prima facie* fatal to the fair trial of the prisoners, a fatal bar to the fair trial of the prisoners who are tried in breach of it? I do not think that s. 233 has had that effect; and if it has not had that effect, it amounts only to an irregularity, which comes within s. 537 of the Code. For this reason, I agree in thinking that this question should be answered in the affirmative.

D. S.

NOTES.

[The Privy Council, in *Subrahmanya Ayyar v. King-Emperor*, (1901) 25 Mad., 61, overruled this decision. "With all respect to Sir FRANCIS MACLEAY and the other Judges who agreed with him in the case of *In the matter of Abdur Rahman*, 27 Cal., 839, he appears to have fallen into a very manifest logical error in arguing that, because all irregularities are illegal as he says in a sense and this trial was illegal, that therefore all things that may in his view be called illegal are therefore by that one adjective applied to them become equal in importance and are susceptible of being treated alike. But this trial was prohibited in the mode in which it was conducted" * * * "Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one indictment. The illustration of the section itself sufficiently shows what was meant. The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission, or irregularity." —25 Mad., 61 at 98, 97.]

Previous to 25 Mad., 61, this was followed in 28 Cal., 7; 28 Cal., 10, but not followed in 29 Bom., 449; see also 26 All., 195.]

[27 Cal. 849]

APPELLATE CIVIL.

The 29th May, and 6th June, 1900.

PRESENT :

MR. JUSTICE GHOSE AND MR. JUSTICE HARINGTON.

Kameshwar Pershad.....Plaintiff

versus

The Chairman of the Bhabua Municipality.....Defendant.*

Bengal Municipal Act (III of 1884, as amended by Act IV of 1894, B. C.) ss. 85 cl. (a), 87, 114, 116—Municipal Taxation—Assessment—Appeal against Assessment—Jurisdiction of Civil Court to set aside an Assessment—“Circumstances and Property within Municipality”—Capability and Circumstances of the Assessee—Specific Relief Act (I of 1877), ss. 42, 45.

An assessment of tax under s. 85 cl. (a) of the Bengal Municipal Act (III of 1884, as amended by Act IV of 1894, B. C.) made in consideration of the assessee's "circumstances and property" (altogether or partly) outside the local limits of the Municipality is *ultra vires* and illegal; and the Civil Court has jurisdiction to set aside such an assessment.

Manessur Das v. The Collector and the Municipal Commissioners of Chupra, (1876) I. L. R., 1 Cal., 409, distinguished. *Navadip Chandra Pal v. Purnanand Saha*, (1898) 3 C. W. N., 73, referred to.

THE plaintiff, who is a zemindar of considerable means [850] and a resident of Benares, recently purchased a small house within the Municipality of Bhabua (in the Sub-Division of Bhabua, District Shahabad). This house was taxed at Rs. 2-8-0 per annum previously to his purchase; and it could be let at an annual rental of Rs. 30. He has also some landed property within the said Municipality, yielding an income of about Rs. 200 per annum. Besides these two properties he owns no other property or holding within the local limits of the said Municipality, but has considerable property beyond those limits.

It appears from the list of assessment prepared under s. 87 of the Bengal Municipal Act (III of 1884, as amended by Act IV of 1894, B.C.) that the Municipal Commissioners of Bhabua assessed the plaintiff's income at Rs. 10,000 per annum and imposed upon him the highest tax (viz. Rs. 84 per annum) allowed under s. 85 cl. (a) of the said Municipal Act, taking into consideration the plaintiff's *capability*, circumstances and property.

The plaintiff presented in due time an application to the Municipal Commissioners objecting to the assessment as made on a wrong principle, and prayed for a reduction of the tax. But the Commissioners rejected his application. Thereupon the plaintiff instituted this suit to have it declared that the said assessment was *ultra vires* and illegal—the tax having been imposed upon him in consideration of his "circumstances and property" outside the Municipal limits; and to have the assessment cancelled as made upon a wrong basis or principle.

The Chairman of the Bhabua Municipality contested the suit and pleaded. *inter alia* :—

* Appeal from Appellate Decree No. 1375 of 1898, against the decree of F. H. Harding, Esq., District Judge of Shahabad, dated the 13th of April 1898, reversing the decree of Moulvie Ali Ahmad, Munsif of Sesseram, dated the 13th of September 1897.

(1) That the Civil Court had no jurisdiction to set aside an assessment of Municipal tax, and to declare it illegal.

(2) That the proceedings of the Commissioners in making the assessment were in accordance with law.

(3) That the plaintiff, though a resident of Benares, carried on money-lending and zemindary business through his servants, who occupied the afore-said house or "holding" within the Municipality.

[851] (4) That the plaintiff lent about Rs. 5,700 to persons residing within the limits of the Bhabua Municipality, and several thousands of rupees to persons residing in the Bhabua Sub-Division in which the Municipality is situate, and these transactions were carried on by his servants.

(5) That the plaintiff had been properly assessed, regard being had to his *capability*, position and circumstances.

The Munsif held that the Municipal Commissioners exceeded their power under the law in making the assessment, and it was therefore *ultra vires* and illegal, that the plaintiff should have been taken to be an ordinary person possessed only of those two properties within the Municipality, shorn of any other source of profit that he might possess outside the Municipality; and that a suit would lie to set aside such an assessment. And he accordingly gave judgment for the plaintiff.

The District Judge, on appeal, was unable to find that the Commissioners acted without, or in excess of their jurisdiction. He was of opinion that the plaintiff occupied the said small house within the Municipality, as a kind of head-quarters for his servants, who conducted zemindary and money-lending business on his behalf—a circumstance which might not improperly be taken into consideration by the Commissioners while making the assessment; that the Commissioners could not be said to be wrong, if they made a distinction between a person in receipt of a limited income in the shape of a pension or an annuity and a person carrying on business of various kinds for his own profit, though they might occupy holdings of the same class; that the present suit being virtually an objection to the amount assessed would not lie, regard being had to the provisions of ss. 114 and 116 of the Bengal Municipal Act, and to the decision in the case of *Manessur Roy v. The Collector and Municipal Commissioners of Chupra*, (1876) I. L. R., 1 Cal., 409; and that the Commissioners were authorized by law to consider the *purpose* for which the holding was occupied by the plaintiff, in assessing him according to his "circumstance and property within the Municipality." And he reversed the judgment and decree of the First Court and dismissed the plaintiff's suit.

[852] The plaintiff appealed to the High Court.

1900, MAY 29. *Babu Umakali Mukerjee and Babu Kulwant Sahai*, for the Appellant.—The question is whether the Civil Court has jurisdiction to set aside an assessment (of tax) made by the Municipal Commissioners under the Bengal Municipal Act. If the Commissioners exceed the law in making the assessment, the Civil Court has every right to interfere and declare the assessment to be contrary to law. Section 45 of the Specific Relief Act (1 of 1877) gives jurisdiction to the High Courts, and s. 42 of the same Act gives jurisdiction to the Mofussil Courts, to interfere in a matter like this. The income on which the tax is assessed under s. 85 of the Bengal Municipal Act must accrue within the Municipality and the person enjoying such income must reside within its local limits.

[GHOSE, J.—If you conduct your business at a place within the Municipality, would not that be a "circumstance" within the meaning of s. 85 of the Act?]

If it relates to matters outside the Municipality that would not. The "circumstances and property" must be within the Municipal limits, and it does not, therefore, necessarily follow that because I have a zemindary office within the Municipality, I should be assessed on an income accrued to me outside its limits.

[HARRINGTON, J.—What position does the plaintiff occupy in the Municipality?] He has an office in the Municipality occupied by his servants; this cannot be said to be a "circumstance" which makes him liable to be assessed with the highest tax allowed under s. 85 (a) of the Act. The assessment is, therefore, *ultra vires*, and the Civil Court has jurisdiction to set it aside: *Navadip Chandra Pal v. Purnananda Saha*, (1898) 3 C. W. N., 73.

[At this stage, the hearing of the appeal was adjourned to send for the Proceedings of the Municipal Commissioners of Bhabua with reference to this matter.]

1900, JUNE 6. Babu *Umakali Mukerjee*.—It is admitted that the assessment list was prepared under s. 87 of the Bengal [853] Municipal Act. This list shows that the plaintiff was assessed on an income of Rs. 10,000; his assessment is *ultra vires*, inasmuch as the plaintiff has no such income within the municipality, and, therefore, the Civil Court has jurisdiction to declare that the assessment having been made on wrong principles cannot be enforced, notwithstanding the provisions of s. 116 of the Municipal Act. *Dwarka Nath Dutt v. Adaya Sundri Mittra*, (1890) I. L. R., 21 Cal., 319 (324); *Brindaban Chunder Roy v. The Chairman of the Serampore Municipality*, (1873) 19 W. R., 309 (312). S. 42 of the Specific Relief Act and s. 11 of the Civil Procedure Code empower the plaintiff to bring a suit to set aside an illegal assessment.

1900, JUNE 6. Babu *Ram Churan Mitter*, for the Respondent.—We have to deal with the statutory rights of the Municipal Commissioners in this case. S. 45 of the Specific Relief Act does not authorize the Mofussil Courts to call in question the acts of the Mofussil Municipalities. *Moran v. Chairman of Motihari Municipality*, (1889) I. L. R., 17 Cal., 329.

The initial qualification which makes one liable to be taxed, is that he must occupy a holding within the Municipality. The plaintiff does occupy a holding within the Municipal limits through his servants who carry on an extensive money-lending business there in his behalf.

When the Municipality assessed the plaintiff on an income of Rs. 10,000, he did not attempt to have the assessment reduced, but wanted to show that he was not liable to be assessed at all, because he did not occupy any holding within the Municipality.

[GHOSE, J.—The only question before us is, whether you have not assessed him with reference to his means or income derived outside the Municipal limits?]

The Municipal Commissioners held after an investigation, that the plaintiff's income was Rs. 10,000 per annum; and he in his appeal to the Commissioners under sec. 113 of the Municipal Act did not dispute the amount of the assessment, but [854] wished to avoid the liability to be assessed. The decision of the Commissioners in a matter like this, being final under s. 114 of the Municipal Act, no suit could be maintained to set aside the assessment.

S. 363 of the Act contemplates actions for damages or compensation, and not for questioning the validity of the acts of the corporate bodies: *Chunder Sekhur Banerjee v. Obhoy Churan Bagchi*, (1880) I. L. R., 6 Cal., 8.

[GHOSE, J.—What is the basis of the assessment as found by the District Judge?] The finding of the District Judge amounts to this:—That the

assessment was made on the plaintiff's income derived within the Municipality. The plaintiff has not shown that he has been assessed on an income derived outside the Municipal limits, and, therefore, it can reasonably be inferred that he was rightly assessed. The Commissioners having acted *bond fide*, and in conformity with the provisions of the law, the Civil Court has no jurisdiction to interfere with their acts: *F. W. Duke v. Rameswar Mahā*, (1899) I.L.R., 26 Cal., 811.

When the tax is levied under s. 85 of the Bengal Municipal Act, it is immaterial whether the assessee has any property or not within the Municipal limits, as long as he has the initial qualification, *i.e.*, a "holding" within the Municipality.

Babu *Umakāl Mukerjee* was not heard in reply.

1900, JUNE 6. The **judgment** of their Lordships was delivered by

Ghose, J.—The suit out of which this appeal arises was the outcome of an assessment made by the Municipal Commissioners of the Bhabua Municipality in the district of Shahabad, under clause (a) of s. 85 of the Bengal Municipal Act III of 1884 as amended by Act IV (B. C.) of 1894. The object of the suit was to have it declared that the assessment was illegal, because the Municipal Commissioners, in making the assessment, and imposing the highest tax as allowed by section 85, proceeded upon the basis of his "circumstances and property" outside the limit of [855] the Municipality. It appears that the plaintiff had recently purchased a small house within the Bhabua Municipality which had previously been taxed at Rs. 2-8-0 per annum. He seems to be a person of considerable means in Benares, where he resides, and he owns a certain share of the Municipal town Bhabua, which yields him, as it was found by the Munsif, Rs. 200 a year.

But it was alleged by the Municipality in their defence to this action that the plaintiff was in the habit of doing considerable business through his servants at the house which he had purchased; that he lent large sums of money to persons residing within the limits of the Municipality of Bhabua, and that his men were in the habit of receiving the collections of his *zemindari* at the said place. And it was pleaded on their behalf that the Municipal officers in making the assessment proceeded in accordance with law, and that no suit would lie for the purpose of having the assessment set aside.

The Munsif laid down, amongst others, the following issues:—"*2nd.*—Can the suit be maintained in a Civil Court? *4th.*—Was there any irregularity in assessing the tax upon the plaintiff? *5th.*—Whether the tax should be assessed upon the property and circumstances within the Municipality only? *6th.*—What would be the proper amount to tax upon the plaintiff? *7th.*—What relief, if any, is the plaintiff entitled to?"

It will be observed that the fifth issue proceeded upon the assumption that the tax imposed upon the plaintiff had been assessed upon his circumstances and property, not only within the limits of the Bhabua Municipality, but also outside thereof; and one may well gather, referring to the judgments of both the Munsif and the Judge of the Appellate Court, that one of the main contentions raised on behalf of the Municipality was that they were justified in imposing the tax upon the plaintiff with reference not only to his circumstances and property within the Municipality, but also his circumstances and property outside the limits thereof. The Munsif found that the action of the Municipality in making the assessment in question was *ultra vires* and therefore the suit would lie. He held, to use his own words that "from the written statement and evidence it is quite clear that the defendant Municipality has

exceeded [856] its proper limits in assessing a tax upon the plaintiff." And later on, he observed: "I am of opinion that the defendant Municipality exceeded their power, and therefore the assessment was irregular." He was of opinion, upon the fifth issue, to which we have already adverted, that the tax should be assessed upon his circumstances and property within the Municipality only. He, however, held with reference to the issue as to the proper amount of tax to be levied upon the plaintiff, and what relief the plaintiff was entitled to, that he was not at liberty to determine what should be the proper amount of tax, and that the only relief that the plaintiff was entitled to, was a declaration that the assessment made by the Municipality was illegal and not binding upon the plaintiff.

Against this judgment, the Municipality appealed to the District Judge of Shahabad; and we might here observe that, if the case of the Municipality really was, as it has now been represented to us, that the basis of the assessment was the plaintiff's circumstances and property within the Municipality only, we should have expected that they would raise this particular ground in their petition of appeal presented to the District Judge, and that they would complain of the issues as framed by the Munsif. And looking at the judgment of the District Judge one cannot help saying that the bone of contention of the Municipality was, as regards the construction to be put upon the words "circumstances and property within the Municipality" occurring in clause (1) of s. 85. The learned Judge has held, and we think rightly held, that the assessment should be made with reference to the circumstances and property within the Municipality and not outside the limits thereof. But he evidently thinks that what the plaintiff seeks to do in the present case is to have the amount of the tax imposed reduced, and that therefore, having regard to the case of *Munessur Das v. The Collector and Municipal Commissioners of Chupra*, (1876) I. L. R., 1 Cal., 409, a suit like the present could not be maintained.

In that case, certain houses had been assessed at Rs. 144 a year, and had so continued until the year 1873, when tax [857] was raised to Rs. 216, though the value of the houses had not in the meantime increased, nor had any change of form been made. The person so taxed brought a suit complaining against the enhancement, and asked that this enhancement might be set aside; and it was held by this Court that the Municipal Commissioners having determined what was the annual tax to be levied on account of the houses in question, though they might have erred in doing so, a suit would not lie to set aside the order of the Commissioners, the object of the suit being to reduce the amount of the tax. But that is not the case here. The plaintiff questions the principle upon which the assessment was made, not so much as to the amount of the tax imposed. He says that in making the assessment the Municipal Commissioners had proceeded upon a certain basis, which could not under the law form the right basis of such assessment, namely, the circumstances and property of the plaintiff outside the local limits of the Bhabua Municipality. As to the question whether a civil suit lies in a matter like this, we need only refer to one of the recent cases upon the point, namely, the case of *Nabadip Chandra Pal, Chairman of the Kamarkhuli Municipality v. Purna Nanda Saha*, (1898) 3 C. W. N., 73, where it was held that "if the assessment made by the Municipal Commissioners be *ultra vires* there is nothing in the Act to prevent a rate-payer from seeking in a Civil Court a decision that the action on the part of the Municipality was *ultra vires*, and that the assessment is not binding upon him." We may, therefore, take it, if the ground of the action be correct, that the plaintiff was entitled to institute the suit that he did in order to have it declared that the assessment in question

was *ultra vires*. The learned Judge of the Court below, however, about the end of his judgment, upon the question whether the Municipal Commissioners in the case had acted without jurisdiction or in the excess of jurisdiction, observes as follows: "I am of opinion that, the plaintiff-respondent occupying the house in question as a kind of head-quarters for servants who conduct zemindari and money-lending business on his behalf, is a circumstance which might not [868] improperly be taken into consideration by the Commissioners. I do not think that the Commissioners can be said to be wrong, if they make a distinction between a person in receipt of a limited income, in the shape, for instance, of a pension or an annuity, and a person who is carrying on business of various kinds for his own profit, although they may occupy holdings of the same class." This portion of the judgment would indicate as if the assessment made by the Municipality was upon the basis of the circumstances and property of the plaintiff within the municipality only; but there is no evidence upon the record to support this position. If that were so, we should have had no hesitation in saying that the suit could not be maintained. But that was not what was found by the Munsif, who tried the case in the first instance. The judgment of that officer proceeded rather upon this, that the assessment was made partly, at any rate, with reference to the circumstances and property of the plaintiff outside the Municipality, and against this conclusion there was apparently no ground taken by the Municipality in the memorandum of appeal to the District Judge. But assuming for the purposes of argument that the learned Judge was right in holding that the Municipality in making the assessment in question did proceed upon the circumstances mentioned in his judgment, it is quite evident, having regard to the judgment of the first Court, and also having regard to the line of defence and the contention raised by the Municipality, both before the Munsif and the District Judge, that the assessment was made, at any rate, partly with reference to the circumstances and property of the plaintiff outside the local limits of the Bhabua Municipality. In this view of the matter we should think that the assessment was *ultra vires* and illegal. Section 85 of Act III of 1884 says: "The Commissioners may from time to time at a meeting convened expressly for the purpose, of which due notice shall have been given, and with the sanction of the Local Government, impose within the limits of the Municipality one or other or both of the following taxes: (a) A tax upon persons occupying holdings within the Municipality according to their circumstances and property within the Municipality: Provided that the amount assessed [869] upon any person, in respect of the occupation of any holding, shall not be more than eighty-four rupees per annum" and so on. Now the first condition, which the law imposes, is that the person to be taxed occupies a holding or holdings within the Municipality; and the second condition is that the taxation must be according to that person's "circumstances and property within the Municipality." And the whole question which had to be considered in this case was whether the Municipality had not in making the assessment in question proceeded upon the basis of the plaintiff's circumstances and property outside the Municipality of Bhabua. If they did so altogether or even partly, as it seems to have been the case, it is obvious that the assessment was *ultra vires*, and that the plaintiff was entitled to bring the suit that he instituted.

We may as well add that the contention that was raised by the plaintiff before the Municipal Commissioners, on appeal against the order of assessment, was that he was not at all liable to be taxed because he had not been residing in the house within the Municipality of Bhabua, which he had purchased. That ground no doubt could not be sustained, and the learned vakil on behalf of the

Municipality has contended before us that the line of action taken by the plaintiff before the Commissioners would rather indicate as if, barring the particular question raised by the plaintiff before the Commissioners, the assessment had rightly been made. We are, however, unable to accept this contention as correct. No doubt his endeavour then was to show that he was not liable to be taxed at all, but it does not follow from this that he thereby accepted the principle of the assessment that was made, much less does it follow that he is not entitled to maintain the suit which he has brought.

The result is that the decree of the District Judge is set aside, and that of the Munsif restored, with costs.

B. D. B.

Appeal allowed.

NOTES.

["The jurisdiction to interfere in matters regarding the amount of assessment has been withdrawn by express legislation, and section 116 (Bengal Municipal Act III of 1884, B.C.) makes the decision of the objection committee final. The cases of *Navadip Chandra Pal v. Purnanand Saha*, 3 C.W.N., 73, and *Kameshwar Pershad v. The Chairman of the Bhabua Municipality*, 27 Cal., 849, do not affect the general principle and are clearly distinguishable. But where the Municipality have the power to make a fresh assessment as they have every three years, and merely raise the valuation, the Civil Court has no power to revise the valuation, but is bound to accept it as conclusive as a matter of fact."—(1910) 37 Cal., 37: 11 C.L.J., 400: 14 C.W.N., 437.

But the Civil Court has jurisdiction where the assessment is attacked on the ground of *ultra vires*:—(1908) 35 Cal., 859: 7 C.L.J., 631: 12 C.W.N., 709.]

[860] ADMIRALTY JURISDICTION.

The 11th, 12th, 13th, 14th, 15th, 18th, 19th, 20th, 21st and 22nd December, 1899, and the 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, 15th, 16th, 17th, 18th, 19th, 22nd, 23rd, 24th and 25th January, 1900.

PRESENT:

MR. JUSTICE AMEER ALI.

In the Matter of the Steamship *Drachenfels*.

Retriever.

versus

Drachenfels.

Hughli.

versus

Drachenfels.

Salvage—Service to a vessel in distress though not in imminent danger—

Interruption of service by accident—Towage service convertible into salvage service—Distinction between towage and salvage service—

The indicia of salvage service—Costs—Practice of the Court in giving costs.

"Any service rendered to a vessel in a state of peril or risk or otherwise in distress, which contributes in some degree to its ultimate safety entitles the person rendering the service to salvage reward.

It is not necessary that the distress should be actual or immediate, or that the danger should be imminent and absolute. It will be sufficient if, at the time the assistance is rendered, the vessel has encountered any damage or misfortune which might possibly expose her to destruction, if the services were not rendered.

Services rendered to a ship which is in a normal condition, and has received no injury, and needs nothing more than expedition, or acceleration of progress, will be treated as mere towage; it is otherwise in the case of a vessel which is in a disabled condition or has received substantial injury. In considering the question whether the service was of the nature of salvage service, the risks of navigation, the difficulty under which it was performed, and the danger in performing it, have all to be taken into consideration.

An ordinary towage service may, in consequence of supervenient danger, be converted into salvage service; but the right to salvage may be wholly or partially forfeited by improper abandonment or by wilful misconduct, or gross negligence on the part of the salvors. The mere fact that the service was interrupted by accident or some like cause, if it has been productive of benefit to the owners of the vessels, will not disentitle the salvors from their reward.

In assessing the award the Court will take into consideration, not only the danger and difficulties to which the salvor was exposed, but also the skill with which the work was performed. The shortness of service may often be taken as showing extraordinary skill and labour.

When two separate salvage actions are consolidated at the instance of the common impugnant, and no order is made giving the conduct of both to one plaintiff, the promovents are entitled to separate costs. Practice of the Court followed, and costs given on the ordinary scale provided for in the rules under the Civil Procedure Code, and not under the schedule relating to Vice-Admiralty actions.

[861] THE *Drachenfels*, a German steamship, left Calcutta on the 11th September 1899, and that same night at about 10 P. M. she discharged her pilot and stood out to sea, and on the 12th she met bad weather. She lost her rudder on the 13th and tried to get back to Calcutta to remedy the damage. She got back to near about the Eastern Channel only on the 18th, and at 2 P.M. on that day Mr. Cox, the pilot, went on board of her, and at about 8 P.M. she anchored not far from the Eastern Channel light. Next morning about 1 A.M. the tug *Hughli*, which had received information from another vessel regarding the condition of the *Drachenfels*, went down to her and enquired, if her services were required, which were accepted. At about 2-30 A. M. in the morning the tug boat was fastened by a hawser to the stern of the *Drachenfels* to act as a rudder, and steer her up the Channel towards Saugor. At one stage of the journey the hawser broke, but a little while after the *Hughli* was again fastened to the *Drachenfels*; this time with two hawsers—one of them, the wire one, parted, but the coir hawser held, and the *Hughli* successfully did her work and brought the *Drachenfels* up to Saugor. For some reason the hawser was thrown off and it was lost. There the two vessels remained at anchor on that day, i.e., the 19th, and the *Retriever*, which had met them somewhere lower down, remained also in attendance at the request of Mr. Cox, who was acting for the captain of the *Drachenfels* during the whole time. Next morning at about 5-30 the two tugs were fastened to the *Drachenfels*, the *Retriever* on the starboard side and the *Hughli* on the port side, in order to tow her upon her journey towards Calcutta. The Flotilla thus made up went up the river, till they came to a place called the Gabtolla Channel, which they entered by the usual track for ships, namely the No. 3 Track. After they had passed the Lower Spar Buoy somewhere abreast of the Lower Black Cask Buoy the *Drachenfels* took the ground. On taking ground she heeled over to starboard, most of the lashings of the two tugs gave way: with some difficulty they got clear of the *Drachenfels*, and then moved off to get rid of the wreckage. After clearing the wreckage they came back to the assistance of the *Drachenfels*, where she had grounded fast. The *Retriever* attempted unsuccessfully to pass her a hawser, then the *Hughli* tried, but met with an accident to one of her propellers, which com-[862]pletely disabled her from pursuing her efforts to help the grounded steamer. The *Hughli* was thus compelled to come up to Calcutta to have her propellers cleared, but the *Retriever* remained by, and next morning she pulled off the *Drachenfels* or assisted in pulling her off the sands on which she had grounded. The *Hughli* claimed that having regard to the condition of the *Drachenfels*, her position at the Sandheads, the risk to

which she was exposed and other circumstances, the work which she performed was salvage work, and that she was entitled to reward on that basis.

The *Retriever's* case was that the danger to which the *Drachenfels* was exposed on the sands after she grounded was of an imminent character, and that the services, which she rendered to her, were such as entitled her to salvage.

The case of the *Drachenfels*, on the other hand, was that she was in no danger at all at the Sandheads, that she could have remained anchored there with safety and drifted up the channel without any assistance from the *Hughli*. The allegations of the *Hughli*, regarding the nature of the work done by her, the character of her services and so forth were disputed. It was also urged on behalf of the *Drachenfels* that the grounding was due to misconduct on the part of the masters of the tugs, inasmuch as they did not keep the pilot in charge advised of the course they were pursuing. It was also contended that the *Drachenfels* could have got off by herself, if the pilot had come on board from the *Tigris*, to which vessel he had gone for the night, and that, as a matter of fact, she got off the ground on the next day by her own exertions.

The two cases for salvage reward promoted respectively by the owners, captains and crews of the steam tugs *Hughli* and *Retriever* against the steamship *Drachenfels* were consolidated at the instance of the latter ship by an order of this Court made on the 15th October 1898.

1899, DECEMBER 11. Mr. Pugh and Mr. Zorab for the tug *Retriever*.

Mr. Dunne, Mr. J. G. Woodroffe and Mr. Peacock for the tug *Hughli*.

Mr. O'Kinealy, Mr. Hyde and Mr. Knight for the steamship *Drachenfels*.

Cur. adv. vult.

[863] 1900, JANUARY 31. **Ameer Ali, J.**—These two cases for salvage reward promoted respectively by the owners, captains and crews of the steam tugs *Hughli* and *Retriever* against the German steamship *Drachenfels* were consolidated at the instance of the latter ship by an order of this Court made on the 15th October 1898. To the consequence of this order I shall refer by and by, but I cannot help expressing at this stage my regret at the inordinate length of the hearing and the amount of public time, which, in spite of every endeavour on my part to keep the discussions confined to the real issues, has been spent over non-essentials. One other remark seems to me necessary before going to the facts of the case.

It was open to the parties to ask for the appointment of assessors and as they have not chosen to do so, should I fall into any misapprehension with regard to any matter of technical detail, the responsibility must be theirs.

The *Drachenfels* is a German steamship of about 900 H.-P., her nett tonnage being 1,573 or 1,574 tons, and her gross tonnage 2,463. She left Calcutta on the 11th September, and that same night at about 10 P.M. she discharged her pilot and stood out to sea. On the 12th she met bad weather. Admittedly she lost her rudder on the 13th, which fact, according to the captain of the *Drachenfels*, was discovered only on the 14th. She then tried to get back to Calcutta to remedy the damage that had happened to her. She got back to near about the Eastern Channel only on the 18th, and at 2 P.M. on that day Mr. Cox, the pilot, went on board of her, and at about 8 P.M. she anchored not far from the Eastern Channel Light. If I remember aright Mr. Cox says it was about 2 miles to the S. S. E.

Next morning about 1 A.M. the tug *Hughli*, which had received information from another vessel regarding the condition of the *Drachenfels*, went down to her and enquired, if her services were wanted. At present I am only giving

the prominent facts, in order to explain how the case comes before me. I shall detail the other circumstances later on.

There was a conversation between Mr. Cox and the captain of the *Hughli*, of which there can be no doubt the captain of the *Drachenfels* was cognisant.

[864] The *Hughli's* services were required and were accepted, and at about 2-30 in the morning the tugboat was fastened by a hawser to the stern of the *Drachenfels* to act as a rudder and steer her up the channel towards Saugor.

There is no doubt that at one stage of the journey the hawser broke. What happened thereafter is a matter of controversy, as also the time when and the place where it took place. To these matters I shall advert presently. A little while after, the *Hughli* was again fastened to the *Drachenfels*. This time with two hawsers, one of them, the wire one, parted, but the coir hawser held and the *Hughli* successfully did her work and brought the *Drachenfels* up to Saugor, somewhere about 1-30. The hawser was thrown off at about 2-30, and for some reason, which is again in dispute, it was lost.

There the two vessels remained at anchor on that day, namely, the 19th, and the *Retriever*, which had met them somewhere lower down, remained also in attendance at the request of Mr. Cox, who, I have no doubt, was acting for the captain of the *Drachenfels* during the whole time. Next morning at about 5-30 the two tugs were fastened to the *Drachenfels*, the *Retriever* on the starboard side, the *Hughli* on the port, in order to tow her up on her journey towards Calcutta. The *Retriever* is a bigger boat with stronger horse power than the *Hughli* and the *Hughli* appears, so far as I can gather from the evidence and the diagram which is in evidence, to have been lashed to the *Drachenfels* a little more forward than the sister-tug.

The *Drachenfels* was not to use her engines, until she got into a straighter channel. The flotilla, made up in the way I have described, went up the river, till they came to a place called the Gabtollah Channel.

The evidence for the promovents is that the flotilla entered the Gabtollah Channel by the usual track for ships, namely, the No. 3 Track, and after they had passed the Lower Spar Buoy somewhere abreast of the Lower Black Cask Buoy the ship took the ground. On taking ground she heeled over to starboard, most of the lashings of the two tugs gave way, with some difficulty they got clear of the *Drachenfels* and then moved off to get rid of the [865] wreckage. After clearing the wreckage, the evidence is, they came back to the assistance of the *Drachenfels*, where she had grounded fast. The *Retriever* attempted unsuccessfully to pass her a hawser; then the *Hughli* tried, but met with an accident to one of her propellers, which completely disabled her from pursuing her efforts to help the grounded steamer. The *Hughli* was thus compelled to come up to Calcutta to have her propeller cleared, but the *Retriever* remained by, and next morning she pulled off the *Drachenfels* or assisted in pulling her off from the sands on which she had grounded. These are the bare outlines of the case which have given rise to these two claims.

The *Hughli* says that, having regard to the condition of the *Drachenfels*, her position at the Sandheads, the risk to which she was exposed and other circumstances to which I shall refer in some detail, the work which she performed was salvage work or of the nature of salvage work, and that she is entitled to reward on that basis.

The *Retriever's* case is that the danger to which the *Drachenfels* was exposed on the sand after she grounded on the morning of the 20th was of an imminent character, and that the services, which she rendered to the disabled ship, were

such as entitled her to salvage. It is unnecessary to refer here to the amount of the claims put forward by these two tugs.

Owing to the order of consolidation, which, as I have said before, was made at the instance of the *Drachenfels*, I am obliged to deal with these two claims in the same judgment with the consequence that in many matters I shall have to go from one to the other at the risk of complicating to some extent the discussion of the subject. It would have been preferable, if the two cases had been kept apart, for, as it seems to me, the claim of the *Hughli* is not connected with that of the *Retriever* or, if at all connected, it is so in a very remote degree; but owing to the order of consolidation the representatives of the *Hughli* have been obliged to be present during the trial of the case for the *Retriever*, and *vice versa*. I now come to the impugnant's case. Her case on the other hand is that she was in no danger at all at the Sandheads, that she could have remained anchored there with perfect safety. It has even [866] been contended that she could have drifted up the channel without any assistance from the *Hughli*, and the allegations of the *Hughli* regarding the nature of the work done by her, the character of her services, and so forth, have been disputed, and disputed with a minuteness as to which I shall have to say a word or two. The *Drachenfels* also alleges that the grounding was due to misconduct on the part of the masters of the tugs inasmuch as, to paraphrase the contention, they did not keep the pilot in charge advised of the course they were pursuing. She also contends that the *Drachenfels* could have got off by herself that night, if the pilot had come on board from the *Tigris* to which vessel he had gone for the night, and that, as a matter of fact, on the next day, the 21st, she got off the ground by her own exertions. I must admit that although this latter allegation is what I gather from the evidence of Captain Kennewig, the learned counsel for the *Drachenfels* did not go so far. He only contended that the *Drachenfels* by working her own engines contributed materially in getting herself off that morning from the place where she had grounded. The principles governing the right to salvage remuneration are now too clearly recognised to require any lengthy discussion. For the purposes of the present case I may take it as a settled rule that any service rendered to a vessel in a state of peril or risk, or otherwise in distress, which contributes in some degree to its ultimate safety entitles the person rendering the service to salvage reward. Again the mere fact that the service was interrupted by accident or some like cause, if it has been productive of benefit to the owners, will not disentitle the salvors from their reward.

In the case of the *Camellia*, (1883) L. R., 9 P. D., 27; 50 L. T., 126, Sir JAMES HANNEN stated that principle thus: "I am of opinion that the principle laid down by Dr. Lushington and Sir R. PHILLIMORE in the cases I have referred to, namely, that services which have contributed to the ultimate safety of a vessel, if interrupted before completion, without default of the salvor, are entitled to some remuneration, is applicable, not only to the case of a vessel saved from imminent risk of wreck, but also to a case like the present, where the vessel is [867] brought into a position of greater comparative safety than that in which she was when she asked for assistance."

It may also be taken as a settled rule that a mere towage service, or, as it is some times called, an ordinary towage service, may, in consequence of supervenient danger, be converted into salvage service. The circumstances under which a service of towage becomes superseded by the right to salvage is described in the case of the *Minnehaha*, (1861) 15 Moo. P.C., 133; Lush., 335. But the right to salvage may be wholly or partially forfeited by improper abandonment or by wilful misconduct or gross negligence on the part of the

salvors. In the case of the *Atlas*, (1862) 15 Moo. P. C., 329 : Lush., 518, it was laid down that such misconduct must be conclusively proved by those who allege it in order to work a forfeiture.

Bearing in mind these principles, which I have stated here in general terms, let us examine the facts relating to these claims. But before proceeding further I think it would be desirable to refer for a moment to the chart which shows the channel up the river from the Sandheads to the entrance of the Gabtollah Channel.

The distance between the Eastern Channel Light and Saugor, the place where the *Drachenfels* anchored on the 19th, is stated by the witnesses to be forty-five miles. The Pilot's Ridge marked on chart A. is, I gather from the Imperial Gazetteer, 139.6 nautical miles from Calcutta *via* the Western Channel.

Hunter in describing the estuary of the Hooghly below Kulpi, which is 49.7 nautical miles below Calcutta, says thus: "The estuary of the Hooghly is famous for its dangerous and numerous sand banks, but they are subject to such great and rapid changes that any attempt at a minute description of them would be more mischievous than useful. The best known of them are the Gasper Sands and Saugor Sands." Leaving the Eastern Channel Light and passing the buoy between the Intermediate and Eastern Channel Lights we come to the Saugor Sands. Further up is the Lower Gasper and further up again is the Upper Gasper: we then come to the Middleton Sands and Long Sands. Bearing in mind [868] these places it would be as well to know exactly the width of the channel as described in the evidence.

According to Mr. Kirkman the distance between the Lower Gasper and the Long Sand Light is 12 miles, and from the Lower Gasper Buoy to Middleton Sand is 6 miles. The width of the Channel between the Lower and Upper Gasper varies from 3 to 1½ miles. At the Lower Gasper the available channel is about a mile, and between the Lower Gasper Light and the Station Buoy at the Upper Gasper, if I understand the evidence rightly, the channel is said to be ordinarily speaking half a mile or thereabouts.

Captain Best in his evidence says that the width of the narrowest part of the channel from the Lower Gasper to Saugor is about half a mile in places, and Mr. Kirkman says the most dangerous places along the route from the Sandheads to Saugor are to be found at the Gasper Sands, the Long Sands, the Middleton Bar, Middleton Spit and Saugor Flat.

There is one other circumstance disclosed in the evidence which must not be overlooked viz., what is stated by Mr. Kirkman, that the flood tide setting towards Saugor runs north at the Lower Gasper Station Buoy away from the Western Sands, but dead on to the Middleton Sands.

At this stage I think I may also call attention to the evidence of the witnesses who speak about the dangers of the Hooghly and what they consist in. Two of the witnesses called by the promovents state these dangers in explicit terms, and I do not think there can be any doubt as to their existence. Mr. Paine says the dangers of the Hooghly are strong tides, cross-currents, constantly changing depths and generally intricate navigation and that the sands are constantly altering, some of them very rapidly. He is corroborated by several other witnesses and not contradicted in any respect by the other side.

Keeping these facts as to the nature of the river in mind, let us see what was the condition of the *Drachenfels* on the 18th or morning of the 19th when she accepted the assistance of the *Hughh*. As regards the condition of the *Drachenfels* herself it is worthy [869] of note, that although Captain Kennewig tries to represent the vessel as not wholly disabled he admits that she was only

partially under control. But the fact remains that she was 210 miles out when she discovered she had been disabled by the loss of her rudder, and it took her 5 days to make up the 210 miles and get within reach of the pilot brig.

Apparently she was first observed by Mr. Chase, who is totally unconnected with this case, and whose evidence I see no ground for disbelieving. Mr. Chase was struck by her movements which he describes in rather graphic terms. He says he remembers going as pilot on board the *Aglaia* in September 1898 and seeing the vessel which afterwards turned out to be the *Drachenfels*, that he saw the *Drachenfels* before he went on board the *Aglaia*, that he observed something which struck him as unusual. She was steering wildly, he went down to her in the *Aglaia* and when within hailing distance of her, he asked if he should send out tugs to her and that the reply was they would first like to consult their own pilot. They had no pilot on board at that time. He then returned to the pilot brig and reported the fact. He then towed down the pilot, Mr. Cox's boat, to the *Drachenfels*, and Mr. Cox, before he went on board the *Drachenfels*, asked him to send down two tugs to him; that on the way up he met the *Hughli* at Saugor and gave her certain instructions. Later on he met the *Retriever* to whom also he communicated similar instructions. In answer to the Court he says, speaking of *Drachenfels*, "She was I think 3 or 4 hours in sight long before the *Aglaia* came into sight. We saw her masts opening out and closing in. We knew that she was steering a wild course. She was moving anything between E. S. E. and North; yes it was her erratic movements which caused me to go up to her." Then I asked him, if what he had said as to her not being under proper control, was an opinion formed from what he then saw of her movements. His answer is clear: "Yes especially when we got near her, I did not want to go close to her. She was steering so wildly. I had to make a long circle and come up behind her. That was her position in the open at sea. Her position in shallow water would be worse."

Captain Kennewig denies that he told Mr. Chase anything with [870] regard to a tug or tugs. He says the only message or commission he entrusted him with was to inform the agents, Messrs. Graham & Co., that the *Drachenfels* had lost her rudder. On Mr. Chase's testimony I have no doubt that Captain Kennewig's statement is not correct and that what Mr. Chase states is true and likely to be true. It is very likely Captain Kennewig did not like to say anything as to whether the assistance of a tug or tugs was necessary, till he got his pilot on board, and it is in evidence that before Mr. Cox got on board the *Drachenfels* he commissioned Mr. Chase to send down two tugs to the assistance of the *Drachenfels*. So far as the actual condition of the *Drachenfels* is concerned, it appears clearly from the evidence of Mr. Chase, which is corroborated by that of Mr. Cox, the pilot. He states in examination-in-chief that she was not manageable, and though cross-examined at considerable length and with great ingenuity he has stuck to the statement that the *Drachenfels* when he took her in charge was wholly unmanageable. He says he would not have attempted to go up to Saugor without assistance, and the expert evidence called by the promoters supports the view that it would not have been possible for the *Drachenfels* to work up the river without the assistance of a tug.

No doubt there is evidence on the other side upon which it is contended it was not only possible but would have been quite safe for the *Drachenfels* to go up the river without the assistance of the *Hughli* by dragging her own anchor and working her own engines. These are matters to which I shall refer later on.

Assuming her condition at that time to have been as is stated what would be her position working up the river without any assistance. As I have already

pointed out, there are various places in the river which are extremely dangerous. The statements of Mr. Kirkman as to their dangers have not been contradicted, although Mr. Bellew, who has come forward on the part of the *Drachenfels*, traversed a large extent of ground to some of which I think it desirable to call attention.

The season of the year when these events took place was during the south-west monsoon, and the plaintiff's witnesses state that September is a most uncertain month regarding the springing up of cyclones, storms and changes in the weather. Mr. [871] Bellew says he would regard October as the most treacherous month in the year. Whether October is more treacherous than September or *vice versa* is a question better fitted for discussion in some debating club than in a Court of Law.

The question which I have to determine is whether there is any chance of the weather changing in September so as to expose a vessel in the condition of the *Drachenfels* to risk and danger.

The chart, to which I have already referred, is issued under the authority of Government, and the notes thereon may be referred to as authoritative. I find one note, which is worthy of attention, worded thus: "Caution.— Owners of vessels are strongly advised not to risk their vessels laying at anchor awaiting orders at the Sandheads between the months of April and November inclusive. Vessels are recommended to go into Saugor roads, where there is a safe anchorage and telegraph station."

Apart from that note what are the facts which have been deposed to on both sides. In the first place I have the evidence of Captain Best and Mr. Durham, who were on the *Hughli*, of Mr. Cox, the pilot in charge of the *Drachenfels*. I have the evidence of several men from the pilot service who have been cross-examined at great length, but against whose testimony nothing has been shown to suggest that they have given their evidence with any interest in the case itself. One of them, Mr. Chase, saw the vessel at the Sandheads. Mr. Kirkman has piloted the *Drachenfels* before, and knows the capacity of the vessel. He and the others are thoroughly conversant with the dangers of the Hooghly and the difficulties of navigation in it. I have also the evidence of a gentleman in Government service, who does not appear to be in any degree interested in the case. I refer to Captain Waller.

On the other hand several witnesses have been called on behalf of the *Drachenfels*, one of whom is Mr. Bellew, who is a pilot of long standing and experience, but the manner in which he introduced himself into the case or became connected with it, in my opinion, detracts considerably from the value of his testimony. The circumstances are detailed in his evidence, and I shall not take up time by dwelling on them. It is enough to say [872] that I think learned Counsel for the promovents were not unjustified in their comment that his evidence should be accepted with considerable reserve and qualification. Captain Lardner was another witness on behalf of the *Drachenfels*. His experience of the river Hooghly is not very large. He was a long time ago in charge of a steamer for only three months as third officer, and though he hazarded opinions on a variety of subjects, his cross-examination has led me to the conclusion that not only was he a strong partisan, but that I cannot attach much weight to any of the opinions he has expressed in the case.

With reference to Captains Ashby and Thomson I shall make a few remarks when I come to that part of the case to which their evidence relates. I shall only say here that they, to use their own language, did not pretend to have any knowledge of the river Hooghly, and whatever they said, they said with regard

to their own experience on those smaller rivers they mentioned, and in connection with those smaller tugs of which they had experience on those smaller rivers.

So far as Mr. Bellew's statements are concerned, to my mind they largely corroborate what has been stated by the expert witnesses called on behalf of the promovents. In my opinion the promovents' witnesses—apart from those who were eye-witnesses to various facts—have given their evidence with great reserve and an absence of partisanship, and I think I may fairly place reliance on their evidence when I find that in many respects they derive corroboration, or, if not corroboration, support from what Mr. Bellew says. I shall explain what I mean. It was contended with considerable force that the *Drachenfels* could have lain at anchor at the Sandheads with perfect safety; that the weather was settled so to speak at that time. that a storm had prevailed for some days before, that is to say, from the 12th and had passed over, and upon Mr. Bellew's statement it was said there was no prospect of a storm for a more or less definite period; that not only could the vessel have remained there in safety, but she could, if she liked, have drifted up the river in the way Mr. Bellew and Captain Lardner suggest. Mr. Bellew, however, says this, that he would not have done that himself, if he could have got assistance; when pressed hard as to why he would not, he said, he would not [873] like to have "fiddled about,"—that is his expression,—for a week or thereabouts. Whether he would have liked to do so or not is not a matter for me to consider now.

The question for my consideration is whether he in any way suggests that the ship in the condition in which she then was, did not require the assistance which she accepted and without which the other witnesses say she could not have got up to Saugor.

Mr. Cox, whatever his mistake, as to what occurred at the Gabtollah channel, if mistake it was, does not now at least appear to be in any way connected with the *Hughli* or the *Retriever*. If any case of bias was to be urged against him I think foundation should have been laid for it in cross-examination, and, that not having been made, I think his evidence is not to be put aside without careful consideration. He says he would not have ventured up the river, if assistance was not forthcoming; and four other men, men who follow the profession of pilots on this river and who have to bring up vessels and who are presumably in a position which entitles their statements to credence, say, that it was impossible to bring up the vessel in the condition she was without the assistance which she received. Captain Waller, a Government servant, is express on that point and he says the same thing.

Why am I, merely on the theorising of a gentleman who is intimately connected with the conduct of this case, to put aside the whole of this evidence? But it is said the ship might have remained there and in safety. Again there is the evidence of these gentlemen to whom I have referred. The only evidence I have on the other side is that of Mr. Bellew, for that of Captain Lardner does not touch the point. He has never had experience at the Sandheads of September weather. Mr. Bellew speaks, and speaks throughout with so many qualifications and reservations, that it is only necessary to refer to his evidence to see that he is a witness, whose testimony requires to be read with the greatest scrutiny. The witnesses for the promovents state that at any moment a storm might have sprung up and put the ship in peril. They describe those risks in their evidence and I do not propose to refer to them in detail. Mr. Bellew says that a storm having just passed over he [874] would not expect another for a fortnight or so. That is a statement of a most indefinite character.

Certain passages from a book by some one named, I think, Marshall, were referred to, to tell me what would happen in September. I have no way of

testing the statements in that book. I can only say that the testimony of the witnesses called and examined in Court are, to my mind, more reliable and of far more use than hypothetical statements in a book, the authority of which is uncertain. But Mr. *O'Kinealy's* contention is that the ship when at the Sandheads was not in any imminent danger, so as to entitle the tug to salvage reward.

In the cases of the *Charlotte*, (1848) 3 W. Robinson, 68, and the *Albion*, (1861) Lushington, 282, it is laid down that it is not necessary that the distress should be actual or immediate or that the danger should be imminent and absolute. It will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction, if the services were not rendered. And in the case of the *Chetah*, (1868) L. R., 2 P. C., 205, which was strongly relied on for the impugnants, where also another vessel had acted as a rudder steering the disabled vessel from astern, though the *Chetah* was in no imminent danger—on which ground the high salvage award given by the lower Court was reduced,—the Privy Council held that there was considerable risk to the vessel saved which would entitle the salving vessel to remuneration. The facts are thus stated in the report: The *Chetah* had on the 17th of March 1867 whilst on a voyage from China to London met with an accident to her rudder whereby she was disabled. The master and crew constructed a jury rudder, but before they had fixed it she was fallen in with by the schooner *Annie Grant*, and with her assistance the *Chetah* arrived off Waterford on the evening of the 27th of the same month. The *Chetah* was sailing with the *Annie Grant* astern and steering her from behind. Dealing with the claim of the *Annie Grant* their Lordships say as follows: "After the most careful consideration of circumstances upon which the claim of the *Annie Grant* is founded and with an anxious desire [875] that the salvors should receive not merely a fair but a liberal remuneration for their services, their Lordships have come to a conclusion as to the value of the services rendered widely differing from that of the learned Judge of the Court of Admiralty." Then they say that the *Chetah* was not in that degree of peril which the learned Judge supposed, that "she had indeed lost her rudder but this loss might have been supplied by some temporary expedient for which there were materials on board. The most important element in a claim for high salvage reward, viz., the imminent peril of destruction of the vessel to which assistance is rendered is therefore wanting in this case." But they go on to add: "That the *Chetah* was rescued from a situation of considerable peril by the exertion of the master and crew of the *Annie Grant* and by the application of proper means for securing her safety at a time when, being crippled by the loss of rudder, she would most probably, if not inevitably, have been driven on shore there can be little (if any) doubt, and the services of the *Annie Grant* have, therefore, been the means of saving very valuable property from impending destruction. That they are entitled to a high salvage reward it is impossible to deny."

In the case of The *Albion*, (1861) Lushington, 282, the possibility of danger was taken into consideration.

Similarly, in two cases in the Supreme Court here, in one of which the learned Judges carefully avoided using the word danger as being ambiguous, the risks arising from the possibility of bad weather were taken into consideration for the purpose of judging whether the services were in the nature of salvage or otherwise.

Bearing in mind then the risk of a change in the weather to which I have referred, and the consequences which might have resulted to the *Drachenfels* in

the condition in which she was, if she had remained there during bad weather, I proceed to deal with the mode in which the work of steering the *Drachenfels* up the river was performed by the *Hughli*.

The work commenced about 2-30 A.M., and according to the evidence of the *Hughli* was interrupted about 9 A.M. somewhere about the Lower Gasper by the parting of the hawser which [876] fastened the *Hughli* to the *Drachenfels*. According to Captain Kennewig and his witnesses the parting is said to have taken place about daylight. The reason of this divergence seems to me perfectly clear. If the parting was at daylight it must have taken place somewhere where the channel was very wide and there would be no risk of their coming to grief. If it parted about 9 A.M. it must have occurred as is alleged by the *Hughli* somewhere near the Lower Gasper Light and admittedly in a dangerous place and in a narrow channel, and it seems to me it was with that object that Captain Kennewig puts the parting of the hawser at daybreak, and denies the statement of the *Hughli*'s witnesses that it was three hours later. That the evidence of Captain Kennewig and his witnesses must be viewed with considerable suspicion is clear from the entries appearing in his logs, especially the rough log, and other circumstances to which I shall refer presently.

Captain Best, Mr. Durham and Mr. Cox all swear that the hawser parted about 9 A.M. as already stated, somewhere near the Lower Gasper. Both Best and Cox say the operation throughout the journey from the Sandheads to Saugor was attended with considerable difficulty, and that in the course of it both vessels were exposed to great danger. Captain Best says he had to steam out sometimes broad on the port quarter, sometimes broad on the starboard quarter and sometimes amidships in order to steer the *Drachenfels* and that the hawser was carried away, because the *Drachenfels* gave a heavy steer and he tried to straighten her up. According to Captain Kennewig the hawser parted first because it was rotten and secondly because no chafing gear was put on in time. Captain Best and Mr. Durham say that chafing gear was used from the outset and that the hawser was not rotten and Mr. Cox says no complaint was made regarding the hawser being rotten nor did he perceive it to be so. My own impression is that the charge about the condition of the hawser was an afterthought and made to minimise the value of the services rendered by the *Hughli*. So far as the difficulty and dangers of navigation are concerned, Mr. Bellow says in his opinion there would be no danger or difficulty, if the work was done with skill and care. According to him, therefore, care and skill would be needed for the purpose [877] of avoiding the dangers. Whatever the effect of his statements may be, the evidence of the other witnesses clearly shows that having regard to the nature of the channel and the other facts to which I have referred in connection with the navigation of the river Hooghly, the work performed was not of an ordinary kind, but was attended both with danger and difficulty and, if I may rely on that testimony, that it was performed with skill. Again I refer to the evidence of Captain Waller. It appears that this is the first case of the kind, viz., of steering with the tug astern on the Hooghly and it was successfully performed. In considering the question whether the service was of the nature of salvage service, the risks of navigation, the difficulty under which it was performed, and the danger in performing it have all to be taken into consideration. It is contended that the work was merely towage work. The distinction between towage and salvage has been pointed out in a number of cases in which the Judges have held that where the ship is in a normal condition and nothing more is needed than expedition or acceleration of progress, that is towage. I refer especially to the case of *The Jubilee*, (1879) 42 L. T. R., 594. In the case

of *The Reward*, (1841) 1 W. Robinson, 174, it was also contended that the service rendered was mere towage. In that case the vessel had lost two of her best anchors and cables and the starboard end of the windlass and the bulkhead had been carried away. The learned Judge who decided that case said: "I apprehend that mere towage service is confined to vessels that have received no injury or damage and that mere towage reward is payable in those cases only, where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered damage or accident," and the services were remunerated as salvage.

In my opinion the services rendered by the *Hughli* helped in rescuing the *Drachenfels*, which was in a disabled condition, and being rudderless as she was, was exposed to risk, if she lay there at anchor, and which was unable to work up the river without assistance—from a position of risk and brought her into a position of comparative safety. The impugnants not satisfied with denying the principal facts on which the *Hughli* bases her claim [878] for salvage reward, went into a variety of matters to show that the work done by the tug was improperly performed. It was suggested that instead of using one hawser of 75 or 80 fathoms she should have used two of 35 fathoms each. No question was put to Captain Best in the course of his cross-examination, which extends over 77 pages of printed matter, regarding this contention. No doubt when Mr. Cox was examined he was questioned whether it would not have been better, if two hawsers had been used. He said "No" and he gave his reasons and I accept those reasons.

Captains Ashby and Thompson spoke of two hawsers being used on various rivers in England and the continent, but they have no experience of the river Hooghly, and it is admitted by Captain Lardner that instead of the 7-inch hawsers used on those other rivers, 18-inch hawsers are in use on the river Hooghly. To expect that an 18-inch hawser should be slackened out and hauled in from time to time is, I judge from the expert evidence, absurd, and I see no reason to suppose that what Mr. Cox states is not well founded, namely, that the proper mode of steering the vessel was adopted in this case.

It was suggested that, if shorter and double hawsers had been used there would have been less sheer. This contention again has been answered by the witnesses for the promovents. Mr. Cox shows what would have happened and so do the other witnesses, especially Mr. Kirkman. These objections, no doubt, helped in prolonging the case, but to my mind they were absolutely useless in rendering any assistance to the Court to arrive at a conclusion whether the promovents are entitled to salvage reward or not.

With these remarks I proceed to the other part of the case.

From Saugor to the Gabtollah Channel where the *Drachenfels* grounded is said to be 8 or 9 miles. The Gabtollah Channel is described by some of the witnesses to be equally dangerous with the James and Mary or at least coming next to it. The shoals and sands are shifting there as throughout the worst part of the Hooghly. According to Captain Best the buoys on the eastern side of the channel serve to mark the edge of the channel in some way, but the sands jut out from the line of buoys. This evidence was elicited in cross-examination and I do not find it [879] contradicted. The sands are so shifting that they require continuous watching and sounding, and Mr. Bellevue says that the soundings taken from time to time do not give any true indication of the water at the different places. That in brief is the state of the Gabtollah Channel.

That channel is usually entered by one of three tracks; No. 3 is said to be the best for ships of high draught, No. 2 is the next best, No. 1 is not used

for ships. All these things have to be kept in view by vessels going up that channel.

It is in evidence that on the morning of the 20th under the orders of Mr. Cox the flotilla made up as mentioned before and being about 98 feet in width started from Saugor to enter the Gabtollah Channel. A controversy has raged about the hour at which the flotilla started and we have heard a considerable amount of examination and cross-examination as to the proper time at which it ought to have started. Mr. Cox says it was the proper time; Mr. Bellew does not venture to say it was not a proper time. He admits that the pilot was justified in starting at that hour, but he says: "Though I would have been tempted to start at that hour I would not have done so." It is difficult to understand his exact meaning, but I find there is no reason for saying that the hour was not proper. According to Mr. Bellew himself the water in both No. 2 and No. 3 tracks was more than sufficient for vessels of the draught of the *Drachenfels*. The tugs were working their engines; it is not necessary to consider at what speed they were working them. The *Drachenfels* as arranged was not working her engines.

It appears that after the Gabtollah Channel was entered, a British Indian steamer coming the other way passed the flotilla and very shortly thereafter the *Drachenfels* struck. At that time the tide was running very strong and almost right across the channel in a north-easterly direction. Mr. Cox says the accident was due to his striking on a lump. A battle has raged round this question of the lump also. Captain Waller says he did not find a lump where it is suggested the *Drachenfels* must have struck. After striking on the lump or sand or grounding somewhere, the steamer according to all the witnesses went [880] over the sands and took up a position some 1,200 feet to the east of the eastern edge of the channel. To my mind whether the vessel struck on a lump or was drifted away, as is suggested by Mr. Bellew, by the action of the tide and in the endeavour to avoid the British India steamer, out of the exact track she ought to have kept, is unimportant. The question is whether the masters of the tug were in any degree responsible for the mishap that took place either as to the time of starting or the navigation of the channel or otherwise. It is in evidence that the time of starting is absolutely at the discretion of the pilot. It is suggested that the accident would not have occurred, if the pilot had altered his helm in sufficient time. I do not wish to say anything that would imply any error of judgment on the part of Mr. Cox but, assuming that he did not in sufficient time alter his helm, is there anything to suggest that the captains of the tugs were in any way to blame or that they abstained from bringing anything to the notice of the pilot, which they should have brought to his notice. The lead was going the whole time and, if I read the evidence aright, there was no deficiency of water found. It is contended that the tug masters ought to have kept in view the leading marks and the buoys, and to have seen that the pilot was keeping in No. 3 track. It is proved beyond a shadow of doubt that that is no part of their duty. They had their own work to attend to and to obey the orders of the pilot. If from any miscarriage of his orders any mishap had arisen, they would have been justly responsible. Mr. Bellew does not say it was their duty to keep on the lock out and to guide Mr. Cox in the navigation of the vessel. Admittedly it would be impossible to give the charge of this flotilla to three different persons. Mr. Bellew admits that Mr. Cox, from what he knows of the man, must have been alive to the whole situation, and that he cannot suggest that any useful purpose would have been answered by his saying what he, after some pressure in cross-examination, stated he would have said to the pilot in spite of the rebuff which he would have anticipated.

Taking all the circumstances into consideration I find that nothing* is brought home to the masters of the tugs to suggest that they left undone anything they were bound to do or did any-[881]thing which they ought not to have done, which led to this result. It is not even shown that the course which was being pursued was not the right course. Various hypothetical suggestions are made that, if they had kept this and that in view they would have known, which way the flotilla was going, but nothing of any tangible character has been proved to justify my holding that there has been any negligence or misconduct on the part of the masters of the *Retriever* or the *Hughli*. After the vessel grounded and took the first roll she appears to have righted herself—even Captain Kennewig admits this—and after one or two other rolls she grounded fast. At this stage we have an independent witness on the scene. I refer to Captain Waller. He was at Kedgeroe on his boat the *Tigris*. Kedgeroe is about 38 nautical miles south of Calcutta. He came down towards the *Drachenfels* and saw her position. He describes how she was fixed there. He saw both the tugs not far off from her. The *Hughli* and the *Retriever* say that after the first roll most of the fastenings gave way, that there was apprehension of serious risk to both of them, so they severed the connection and cleared off, and that, after clearing the wreckage, they came back to the assistance of the *Drachenfels*. There was no abandonment of any kind on their part up to that stage. The *Hughli* says that her being on the port side of the *Drachenfels* to some extent contributed to her not capsizing at the first roll. Whether she did or did not is a matter of little moment in the decision of the case, though that also has formed a matter of long examination.

I myself am inclined to think from the expert evidence on behalf of the promoters that the *Hughli* must have contributed to some extent in keeping the *Drachenfels* from capsizing, but whether she did so or not is, to my mind, of small importance. Captain Waller saw both these vessels close to the *Drachenfels*. He saw the *Hughli* attempting to pass her hawser to the Gorman ship and fail. As regards the *Retriever's* attempts to pass a hawser there can be no doubt and it is not disputed that she did try to do so; but the coming back of the *Hughli* to the *Drachenfels* and her endeavours to pass a hawser has been denied by Captain Kennewig and his witnesses. That the *Hughli* did come back and did attempt to pass the hawser has been conclusively [882] established and I must say I was astonished to see that so much time was taken up in the cross-examination of Captain Best on that point. I utterly disbelieve Captain Kennewig's denial.

The attempt of the *Retriever* was made first and Captain Arden says that it failed entirely, because no one on the *Drachenfels* was prepared to put out a line to take the hawser in. He is corroborated by Mr. Cox. On the other side is the evidence of Captain Kennewig alone. I am inclined to think, accepting the view suggested by counsel for the *Drachenfels*, that the denial of Captain Kennewig regarding the *Hughli's* attempt was due to inattention. But it shows that the accident had wholly demoralised the men on the *Drachenfels*, and that they were not ready to do anything to help themselves and were not ready to take in the hawser brought to them by the *Retriever*. This attempt therefore failed. Just at the time when Captain Arden was taking in his hawser, the *Hughli* came up and appears to have anchored between the *Drachenfels* and the *Retriever* and then shifted her position again to a more appropriate place as described by Captains Waller and Best and Mr. Cox; she then sent out a boat with a hawser for the purpose of passing it to the *Drachenfels*. Captain Best describes the circumstances connected with it in his evidence. I will refer first to Captain Waller's deposition on this point. At page 17 he says: "I

could not tell how far the *Hughli* was from the *Drachenfels* when I first saw them. The two tugs were moving, when I first saw them, I thought they were manœuvring to get to her. When I saw her aground I thought the tugs were going to her assistance. There was a heavy rain squall and I could not see. I first saw the *Drachenfels* and the tugs after the rain squall. After I got up I was able to judge how far the tugs were from the *Drachenfels*. When I got up to the *Drachenfels* the *Hughli* was, I should say, 700 to 800 feet from the *Drachenfels*. I saw the *Hughli* go up to the *Drachenfels* and drop her anchor. Before that I could not see what she was doing. After that I saw she was trying to pass her hawser to the *Drachenfels*. There was a tow boat there, and I could see she was trying to get her hawser across. I was watching the manœuvre. I was 300 or 400 feet from the *Hughli* on the other side. I saw [883] the boat, having a cross tide, could not fetch the ship with the amount of line she had out. The cross tide was setting her about N.N.E. It was away from the *Drachenfels*. They were paying out the hawser on board. The tide caught the hawser and drove it under the *Hughli* and it caught the propeller."

Captain Best and Mr. Durham describe what happened so far as they saw. Captain Arden also speaks to the incident. Just then there was some movement on board the *Hughli* which led to the fouling of the starboard propeller. Captain Best in his evidence says at page 17:—"We slacked away the line and the boat rowed towards the steamer, towards the *Drachenfels* and got very near the *Drachenfels*, until the line was all out. Then we paid the wire hawser out, attached to the tow line to which the small wire was attached as well. They did not fetch the ship. They might have thrown a rope to the boat from the ship, but they were not paying much attention. Anyhow they did not do it."

Q.—Then what happened?

A.—"After that the wire got foul of the starboard propeller of the *Hughli*."

Q.—What caused that?

A.—"The wire being so heavy it went right down. The boat could not take the wire out. The coils of the wire from the coils on deck would not open out straight, there being no strain on it, and the wire being heavy sank and fouled the propeller."

Mr. Durham in his evidence says that he was attending to the paying out of the hawser and that it was some movement by the tug which led to the mishap. In answer to the Court in answer to the question "Having regard to the position of the tug to the *Drachenfels*, would that be the right position to let out the line?" He said: "In my judgment that was the right position." If the starboard propeller was going astern there would be risk; knowing the starboard propeller was not going at that time there was no risk or danger."

Captain Waller in answer to the following question. "When [884] you saw the boat taking the hawser across to the *Drachenfels* was there anything you saw that it did in connection with the hawser that was wrong?" he said, "No," and then he went on to add that the only possible way of conveying the hawser from the *Hughli* to the *Drachenfels* was by a tow boat and that the fouling of the propeller was the fault of no one and he puts it down to the strength of the current. Mr. Cox says it was not a necessary consequence of the manœuvring that took place that the hawser fouled the propeller. After the propeller was fouled, Captain Waller and the others say it was impossible for the *Hughli* to render any assistance and so she came up to Calcutta.

The contention on the other side is that the fouling of the propeller was the fault of the *Hughli*.

Upon a careful consideration of the evidence I have come to the conclusion that the view expressed by Captain Waller is correct; that it was the fault of no one but a pure accident owing to the action of the tide taken perhaps with the manoeuvring for the purpose which Captain Best mentions.

Then it is in evidence that after the *Retriever* had left the place in order to haul in her hawser the *Drachenfels* put up a signal asking her not to abandon her. This signal was hoisted after she was on the sands and when the captain saw the tugs going away.

The position of the *Drachenfels* at that time, according to Captain Waller and all the witnesses--both those present and the experts--seems to have been one of considerable danger. Captain Waller says he boarded the *Drachenfels* a 1-40; she had a heavy list then to starboard. He could not state the extent of the list, but she kept going over as the tide fell. His vessel was hanging by the *Drachenfels*. She was 400 or 500 yards off. Mr. Cox being asked, if there was any danger to the *Drachenfels* being hard and fast, says: "Yes, in danger of breaking her back."

Asked as to the position of the *Drachenfels* in the afternoon he said: "The list was gradually getting more and more with the ebbside. The sand was gradually working away from her starboard side and giving her a bigger list;" and then he describes the various steps taken to get away from the ship. "The [885] sickmen were taken on board the *Retriever*. As the list went on increasing, it was deemed advisable to remove the men. One sick man went in the boat with me, when I went to the *Retriever*."

Mr. Bellew stated that there was no danger of capsizing though there might be other dangers; but, if his evidence is carefully analyzed, it will be seen that he also, like Captain Lardner, was forced to admit that the *Drachenfels* was in a position of great peril at that place, so much so that Captain Waller, a witness wholly unconnected with the case, says he advised both the captain and the pilot of the *Drachenfels* to leave the vessel, and that the captain of the *Drachenfels* did as a matter of fact send over two sick men he had on board—one to the *Tigris* and the other to the *Retriever*—and a great portion of his belongings; and although Captain Kennewig suggests the lascars and the crew left without his express sanction, I have no doubt on the evidence that that is not true. That they were allowed to go by him in consequence of the danger to which the ship was exposed is perfectly clear.

Mr. Cox details conversations with Captain Waller and Captain Arden as to the attempts to float the ship at night and he says they all came to the conclusion it would be most dangerous to make any such endeavour. Captain Arden details a conversation with Mr. Cox regarding the showing of a blue light on the *Drachenfels* which he would take as a signal to him that all the men on board the ship had left and that, on seeing that light if the ship capsized, he would not make any attempt to save the crew from drowning. Mr. Cox corroborates that statement. Captain Kennewig denies it, and says he was not told about any such arrangement. He admits, however, he did as a fact go over with all his European crew to the *Tigris*, but says, later in the evening he returned to his vessel with some of his men and that when the water rose he made an attempt to float the vessel and he showed a blue light and whistled to induce the pilot, who was on the *Tigris*, to return to the *Drachenfels*. He denies various other circumstances deposed to by Captain Arden, Mr. Cox and Captain Waller. It is material now to consider what Captain Waller says at page 6 (evidence taken on commission).

"At the time the captain was leaving with these 5 or 6 men [886] both the pilot and I advised him not to go on board. We told him why, for fear of

the vessel capsizing. That was why he took the anchor to anchor the boat close to the ship. He took the light, the anchor and the awning, because he wanted to keep a watch on the ship. He said he wanted to keep close to his ship. He said he was going to anchor near her to see that no one would take the ship, that is to see that no one would go on board and claim her. In my opinion there was no chance of getting the ship off that night I said you can't do anything with her to-night. The pilot said the same thing. He said he could not do anything that night. The captain did not say anything to the effect that he hoped to get her off that night or that there was any likelihood of getting her off that night. I did not hear the captain ask the pilot to go along with him. The crew of the *Drachenfels* remained on board my vessel the whole of that night. The ship's boats were lying astern of me all night with the exception of the one boat the captain went away in. I saw a blue light that night between 12 and 1 o'clock. It was burning on board the *Drachenfels*." Asked his reason for thinking that they could not get the *Drachenfels* off that night he said: "It was dirty weather; she could not have got off without the tug and the tug, if she had come that night, would most likely have got aground herself. It was a dark night, very dark and rainy with occasional squalls."

I need not refer to Captain Arden's evidence. They all swear it would have been most dangerous to have attempted to float the ship that night, and beyond that Captain Arden and Mr. Cox both say there is a Government rule against anything of that sort being done at night. Mr. Bellew admits the existence of this rule, but he says in spite of it he would have made the attempt on the ground that necessity overrides all rules. Putting aside the evidence of the other pilots—men of as great experience as Mr. Bellew—that it would not have been safe, I have the testimony of Captain Waller who was on the spot, who knows the place and the kind of weather and the difficulties of the situation and who says that it would not only have been difficult, but dangerous to attempt it that night. I think I ought to accept the story of the arrangement to which Captain Arden and Mr. Cox have deposed regarding the showing of a blue light.

[887] Whether any attempt was made by Captain Kennewig on that night to float his ship or not, I am satisfied on the evidence of Captain Waller, Mr. Cox and Captain Arden that there was no change in her position the next morning. There is no reason suggested why I should disbelieve Captain Waller when he says he found her next morning in exactly the same place.

Mr. Cox says that next morning at his suggestion Captain Kennewig signalled to the *Retriever* to come within hailing distance which she did, and that, after considerable manœuvring, she got into a proper position, passed the hawser and pulled the steamer off. Captain Kennewig says:—"In my opinion, if the *Drachenfels* had not worked her engines in the way she did, she would not have got off on that occasion." In other words his case is that very little assistance was rendered by the *Retriever*. On the other hand I have the evidence of Captain Waller and Captain Arden who say that the *Drachenfels* could not have got away from that place without the help of the *Retriever*. He says, "She would have broken her back or capsized". Captain Waller goes further. Asked "In your opinion was the *Retriever's* position on the sand, when she got into position for towing, a position of danger?" He answered "She was putting herself very close to the sand. I think she was running a danger, running a risk, her stern getting aground. The consequences might have been that she might have lost her rudder or her propeller. Yes, the *Retriever* succeeded in passing a hawser to the *Drachenfels* on this occasion and commenced towing. I don't remember at what time she commenced

twing. The *Drachenfels* was nearly upright when the *Retriever* began towing. I could not say at what angle; she was nearly upright. She had a slight list to starboard still. I was then about 1,000 feet away from her at that time. She never changed her position at all from the early morning. She never moved until the tug pulled her." Asked, "In your opinion was the position of the *Drachenfels* on the 21st a position of peril and danger?" He says "Yes." Asked "In your opinion could she have come into the channel without the assistance of the *Retriever*?" He answered "No, never. It was impossible." He was cross-examined at considerable length, but he adhered to his opinion. The same view is expressed by the other witnesses for the pro-[888] movents. Mr. Bellew suggests she could have remained there, until the spring tides set in again, by which time cargo boats would have been sent down and the ship could have been lightened. His cross-examination shews the danger to which cargo boats, if forthcoming, would have been exposed. I have, however, very little hesitation in holding upon the evidence, I have referred to, that the *Drachenfels* would before the next spring tides have broken her back, capsized, or, as Captain Lardner says, gone deeper into the sand.

The next question which I have to consider is whether the *Retriever* in performing her work exposed herself to danger and whether it was performed with skill under difficulties.

Captain Waller describes the difficulties to which the *Retriever* was exposed, and he mentions the dangers to which she subjected herself.

Mr. Paine (who was not present, but was called as an expert) corroborates him. I need not refer to the evidence of Mr. Cox and Captain Arden.

Regarding the skill required for the work, Captain Waller says it was the best bit of towing he had ever seen. Mr. Kirkman, a witness of considerable experience, says the same thing. Mr. Paine says in cross-examination that he does not think the *Drachenfels* rendered any material assistance to the *Retriever* in pulling her off, and that in his opinion the tug could have got the *Drachenfels* off without any assistance from her as the *Retriever* had reserve speed.

Having regard to all these circumstances I hold that the work performed by the *Hughli* was of the nature of salvage and that she is entitled to salvage reward for the services she rendered; and that the services rendered by the *Retriever* on the 21st were of a meritorious character.

The only question that remains for me to consider is what would be a proper award to make in the two cases.

The *Hughli* asks for £5,000 and in her demand she includes £100 for towage on the 20th.

This towage was undoubtedly not ordinary towage. All the witnesses describe it as of a dangerous character and there can be [889] no question that it was of an extraordinary character, but it is unnecessary to go into this further, for I think it would be convenient to assess the reward generally so as to include the services rendered on the 20th as well as the compensation for the damages suffered.

To refer the question of damages to the Registrar would be only putting the parties to unnecessary expense. I think, giving the case my best consideration, that Rs. 20,000 to the *Hughli* to cover everything would be the most appropriate award. As regards the *Retriever* she has already obtained various

sums for towage services and the damages done to her. I think a sum of Rs. 30,000 would be the most appropriate sum for her.

The work occupied only a short time, but shortness of service has often been taken as shewing extraordinary skill and labour.

I assess the remuneration on the value of the ship *Drachenfels*, its cargo and freight which has been agreed to pay the parties to come to Rs. 7,28,000. I also keep in view the respective value of the *Hughli* and the *Retriever*.

I have been addressed on the question of costs by counsel for the *Hughli* and the *Retriever* on the one side and Mr. *O'Kinealy* on the other. The plaintiff's counsel applied that I should give costs under the schedule relating to Vice-Admiralty actions, but it is clear upon the practice of this Court since the case of the *Dacca*, (unreported) decided by PHEAR, J., in 1875 and which has been consistently followed in all subsequent Admiralty actions that costs will be given on the ordinary scale provided for in the rules in accordance with the Civil Procedure Code. SALF, J., in the *Falls of Ettrick*, (1894) 1. L. R., 22 Cal., 511, gave costs on the ordinary scale and I propose to follow the same course.

The plaintiff's counsel contend they are entitled to separate costs. Mr. *O'Kinealy* contends they are not so entitled especially in view of the consolidation order of the 15th of October 1898. I have carefully considered the order made by the learned Judge on the application of the *Drachenfels* for the consolidation of these two matters, and I am of opinion that that order was made, [890] as it was asked for, with the object of avoiding a double set of costs to the impugnants. It was never intended so far as I can gather from the words of the learned Judge, and his remarks to Mr. *Orr*, that the conduct of the two actions should be given to one set of promovents. In the order of the 15th of October as well as of the 17th of May, both promovents are allowed to cross-examine the witnesses separately, and having regard to the course which the two actions have taken, both in the examination of the witnesses before the Commissioner as well as in Court, it would be hardly justifiable on my part to give only one set of costs. Mr. Best was cross-examined by the impugnants, as I pointed out before, at extraordinary length. I am forced to make this comment; not satisfied with one answer, counsel returned to the charge over and over again.

The impugnants raised every possible objection against the claim of the plaintiff, the result of which has been an inordinate prolongation of the hearing.

I think this is a case in which I am bound to give separate costs, and I do so.

The learned counsel for the impugnants said that the claims of the promovents were exorbitant. In one case Rs. 84,000 were asked for, and in the other over a lakh and as the Court has now awarded in the case of the *Hughli* one-fourth of that claim, and in the case of the *Retriever* one-third, I ought to follow the precedent as laid down in the case of the *Champion*, (1889) 1. L. R., 17 Cal., 84, in which the Appellate Court directed that all costs incurred by the impugnants for giving security should be deducted from the costs, and I am informed that in this case the Chartered Bank gave the Bond.

On one side it is contended that the plaintiffs would not accept the security offered by Graham & Co. That is denied. I am not in a position to judge which statement is correct. Had the position been exactly similar I might have been induced to follow the case of the *Champion*, (1889) 1. L. R., 17 Cal., 84, but in the present case I find there was no tender of any kind. I find also that Captain [891] Kennewig denies every circumstance connected with the plaintiffs'

claims and I have found that in every particular he has been, to put it mildly, telling untruths.

No doubt the plaintiffs have appraised their services at a higher figure than I have, but it does not follow from this that their claims are exorbitant. Keeping in view the deliberate and obstructive conduct of the captain of the *Drachenfels*, I think it would be only fair to give the plaintiffs the costs which have always been awarded in these Admiralty cases, that is on scale 2. I may mention that in the *Falls of Ettrick*, (1894) 1. L. R., 22 Cal., 511, the claim of the *Chusan* was 40 per cent. and SALF, J., only gave 10 per cent. and costs followed. He also gave the *Warren Hastings* much less than she asked for. He allowed her costs of hearing and other costs which had been incurred by her separately.

The plaintiff's counsel urge that, considering the length of the trial and the number of experts called on account of the objections raised by the *Drachenfels* as to the risks she incurred and other questions which she raised, the Court ought to give special directions. I appreciate that argument and think it would only be right to give the directions in the terms of the rule.

I hold that the fees ordinarily allowed under Rules 10, 14, 16 will not be sufficient to indemnify the plaintiffs against the costs incurred by them, and I accordingly direct that the Taxing Officer should exercise his discretion in allowing the costs under these heads on the special scale. I also leave it to him to say what amount should be paid to the expert witnesses, as I have nothing before me on which I can decide this question.

The plaintiffs are entitled to reserved costs including the costs of the commission, except as to the adjournment of the 27th July. The *Hughli* is to pay the costs of the *Retriever* of and incidental to that application for adjournment.

Attorneys for the tug *Hughli* : Messrs. Orr, Robertson and Burton.

Attorneys for the tug *Retriever* : Messrs. Pugh and Co.

Attorneys for the Steamship *Drachenfels* : Messrs. Morgan and Co.

[892] CRIMINAL REVISION.

The 26th and 29th March and 7th and 14th May, 1900.

PRESENT :

MR. JUSTICE PRINSEP, MR. JUSTICE AMEER ALI AND MR. JUSTICE STANLEY.

Laldhari Singh and others.....(1st Party) Petitioners

versus

Sukdeo Narain Singh and another.....(2nd Party) Opposite Parties.*

Ownership of land, dispute as to—Collection of rents—Zemindars and tenants versus rival zemindars and tenants—Necessary parties to proceedings under s. 145 of the Code of Criminal Procedure—Parties concerned, meaning of—Omission to add necessary parties—Addition of parties during proceedings—Revision and alteration of character of such proceedings by succeeding Magistrate—Jurisdiction of Magistrate—Revision, power of High Court to interfere—Code of Criminal Procedure, ss. 145, 429—Charter Act (24 and 25 Vic. c. 104), cl. 15.

The words in s. 145 of the Code of Criminal Procedure, "parties concerned" in a dispute do not necessarily mean only the parties who are disputing, but include also persons who are interested in or claiming a right to the property in dispute. It is the duty of the Magistrate on the materials before him to ascertain so far as he can, who are the persons interested in or claiming a right to the property in dispute and to give notice to them all, so that the whole matter so far as his Court is concerned, may be disposed of in one proceeding.

Ram Chandra Das v. Monohur Roy (1893) I. L. R., 21 Cal., 29, and *Protap Narain Singh v. Rajendra Narain Singh*, (1898) I. L. R., 21 Cal., 29, followed.

Where there was a dispute as to the ownership of lands between certain zemindars and their tenants on the one side and other zemindars and their tenants on the other, and the real matter for determination was not merely which of the two parties of zemindars were entitled to collect the rents of the lands, but also which set of rival tenants was entitled to hold actual possession of the lands and in a proceeding under s. 115 of the Code of Criminal Procedure the zemindars only were made parties and not the tenants. *Held* (AMEER ALI and STANLEY, JJ.) that the tenants were necessary parties to the proceeding and the omission to make them parties went to the root of the case and was an illegality affecting jurisdiction which would justify the High Court in setting aside the order. PRINSEP, J.—The omission to join the tenants could not vitiate an order as between the zemindars on an objection that it was without jurisdiction and that no question of jurisdiction [892] arose in the matter. The High Court's powers are under the Charter Act, and these could be exercised only in respect of jurisdiction.

Where a Magistrate recorded proceedings under s. 145 of the Code of Criminal Procedure and his successor on the same materials revised those proceedings altering their entire character, converting the dispute, which was originally stated to be a dispute regarding the actual possession of the land into a dispute regarding the collection of rent between the persons named therein :—

Held, (AMEER ALI and STANLEY, JJ.), that it was an abuse of jurisdiction on the part of the Magistrate so to alter the proceedings, and an abuse which would justify the intervention of the High Court under the powers conferred by the Charter. AMEER ALI, J.—

* Criminal Revision No. 110 of 1900, made against the order passed by M. M. Chakrabutty, Esq., Sub-Divisional Magistrate of Jahanabad, dated the 29th of December 1899.

The High Court has the power to interfere both under its revisional jurisdiction as also under cl. 15 of the Charter.

Hurbullubh Narain Singh v. Luchmeswar Prosad Singh, (1896) I. L. R., 26 Cal., 188, referred to.

IN this case proceedings were instituted under s. 145 of the Code of Criminal Procedure, upon a police report submitted by the Sub-Inspector of Arwal, dated the 22nd of July 1899, to the effect that there was a dispute as to the actual possession of certain lands "between Babu Laldhari Singh of Bharathpura (1st party) and Babu Sukhdeo Narain Singh of Narga (2nd party) . . . through their respective tenants . . . Hence there is likelihood of a breach of the peace . . . at the instigation of . . . the servants and tenants of Babu Laldhari Singh they (*i.e.*, the Babu of Narga and the Babu of Bharathpura) have now raised these disputes . . . Under these circumstances I fully believe that both parties will create a disturbance at the time of cultivating the said disputed lands or offer opposition to the cultivation thereof on behalf of one of the parties." Upon receipt of this report the Sub-Divisional Magistrate of Jahanabad issued an order on the 22nd of July 1899 under s. 145 of the Code of Criminal Procedure calling upon Laldhari Singh and Sukhdeo Narain Singh to appear before him. The order recited *inter alia* that "it appears from the report of the police that there is a dispute as to the actual possession of about 42 bighas 6 cottahs 7½ dhurs of land comprised in various plots, &c., between Babu Laldhari Singh and Babu Sukhdeo Narain Singh through their respective tenants." The Sub-Divisional Magistrate was transferred and the case was taken up on the 12th of August by his successor, a Joint Magistrate. [894] Previous to the 12th of August written statements had been filed by both parties. In their written statement the first party put forward the objection that the case could not proceed, unless the tenants mentioned in the report of the police and the other proprietors were made parties as being parties concerned in the dispute. The Joint Magistrate altered the proceedings, first by the inclusion of the names of the three brothers of Laldhari Singh in the first party, secondly by changing 'actual possession of' to 'collection of rents in' and that Prayag Narain Singh's name should be included in the second party. Accordingly an order was drawn and passed which was entitled "revised proceeding," by which after reciting that it appeared that there was a dispute between the parties named in the original order and the added parties "regarding the collection of rents in about 12 bighas 6 cottahs and 7½ dhurs of land, &c.," the several parties were required to appear and file written statements of their "respective claims as regards the facts of actual possession of the subject of dispute." On the same day the first party filed a written statement in which the objection as to parties previously raised was repeated, and a further objection was taken that there was no dispute about the collection of the rent of the land, the subject of dispute. The Joint Magistrate overruled the objection of the first party, and in the absence of the tenants of either party as party to the proceedings decided that the disputed land was in the possession of the second party.

Mr. Jackson (with him Mr. Hill, Babu Saligram Singh and Moulvie Syed Sahmsul Huda) for the Petitioners.

The Advocate-Gen^l (Mr. J. T. Woodroffe) (with him Moulvie Mahomed Yusuff and Moulvie Mahomed Ishfaq) for the Opposite Party.

1900, MARCH 29. **Prinsep, J.**—The matter before us relates to a rule in which we have to consider an order passed by the Magistrate under s. 145, Code of Criminal Procedure. By the order passed under s. 145 (1) proceedings were taken in regard to a dispute as to the "actual possession" of certain

specified land between Laldhari Singh and Sukhdeo Narain Singh through their respective tenants, the Magistrate being satisfied that this dispute [895] was likely to lead to a breach of the peace. This Magistrate was afterwards succeeded by another Magistrate in the sub-division of Jahanabad, and he by an order of the 12th August purporting to be also under sub-sec. (1) and reciting the same information declared the dispute to be also between other persons. Together with Laldhari Singh, the Magistrate joined the minor brothers of Laldhari of whom Laldhari was the guardian, and, together with Sukhdeo Narain Singh he added Prayag Narain Singh. The Magistrate also declared that the dispute between these parties which was likely to cause a breach of the peace was regarding "the collection of rents of the lands" specified in the previous order. After hearing the evidence the Magistrate has declared possession to be with Sukhdeo Narain Singh and Prayag Narain Singh.

The objections taken which have been argued before us on this rule by Mr. Hill on one side and the learned Advocate-General on the other arise from the terms of the order of the 12th August last. It is, first of all, contended that the Magistrate was not competent to add parties to the original order, and that the order of the 12th August was not in substitution for the former order, but for the express purpose of making such persons parties to the case. In the next place, it is contended that the new parties were not concerned in the dispute which gave rise to these proceedings and that there was no information before the Magistrate on which he could hold or, to use the words of the law, be satisfied that such persons were concerned in such dispute. Objection is also taken to the form of the order finding actual possession as between the contending parties who are zemindars, whereas the real dispute is between two sets of tenants who claim to be respectively in possession of the land, each set as tenants of one of the contending parties.

In regard to the first objection, it may be pointed out, that the proceedings which have given rise to this rule, were drawn up expressly on the petition of Laldhari Singh. He was one of the parties in the original order and he was mentioned in the police report as being the most prominent person on one side in the dispute likely to cause a breach of the peace. There can be no possible objection, therefore, to Laldhari Singh as a party to [896] the proceedings. The persons who are added at his instance were his own minor brothers, co-sharers with himself and under his guardianship in the management of their affairs, and, without any objection on his part, evidence has been taken and the case has been conducted to a termination with all those persons as parties. It seems to me, therefore, that an objection cannot now be properly raised on his behalf. If, on the other hand, it is considered as being raised on behalf of his minor brothers, I am of opinion that it is equally untenable. Laldhari Singh being their guardian and manager of their estate must be regarded as acting on their behalf in all matters connected with their property and, in the present instance, it appears that he was acting on his own behalf and also in the interests of his brothers in asserting their claim to the possession of the land in dispute. In the next place, I regard the order of the 12th August as the real order in this case and I consider that, by passing it the Magistrate intended to substitute it for the previous order of the 22nd July, which, in his opinion, was defective. There can be no objection to such a course.

It is, however, contended that the new parties whom I may for convenience sake, term the added parties, were not concerned in the original dispute, for they are not mentioned in the police report as so concerned. This objection has already been answered in respect of the minor brothers of Laldhari. It is, however, valid in respect of Prayag Narain Singh who has been

joined with Sukdeo Narain Singh, as second party and, therefore for this reason, the final order passed under s. 145 can be regarded as only in favour of Sukdeo Narain Singh.

Mr. *Hill* lastly contends that the entire proceedings are bad, because the tenants who are really the contending parties have not been brought into this case, and he suggests that difficulties may arise, if the present order, as between the two zemindars, be maintained, inasmuch as such order, being passed behind the back of the tenants, could not affect their rights and interests. I can see no objection to an order under s. 145 being passed as between two zemindars who are in dispute within the terms of that section.

[897] The tenants' rights in no way can fail with those of the zemindars, who, it is stated, put those tenants on the lands and who have identical interests with them. In what way the order declaring the possession of one of these zemindars may affect these tenants it is not our duty in this case to consider, nor does the fact that the tenants were not made parties affect the validity of the final order under s. 145 as between the zemindars. If we consider the nature of the proceedings under s. 145 this will I think be evident. The Magistrate was satisfied from the police report that the dispute between the zemindars regarding the possession of the lands was likely to cause a breach of the peace, and he has, as between them, in order to prevent a breach of the peace, found which of the zemindars is in possession. It may be that the police report on which he acted also shows that the tenants under each of these zemindars were also in dispute, but he was not bound to consider that dispute, if he thought that a settlement of the disputes between the zemindars was sufficient to prevent a breach of the peace, and I am unable to see, as it has been suggested, that the exclusion of the tenants from these proceedings in any way affects their validity as to the dispute between the zemindars or affects the jurisdiction of the Magistrate. Whether a Magistrate institutes proceedings under s. 145 is a matter entirely for his discretion, and he is in no way bound to act on all that is stated on the police report before him. Here he appears to have thought that a settlement of the disputed possession between the zemindars would be sufficient to avert the apprehended danger to the public peace. If the Magistrate should find that a dispute between the tenants is still likely to disturb the peace, he can take fresh proceedings in the matter. Experience has however amply shown that in a matter of this kind where the dispute between the zemindars is settled, the persons claiming to be tenants accept the order passed and seeing that their interests have been represented by the zemindars under whom they claim, this result necessarily follows in nearly every case. If, however, the tenants on either side still hold out the Magistrate has a further remedy.

Again, it may be observed, that in the police report it is [898] clearly shown that though the tenants were the parties actually in dispute they were backed by their respective zemindars and I take it that it cannot be said that the zemindars were not at least equally parties of this dispute.

Lastly, I do not consider that the objection raised is *bona fide*. It was no doubt raised by Laldhari, who has obtained this Rule in the earliest stage of this case, but it does not appear that any objection has been raised by the tenants themselves and as I have already stated it may be held that the rights of the tenants to hold possession already with them may still remain. Whether that be so is a matter that may require determination. But when as between Laldhari and the other zemindar it has been held that he is not in possession, it is not open to him to question the validity of the proceedings, because his tenants are no parties to the case. He could have proved that he was in

possession through his tenants and in this he has failed. His object is clearly to get another opportunity through his tenants of re-opening the case.

There is another objection suggested which I must notice. In the first proceedings the Magistrate stated that the cause of dispute was *actual possession*. In the second he has stated it to be *the right to collect rents from the land in dispute*. If this be regarded as within sub-sec. (2), this is an error, for a dispute regarding the right to collect rents considered as a dispute regarding actual possession within the terms of the section is obviously the landlord's right to the rents payable by certain persons in actual occupation as tenants, and sub-sec. (2), as I understand it, is intended to show that constructive possession through the collection of rents is the actual possession which may be determined in proceedings under s. 145. But the words used by the Magistrate though misapplied may have been used to mean that the matter in dispute, which he had before him, was the possession of the zemindar by the collection of rents from tenants in possession by occupation of the lands, and in this sense, I think that they may be accepted, that it was so intended and accepted is shown by the written statements put in by the zemindars, by the evidence offered and taken, and by the judgment of the Magistrate. For these reasons I am of opinion that this objection is untenable.

[899] I have studiously abstained from any reference to the evidence in this case, because a case under s. 145 is not one with which we can deal as a Court of Revision under the Code of Criminal Procedure. Such cases are expressly excluded from our cognizance as a Court of Revision under that Code. Our powers are under the Charter Act and these can be exercised only in respect of jurisdiction. Dealing with the objections from this point of view I think that the Rule should be discharged.

In my opinion no question of jurisdiction arises in this matter. The case is between two sets of zemindars each claiming possession and the dispute as between them can be decided by the Magistrate. It is moreover for the Magistrate to determine who are the parties to the dispute likely to cause a breach of the peace, and to settle the dispute as between them. It is not for the High Court in revision to say that such an order will not finally settle that dispute, because other persons claiming to be tenants under those zemindars have not been made parties to those proceedings, for it may happen that the tenants alone are not to the satisfaction of the Magistrate shown to be likely to break the peace. The omission to join the tenants cannot, in my opinion, vitiate an order as between the zemindars on an objection that it is without jurisdiction; nor is it for the High Court in Revision to say that the Magistrate should have been satisfied that the tenants were likely to break the peace. The object of proceedings is to keep the peace by removing the cause of dispute. If it should so happen that a dispute between the tenants is likely to cause a disturbance of the public peace, a remedy is still open to the Magistrate. Evidence of possession can be obtained through the possession of the tenants and it can also be obtained through the right of the zemindar to put those tenants on the lands in dispute, and as to the value of the evidence derived from proceedings taken before the Collector it should be borne in mind that they were tendered on behalf of the petitioner, and, therefore, the Magistrate was called upon to determine whether they were admissible as evidence, and if so, how far they affected the matter in issue between the zemindars.

I have not considered the evidence or the manner in which it has been dealt with, as that is a matter, which as a Court of Revision, we cannot consider

[900] STANLEY, J.—The proceedings in this matter were instituted under s. 145, Code of Criminal Procedure upon a police report of the 22nd of July 1899, to the effect that there was a dispute as to the actual possession of certain lands "between Babu Laldhari Singh of Bharathpura . . . and Babu Sukhdeo Narain Singh . . . through their respective tenants." In the report an information of the duffadar of the circle is referred to to the effect that "the servants and tenants of Babu Laldhari Singh are bent upon creating a disturbance and forcibly cultivating the lands of mouza Kasra, regarding which disputes have been going on between the Babu of Bharathpur and the Babu of Narga, the paddy and rabi crops whereof were threshed and sold and the sale proceeds of the grains have already been deposited in the Treasury. Babu Sukhdeo Narain Singh of Narga will offer opposition to the same. Hence there is likelihood of a breach of the peace." It further appears in the report that "Hurbans Lal, the *karpardaz* (agent), Jodhon Singh, the amin, and Gopal Singh, the *brahil* (peon), at the instigation of Hurukh Singh, the tenant of Babu Laldhari Singh, now state that the said lands are the *jotes* of other tenants. It is, therefore, not improbable that they will create a disturbance at the time of ploughing the said lands." Further it appears in the report that the Sub-Inspector, who reported the matter, examined Sham Kuar Koeri and Budhun Dhobi, two of the parties on the side of the Babu of Bharathpur and that they stated that the disputed lands are their *jotes* and also the *jotes* of Hurukh Singh, Bhuglu Teli, Bhabiehan Kuhaur, Prayag Singh and Roghu Rai Kandur. It is further stated in the report that "at the instigation of Hurukh Singh, Jodhun Singh, Prayag Singh, Gopal Singh and Hurbans Lal, the servants and tenants of Babu Laldhari Singh, they (*i.e.*, the Babu of Narga and the Babu of Bharathpura) have now raised these disputes" and finally the Sub-Inspector states as follows:—

"Under these circumstances I fully believe that both the parties will create a disturbance at the time of cultivating the said disputed lands or offer opposition to the cultivation thereof on behalf of any party. Hence I submit this report."

From this report it appears to me to be reasonably clear that the dispute which was reported to be likely to lead to a breach [901] of the peace was one concerning the actual possession of and the right to cultivate the lands.

Upon receipt of this report the Sub-Divisional Magistrate issued an order on the 22nd of July 1899, under s. 145, Code of Criminal Procedure, calling upon Laldhari Singh and Sukhdeo Narain Singh to appear before him. This order contains the recital that "it appears from the report of the Police that there is a dispute as to the actual possession of about 42 bighas 6 cottahs 7½ dhurs of land comprised in various plots, etc., between Babu Laldhari Singh and Babu Sukhdeo Narain Singh "through their respective tenants." Upon this report alone the order of the Magistrate purports to be based. Written statements were filed by both parties and the case was taken up on the 12th of August 1899. In their written statement the first party put forward the objection that the case could not proceed, unless the tenants mentioned in the report of the Police and the other proprietors were made parties, as being parties concerned in the dispute. The Joint Magistrate evidently saw the force of this objection, for he immediately proceeded to amend the proceedings, being of opinion, as he says, that the proceedings should be slightly altered first by the inclusion of the names of the three other brothers in the 1st party and secondly by changing "actual possession of" to "collection of rents in" and "that Prayag Narain Singh's name should be included in the second party." Accordingly an order was drawn up and passed, which is entitled "revised

proceeding," by which after reciting that it appeared that there is a dispute between the parties named in the original order and the added parties "regarding the collection of rents in about 12 bighas 6 cottahs and 7½ dhurs of land in mauza Kasra," etc., the several parties were required to appear and file written statements of their "respective claims as regards the facts of actual possession of the subject of dispute."

The first party on the same day filed a written statement in which the objection as to parties previously raised was repeated and the further objection was taken "that there is no dispute about the collection of the rent" of the land, the subject of dispute. The dispute originally reported to exist, it is to be observed, was a dispute as to the actual possession of certain [902] lands between Laldhari Singh and Sukdeo Narain Singh "through their respective tenants," the dispute being that the tenants of the second party claim to be entitled to the possession of the land as tenants of the second party, while a different set of persons claim to be entitled to possession as tenants of the first party. The Sub-Divisional Magistrate overruled the objection of the first party and in the absence of the tenants of either party as parties to the proceedings heard the evidence adduced by the first and second parties and decided that the disputed land was in the *takhta* and the possession of the second party.

Mr. Hill, on behalf of the first party, who now seeks to have the order of the Sub-Divisional Magistrate set aside, has contended that the order is bad in law and made without jurisdiction, inasmuch as the two sets of tenants who respectively claimed to be tenants of the land in dispute were parties concerned in the dispute, and as such, were necessary parties to the proceedings. This objection had been taken before the Magistrate at the earliest opportunity. I am of opinion that the contention is well founded. It is to be observed that the dispute in this case was not a dispute between the rival zemindars as to the right to collect the rents from tenants who were admittedly in undisputed occupation of the land, but it was a dispute as to the ownership of the lands between certain zemindars and their tenants on the one side and other zemindars and their tenants on the other. The real matter for determination was not merely which of the two parties of zemindars was entitled to collect the rents of the lands, but also which set of rival tenants was entitled to hold actual possession of the lands. It was a dispute of a dual character. The fact that the crops of the land had been threshed and sold and the proceeds lodged in the Treasury supports the view that the actual possession of the lands was a matter in dispute. Section 145, Code of Criminal Procedure, provides that the Magistrate when he is satisfied that a dispute likely to lead to a breach of the peace exists "shall make an order in writing stating the grounds of his being so satisfied and requiring the *parties concerned in such dispute* to attend his Court . . . and to put in written statements of their respective claims as regards the *fact of actual possession* of the subject of [903] dispute." It is the fact of actual possession which the Magistrate is to determine under the section, and it is only when he has satisfied himself without reference to the merits of the claims of any of the parties to a right to possess the subject of dispute, that any of the parties was at the date of the order in such (*i. e.*, actual) possession that he can properly pass an order under the section declaring such party to be entitled to possession. The Magistrate in this case was made aware by the Police report that two sets of rival tenants claimed to be in actual possession of the lands in dispute.

Prior to the alteration of the law by the present Code it was laid down that questions between rival zemindars as to the right of collecting rent directly from the ryots might be considered by the Magistrate under s. 530 of Act

X of 1872, the section which corresponds with s. 145 of the present Code. *Empress v. Thacoor Dyal Singh*, (1878) I. L. R., 3 Cal., 320. Now by s. 145, Code of Criminal Procedure, sub-sec. (2), land is expressed to include the "rents and profits of lands," and it may, I think, be accepted as settled law that a dispute as to the right to collect rents is a dispute concerning land within the meaning of s. 145, Code of Criminal Procedure: *Pramatha Bhushana Deb Roy v. Doorga Churn Bhattacharji*, (1885) I. L. R., 11 Cal., 413; *Abhayessari Debi v. Sidhessari Debi*, (1889) I. L. R., 16 Cal., 513. In these cases which I have quoted the disputed possession consisted of receipts of rents from tenants in actual or present possession. There was no dispute between rival tenants as to the right to the present possession of the lands, as there is in the case before the Court. It appears to me, however, that, if a zemindar is called upon to establish a claim to actual possession by receipt of rent, he must satisfy the Court by proper evidence that the tenants by virtue of whose possession he constructively holds possession were at the date of the order in actual or present possession of the constituent portions of the land in dispute, and that it is not sufficient for him to establish to the satisfaction of the Magistrate a good paper title to a proprietary interest in the lands; he must go further and show [904] by receipt of rent or otherwise that he is in actual possession through persons actually occupying the land as his tenants. If he does not show this, the Magistrate cannot determine the fact of actual possession, which, it is his duty to determine under s. 145, if he is able to do so. In the case of *Ram Chandra Das v. Monohur Roy*, (1893) I. L. R., 21 Cal., 29, TREVELYAN and RAM-PINI, JJ., considered that the words in s. 145 "parties concerned" in a dispute do not necessarily mean only the parties who are disputing, but includes also persons who are interested in or claiming a right to the property in dispute. They state in their judgment as follows:—

"We think the construction that the words 'parties concerned' in s. 145 included persons who are interested in or claiming a right to the property is the reasonable construction, and that it is the duty of the Magistrate on the materials before him to ascertain, so far as he can, who are the persons interested in or claiming a right to the property in dispute, and to give notice to them all so that the whole matter, so far as his Court is concerned, may be disposed of in one proceeding." This view commends itself to me as conveying the true interpretation of the section. It is supported by the language of the judgment of a Full Bench of this Court in the case of *Protap Narain Singh v. Rajendra Narain Singh*, (1896) I. L. R., 24 Cal., 55, 60, wherein it is stated as follows:—"The Magistrate's duty before he initiates proceedings is not only to be satisfied that a dispute exists, but to ascertain as far as possible who are "concerned in the dispute" (an expression the meaning of which it is not necessary for us in the view which we take of the facts to determine in this case), so that they may be required to attend and the question of possession may be as far as possible settled."

The Magistrate has not in the present case followed the course of procedure so laid down; on the contrary he has refused or neglected to make the tenants who were unquestionably disputing about the lands, parties to the proceedings; and in so doing he has ignored the provisions of the section, which required him to summon before him some of the parties who were concerned in [905] the dispute. This is a matter which seems to me to lie at the root of the jurisdiction under the section.

The mischief of the course which the Magistrate adopted is apparent from a perusal of his judgment. Instead of relying upon evidence of facts going to establish actual possession such as receipt and payment of rent, cultivation of

the lands, *pattas*, *kabuliats*, etc., he relies upon a *butwara* or partition of the property made so long ago as the year 1870. He investigates the paper title of the second party and from inferences which he draws from this paper title he determines the question of actual possession; not merely does he do so, but he ignores as being fraudulent and collusive, certain orders of the Civil Court which were obtained by the first party and under which distraints had been levied against their tenants for the rent of the lands in dispute.

Assuming that the *butwara* proceedings taken in the year 1870 were favourable to the contention of the second party and showed that the second party was entitled to the lands at the time of these proceedings, it may well be that by mere assignment or by adverse possession the first party and their tenants have since acquired a good title as against the second party. There may, for example, have been an encroachment by the tenants of the first party on the land of the second party which has been submitted to by the 2nd party for a sufficient length of time to give a title by prescription to the encroaching tenants. Such an encroachment on the part of the tenants would enure for the benefit of their landlords. In such a case there would be no document to support the title so acquired.

It is stated by the first party that their tenants paid rent in arrear for the land in dispute under pressure of the distraints issued by the Civil Court. This payment, if made, is a significant fact. It is alleged, and no doubt may be the case, that the dstraint proceedings were collusively carried on between the first party and their tenants with the improper object of fabricating evidence which would lend colour to a claim to the lands, and in this connection, it is to be observed, that in the Civil Court objections were raised to the proceedings by ryots who denied the title to the land of the tenants of the first party, and that these objections were overruled on the ground that the ryots so [906] objecting had no *locus standi* in the civil proceedings. However this may be, it appears to me, that the Magistrate overstretched the limits of his jurisdiction when he declared that these proceedings were collusive in the absence of the tenants of the first party, who were reported to him to be parties concerned in the dispute, and whom he refused to summon to his Court on the ground that they had no concern in it.

It appears to me that the amendment made by the Magistrate in the proceedings, was made with the object of overcoming the objection as to parties which had been raised by the first party, and judging by the police report not improperly raised and that the action of the Magistrate in this respect was based upon a misconception of the meaning and requirements of the law. It was, I think, under the circumstances of this case, no answer to the objection to state, as the Magistrate has done, that "the tenants cannot be concerned in or parties to collection of rent which is a right only of the zemindars." The duty of the Magistrate was to deal with the dispute as it really was, namely, a dispute between one set of zemindars and their tenants on the one side and another set of zemindars and their tenants on the other, and accordingly to maintain in possession according to their respective interests the zemindars and their tenants, whom he found on satisfactory evidence to have been in actual possession, at the date of the order, if the evidence satisfied him that any of the parties to the dispute was in such possession; and if he was unable to satisfy himself as to this then to have recourse to the provisions of s. 146 of the Code of Criminal Procedure, and, if necessary, bind over the parties to keep the peace. In the case *Harak Narain Singh v. Luchmi Bux Roy*, (1879) 5 C. L. R., 287, in dealing with a case under s. 340 of Act X of 1872, JACKSON, J. says as follows: "It seems to me clear that when a zemindar has let his

lands or a portion of them in farm, he, his farmers, and the occupancy ryots are all in their degree concerned in any dispute as to possession which may arise, and that they may and ought to be respectively maintained in possession of the interests which they severally enjoy." The learned Advocate-General seeing the force of objection as to parties, endeavoured to meet [907] it by this argument. He says in substance, as I understand his argument, that, admitting that the objection would be valid in the case of a dispute between real rival tenants and their zemindars on the one side and other tenants and their zemindars on the other; in the present case the so-called tenants of the first party are not tenants at all, but mere dummies, persons who are collusively put forward by the first party for the purpose of defeating the rights of the rival zemindars. This argument appears to me to beg the question. The dispute was between rival tenants as well as their respective zemindars as appears from the police report upon which and upon which alone the proceedings were based, and it was not for the Magistrate, I think, to close his eyes to this fact and turn the dispute from being a dispute as to possession into a dispute as to the receipt of rent. In this respect, in my opinion, he exceeded his powers.

That the order is calculated to operate to the prejudice of the first party and their tenants, appears to me to follow from the fact that all disturbance of possession of the second party is prohibited by this order. In the case of *Goluck Chandra Pal v. Kali Charan De*, (1886) I. L. R., 13 Cal., 175, my brothers PRINSEP and GRANT, J.J., laid it down that the servants of a party to proceedings under s. 145, Criminal Procedure Code, who were not parties to a proceeding under that section, were nevertheless liable to prosecution under s. 88 of the Penal Code for disobedience to the order of a public servant for disturbing the possession of the party in whose favour an order of the Magistrate was passed under s. 145, Criminal Procedure Code. The persons who claim to be tenants of the first party are either mere servants or tools in the hands of the first party or else they are tenants of the first party. Admittedly they are not tenants of the second party. If they are servants of the first party they would, upon the authority of the case to which I have referred, be liable to prosecution under the Penal Code, if they disturbed the possession purported to be given by the Magistrate's order. If on the other hand, they are tenants of the first party and as such entitled to the possession of the land in dispute, they would incur serious risk of prosecution if, in the face of the [908] order, they should persist in maintaining this claim to possession of the land. The first party also would, I apprehend, be precluded by the order of the Magistrate from accepting rent from them as tenants, inasmuch as the so doing would amount to a disturbance of the possession of the rents and profits of the land, and so a contravention of the order. The tenants cannot therefore discharge their liability to pay their rent, if tenants they are.

The way, I may observe, in which the learned Magistrate has in his judgment dealt with the question of possession, seems to me to be somewhat remarkable. From this judgment it would seem that he regarded the question of title as the question for his determination rather than the question of possession. He says that a mass of village papers has been filed on each side (what these are we are not told) and then proceeds to say: "setting off the village papers of one side against those filed by the other and regarding them of nearly the same value, I proceed to discuss the distraint and the *batwara* papers and their weight on the question of possession." A remarkable process in the determination of the question before him is adopted in regard to the village papers, whatever these papers may have been, and the Magistrate forthwith

proceeds to deal with the distraint proceedings and the *batwara* papers. The order of the Civil Court and the distraint consequent therein he has no hesitation in treating as void, and he declares the conduct of the tenants of the first party to have been fraudulent and collusive, although he has previously refused to make them parties to the proceeding and no opportunity was afforded them of refuting this charge. The distraint proceedings being thus disposed of, the Magistrate next deals with the *batwara* proceedings which were determined in the year 1870. The partition then effected, no doubt, affords useful evidence of title at that date, but I fail to see that much importance can be attached to it in determining the question of actual possession in the year 1899. If this evidence had been supplemented by evidence of receipt of rent, the granting of *kabulyats*, the occupation and cultivation of the lands by the tenants of the party deriving under the partition, it would be otherwise. Here, however, the Magistrate in his judgment relies on no such evidence, but attaches weight and importance to the *batwara* proceedings and comes to [909] the conclusion on the whole that the evidence of possession appears to be "more satisfactory and convincing for the second party" and decides accordingly.

The effect of the order as I have said appears to me to be prejudicial to the tenants of the first party, although they were not parties to the proceedings, for it is a judicial determination binding on their landlords, if not on them, that the second party were at the date of the order in actual possession of the lands through their tenants and that the tenants of the first party had no such possession.

It appears to me, moreover, that the first party were also prejudiced in not having their tenants associated with them in the proceedings as responsible litigants.

No doubt it was open to these tenants to come forward and give evidence in support of the case of their zemindars, but it might well be, seeing that they were not made parties to the proceedings, that they would not overexert themselves, if they did not elect to remain mere spectators of the dispute.

For the foregoing reasons I am of opinion that the proceedings of the Magistrate were misconceived, and that the order passed by him is bad in law for failure on his part to comply with the requirements of s. 145. I would, therefore, set aside this order and direct that any costs which may have been paid under it shall be refunded.

Upon the second contention, which has been pressed by Mr. Hill, namely, the objection as to the adding of parties by the Magistrate after the proceedings had been instituted, I think that the so-called "revised proceeding" may properly be regarded as an entirely new proceeding. The original proceedings were revised with the object of overcoming the objections raised in the written statement of the first party, and the amended proceedings were to my mind intended to be a new proceeding. If they be so regarded, there appears to me no substance in the objection as to adding of parties. At the same time there was nothing in my opinion to justify the revision which was made by the Magistrate. The amendment was obviously made to meet the valid objection of the first party and was not justified by the [910] circumstances which were brought to the notice of the Magistrate by the police report. It was, I think, an abuse of jurisdiction on his part so to alter the proceedings, and an abuse which would justify the intervention of the High Court under the powers conferred by the Charter.

Owing to the above difference of opinion the case was referred under s. 429 of the Code of Criminal Procedure to Mr. Justice AMEER ALI.

Mr. Jackson (with him Moulvie Syed Shamsul Huda) for the Petitioners cited *Hurbullubh Narain Singh v. Luchmeswar Prosad Singh*, (1898) I. L. R., 26 Cal., 188; *Empress v. Protap Chandra Ghose*, (1898) I. L. R., 25 Cal., 852; *Charoobala Dabee v. Empress*, (1899) 3 Cal. W. N., 601; *Opoorba Kumar Sett v. Probod Kumary Dass*, (1893) 1 Cal. W. N., 49; and *Nemai Chand Kundu v. Nibaran Chandra Dheriah*, (1900) 4 Cal. W. N., short notes cliv.

Mr. C. Gregory (with him Moulvie Mahomed Ishfaq) for the Opposite Party.

1900, MAY 14. The following judgment was delivered by

Ameer Ali, J.—This case has been referred to me by the Honourable the Chief Justice in consequence of a difference of opinion between the learned Judges presiding over the Criminal Bench at the time it was heard.

The facts which have given rise to these proceedings are sufficiently set out in the judgment of the Sub-Divisional Magistrate of Jahanabad, and it is not necessary, therefore, to state them in detail. It is enough to refer only to the salient facts for the proper understanding of the questions involved in the case.

It appears that upon a *butwara* or partition made some thirty years ago, one portion of Mouza Kushra in the Sub-Division of Jahanabad fell to the share of Laldhari Singh and his minor brothers commonly called the Bharathpura Babus, who in these proceedings are designated the first party, whilst [911] the other portion fell to the share of a relative of theirs whose interest has been recently purchased by Sukhdeo Narain Singh and his co-sharers commonly known as the Narga Babus and who in these proceedings are called the second party. Between these two *tukhtas* or plots there lies a strip of land consisting of over 42 bighas in area, which forms the subject-matter of the present dispute. On the 13th of July 1899 the Sub-Inspector of Arwal submitted a report to the Sub-Divisional Officer, the purport of which is set out in the judgment of Mr. Justice STANLEY. But as the case practically turns upon that document it is desirable I should refer here to some of the important passages. The report begins thus:—"I beg to state that this day when I was returning from Kurthu, Raghu Nath Upadhyia, the *duffadar* of this circle, met me at Mouzah Kushra, where he submitted to me an application signed by himself and containing information to the effect as follow: "The servants and tenants of Babu Laldhari Singh of Bharathpura are bent upon creating a disturbance and forcibly cultivating the lands of Mouza Kushra regarding which disputes have been going on between the Babu of Bharathpura and the Babu of Narga, the paddy and *rabi* crops whereof were threshed and sold, and the sale-proceeds of the grains have already been deposited in the Treasury. Babu Sukdeo Narain Singh of Narga will offer opposition to the same. Hence there is a likelihood of a breach of the peace. I therefore give information." After stating that he had sent for a number of tenants and questioned them on the matter the Sub-Inspector records his conclusion that the lands are the *jotes* of the other tenants, and then he proceeds as follows: "It is therefore not improbable that they will create a disturbance at the time of ploughing the said lands." He goes on to say: "Although I sent for the people on the side of the Babu of Bharathpura, yet, except Sham Unar Koeri, and Bhudan Dhobi, no other man on behalf of the said Babu appeared before me from Kushra. Upon asking them they stated that the disputed lands are their *jotes* and also the *jotes* of Harakh Singh and others," and so on. He states further that it appeared to him from his enquiries that the tenants of the second party had since a long time been in possession of these lands; and he adds that, "at the instigation [912] of Harakh Singh,

Judhan Singh, Prayag Singh, Gopal Singh and Hurbanslal, the servants and tenants of Babu Laldhari Singh " (meaning the first party) " they have now raised these disputes " and he winds up his reports as follows : " Under these circumstances I fully believe that both parties will create a disturbance at the time of cultivating the said disputed lands or offer opposition to the cultivation thereof on behalf of some party." Upon this report the Sub-Divisional Officer of Jahanabad recorded an order on the 22nd of July in the following terms : " Whereas it appears from the report of the police that there is a dispute as to the actual possession of about 42 bighas 6 cottahs 7½ dhurs of land comprised in various plots . . . between Babu Laldhari Singh of Bharathpura . . . and Baboo Sukdeo Narain Singh of Narga . . . through their respective tenants; and whereas from the above report and the nature of the dispute I am satisfied that the dispute is likely to lead to a breach of the peace, I hereby call upon the aforesaid parties to appear before me in person or by pleader on the 4th August 1899 and file written statements of their respective claims as to the fact of actual possession of the said land in dispute." The then first party, namely, the Bharathpura Babu, Laldhari Singh, filed his written statement on the 12th of August; in which, among other objections, he urged that the proceedings were bad, inasmuch as the tenants mentioned in the report of the police were not made parties. The Magistrate, who had recorded the proceeding of the 22nd of July, was in the meanwhile succeeded by another officer, and he apparently upon the written statement filed by the first party and in order to meet Laldhari Singh's objection " revised," as he calls it, his predecessor's proceeding, and drew up the one upon which the present order is based. This so-called revised proceeding, which bears date the 12th of August, runs thus : " Whereas from the report of the Sub-Inspector of *thana* Arwal, dated 13th July 1899, it appears that there is a dispute between the under-mentioned persons regarding the collection of rents in about 12 highas, 6 cottahs, 7½ dhurs of land in Mouzah Kushra, *thana* Arwal as specified below, and that this dispute, I am satisfied from the said report, is likely to cause a breach of the peace. I hereby, under s. 145 of the Code of Criminal Procedure, call upon [913] the aforesaid persons to appear before me in person or by pleader, on the 23rd day of August 1899 and to file written statements of their respective claims as regards the fact of actual possession of the subject of dispute." By this revision the Sub-Divisional Magistrate altered the entire character of the proceeding; he converted the dispute, which was originally stated to be a dispute regarding the actual possession of the land, into a dispute regarding the collection of rents between the persons named therein. Although no doubt, at the end of the proceeding, he calls upon the parties " to file written statements of their respective claims as regards the facts of actual possession of the subject of dispute," it does not alter the new complexion he gave to the dispute. At the same time he introduced into the proceeding on the side of the first party the minor brothers of Laldhari Singh and a person named Prayag on the other. There is nothing to show that beyond being co-sharers of Laldhari these minors were at all concerned in the dispute. But it is said that they were made parties at the instance of Laldhari and that he is their guardian. What that has to do with the case it is difficult to imagine; they certainly did not apply to be made parties. However that may be, the tenants of the first party who, it was clear from the police report, claimed to be in actual occupation of land, were not made parties. Thereupon a fresh written statement was filed on behalf of the Bharathpura Babus, in which the same objections were substantially repeated. The Sub-Divisional Officer overruled the objection; and holding that the distraint proceedings which Laldhari had taken against his tenants in respect of this very land and upon which he

naturally relied in support of his claim to be in actual possession thereof through them were collusive and fraudulent, he came to the conclusion upon the evidence before him that the second party was in possession of the strip of land in dispute, and he accordingly made an order in his favour under s. 145 of the Criminal Procedure Code. The first party then applied for and obtained from this Court a rule calling upon the Sub-Divisional Magistrate to show cause why his order declaring the second party to be in possession should not be set aside. The rule was asked for on several grounds, but was granted in a general form. It was accordingly open to the Court to go into the whole case. The principal objection taken to the order of the [914] Sub-Divisional Magistrate was that the lower Court had acted illegally in not making the tenants parties to the proceeding and in altering its form as already mentioned on the 12th of August. The case came before Mr. Justice PRINSEP and Mr. Justice STANLEY. Mr. Justice PRINSEP was of opinion that although it would have been better, if the tenants had been joined, still, as the omission to make them parties does not affect the jurisdiction of the Court, the High Court could not interfere with the order of the Magistrate. Mr. Justice STANLEY, on the other hand, was of opinion that the omission goes to the root of the case and is an illegality, which would justify the High Court in setting aside the order. I have given just the bare essence of the two views.

Looking to the report of the Sub-Inspector which forms the basis of the case, it seems to me clear that the Sub-Divisional Magistrate in recording the revised proceeding either misapprehended the nature of the dispute between the parties or he was anxious to take a short cut to avoid introducing a number of parties into the case. This was not a case of a dispute between two rival sets of zemindars contending amongst themselves as to who was in receipt of rent from one common set of tenants. Had that been the case it would have been a dispute regarding the collection of rents. From the police report, however, it is perfectly clear that two rival sets of tenants claiming to hold under two rival sets of zemindars were disputing as to the actual occupation or possession of this strip of land. The two sets of zemindars could not be said to be in actual possession, except by receipt of rent through their tenants, but the persons actually in possession or claiming to be actually in possession were the tenants, who, as the report beyond question shows, were disputing and from whose attitude a breach of the peace was apprehended at the time of cultivation. For the purpose of considering how far the procedure adopted in this case is legal or regular, we may assume that the Bharathpura Babus were in receipt of rent from the persons who alleged to be their tenants, and we may assume that they received rent from them in respect of this very land. Similarly it may be assumed that the Narga Babus were in receipt of rent from their tenants and perhaps in respect of this very land. But the question which required determination was which set of tenants was in actual occupation of this land. [915] The Sub-Divisional Magistrate chose, apparently upon the objection of the first party, to alter the proceeding not merely in form but in substance, as a slight examination of the facts would show. As I have stated before, had two rival sets of zemindars been disputing about the collection of rents from the same set of tenants, the revised proceedings would have been perfectly regular and in accordance with law, for the dispute in that case would have, in reality, related to the question which set of zemindars was entitled to collect the rent from the tenants whom both sets recognized to be in occupation of their holding. But here two rival sets of tenants holding under two different sets of zemindars were contending about the actual possession of a strip of land. There was no question as to the collection of rent at all. The dispute,

pure and simple, was which set of tenants was in actual occupation of the land. The tenants thus were the parties directly concerned in the dispute. If the tenants of the first party were in possession then the latter were in possession through them (to use the Sub-Inspector's language). If the tenants of the Narga Babus were in possession, then these zemindars were in possession through them. It will be seen, therefore, that whereas the tenants were directly concerned in the dispute the zemindars' concern was of an indirect character. The presence of the tenants was thus essentially necessary for the proper and effectual decision of the case. Section 145 of the Criminal Procedure Code requires that "whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class is satisfied from a police report that a dispute likely to cause a breach of the peace exists * * * * * he shall make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court * * * and to put in written statements of their respective claims as regards the fact of actual possession of the subject of dispute." The meaning of the expression "parties concerned" has been discussed in several recent cases. I need only refer to *Protap Narain Singh v. Rajendra Narain Singh*, (1896) I. L. R., 24 Cal., 55, and *Ram Chandra Das v. Monohur Roy*, (1893) I. L. R., 21 Cal., 29. I desire to express my entire concurrence with the [916] views therein expressed. In the present case, however, it does not seem to me to require any positive authority or any long process of reasoning to come to the conclusion that the persons who were directly and essentially concerned in the dispute were the tenants, who respectively asserted actual possession of this land. It is possible that the tenants of the first party were mere dummies or were not really in possession, but that question could only be determined in their presence. A short consideration of the consequences likely to follow from the fact of their not having been made parties would show, in my opinion, that their omission is a matter which goes to the root of the case. In the first place, if the tenants of the first party are actually in possession and, if the present order, as Mr. Gregory for the second party stated, does not affect them, and they can still hold possession in spite of that order, in that case the whole proceeding is absolutely worthless. If the effect of the order, however, be that, although not made parties, the tenants of Laldhari are affected by it, in that case a determination most prejudicial to them has been arrived at without their being present or being heard. It is futile, in my opinion, to say that, as their landlords were present, they have not been prejudiced or that they could have come in, if they had chosen. It is hardly likely that raiyats would force themselves into a proceeding of this nature of their own free will, unless called upon by the Court.

Again, if they are not liable to prosecution upon this order for going upon the land, the first party zemindars would not be in a position to prevent their so doing, and yet would be liable to prosecution in case any attempt is made by their servants, or tenants to disturb the possession given to the second party. Again an order having been made under s. 145, to get rid of its effect the first party will have to go into the Civil Court, but the tenants of the second party not being parties to the proceeding, they (the first party) would find considerable difficulty in joining them as defendants in a civil suit, for they have no cause of action against them. The cause of action in a suit of that character being based on the order under s. 145.

As regards the position of the tenants in this case it may be useful to refer to the language of the learned Judges who decided [917] *Janaki Nath Ray v. The Queen-Empress*, (1899) 3 Cal. W. N., 329, where they say emphatically

"in the next place the Magistrate should be aware that one of the first principles on which our Courts proceed is that judicial proceedings cannot bind a person who is not a party to them." Thus the omission of the tenants from the present proceeding would necessitate a fresh and separate proceeding against them, a procedure not only harassing, but to my mind, unwarranted by law. In my opinion the section contemplates one proceeding against all the parties *known to be concerned* in the dispute so as to conclude the matter definitely and finally so far as the Criminal Courts were concerned. If the Sub-Divisional Magistrate had considered how an order of this kind would work, he would have seen himself that the revised proceeding which he recorded was one which could not possibly be carried out. When a Magistrate is expressly enjoined, as he is by s. 145, to require *the parties concerned in the dispute* to come in and assert their claims, it is his duty to call upon all of them to do so, and he cannot make a selection as the Sub-Divisional Magistrate in this case has chosen to do. The question of leaving out parties or instituting proceedings against wrong parties is, in my opinion, not a mere irregularity, but a question affecting jurisdiction; the Sub-Divisional Magistrate having altered the nature and character of the dispute by his order of the 12th of August and having omitted to include in the proceedings the tenants who were directly concerned in the dispute and without whose presence the dispute could not be satisfactorily settled, I think his order is illegal and without jurisdiction.

I agree with Mr. Justice STANLEY in thinking that the order recorded by the Sub-Divisional Magistrate on the 12th of August was an abuse of jurisdiction, inasmuch as the report on which it rested did not give any information as to any dispute regarding the collection of rent, but had reference to the actual possession of a piece of land by two rival sets of tenants claiming to hold under two rival sets of zemindars.

That being so, the case falls clearly within the enunciation of the law as set forth in the judgment in *Harbullaubh Narain Singh [918] v. Luckmeswar Prosad Singh*, (1898) I. L. R., 26 Cal., 188, and I think this Court has the power to interfere both under its revisional jurisdiction as also under clause 15 of the Charter. For these reasons I am of opinion that the whole proceeding is bad and ought to be set aside. If there is still any apprehension of a breach of the peace the Magistrate can take any step in accordance with law which he may consider necessary for the purpose of preventing any occurrence of that kind.

I accordingly make the rule absolute and set aside the order of the Sub-Divisional Magistrate of Jahanabad, dated the 29th of December 1899, declaring the second party to be entitled to the possession of the disputed land, until evicted therefrom in due course of law. I also direct that the costs, if paid, be refunded.

D. S

Rule made absolute.

NOTES.

[The persons 'concerned' are not confined to the actual disputants:—30 Cal., 156 F.B.; 28 Cal., 446; 38 Cal., 889; 6 C.W.N., 101; 5 C.W.N., 428; 5 C.W.N., 900.

As regards the power of transfer, see also (1901) 28 Cal., 709; of interference in revision, see also (1905) 33 Cal., 68.]

[27 Cal. 918]

The 1st May, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HANDLEY.

Daimulla Talukdar.....Petitioner

versus

Maharulla Talukdar.....Oppository Party.*

Jurisdiction—Dispute regarding right to property—Power of Magistrate to determine rights and shares of parties—Civil Court—Code of Criminal Procedure (Act V of 1898), ss. 144 and 145.

It is not because private parties or members of the same family dispute regarding their respective rights to land or crops, that a Magistrate is called upon to interfere. A Magistrate cannot take upon himself to decide questions of fact and Mahomedan law, so as to satisfy himself as to what are the actual rights of the parties to the lands in dispute. If he has good reasons to believe that such a dispute is likely to cause a breach of the peace, the law enables him to ascertain and maintain actual possession, or if it is shown that the members of the family are inclined to break the peace he can bind them all over to keep the peace.

Where there was a dispute between the parties, who were related to one another, as to the amount of their shares to certain property which was claimed on the one hand to be joint in certain shares, and on the other hand to exclusively belong to the other party, and no proceedings had been taken under s. 145 of the Code of Criminal Procedure, nor was there [919] anything to show that there was any probability of a breach of the peace, the Magistrate passed the following order : "The applicants must not plough more than 12 annas of the land." *Held*, that such an order could not properly fall within s. 144 of the Code of Criminal Procedure, as an order under that section could only be passed on some emergency and would have effect for only two months. The present order in its operation would have effect and was intended to have effect, until the parties went to a Civil Court to settle their disputes, and no emergency was even suggested. That the order, therefore, was entirely without any authority of law and must be set aside.

IN this case certain parties, who were related to one another, were quarrelling regarding their rights to certain property, which was claimed on the one hand to be joint in certain shares, and on the other hand to exclusively belong to the other party. There were no proceedings taken under s. 145 of the Code of Criminal Procedure in order to ascertain the actual possession of the land, nor was there anything to show that there was any probability of a breach of the peace.

The Sub-divisional Magistrate made certain inquiries, and having taken upon himself to decide questions of fact and questions of Mahomedan law, so as to satisfy himself as to what were the actual rights of the parties to the lands in dispute, passed the following order : "The applicant must not plough more than 12 annas of the land."

Babu *Mohini Mohun Chuckerbutty* for the Petitioner.

Babu *Atulya Charan Bose* for the Opposite Party.

1900, MAY 1. The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

Prinsep, J.—There was a dispute between the parties who were related to one another, and on this, after having made certain inquiries, the Sub-

* Criminal Revision No. 182 of 1900, against the order passed by J. Johnstone, Sub-Divisional Officer of Serajgunj, dated 27th January 1900.

Divisional Magistrate passed the following order: "The applicant must not plough more than 12 annas of the land." In coming to this conclusion, as we learn from the Sub-Divisional Magistrate's explanation, he has taken upon himself to decide questions of fact and questions of Mahomedan law, or in other words to exercise the functions of a Civil Court, so as to satisfy himself as to what are the actual rights of the parties to the lands in dispute. There were no proceedings [920] taken under s. 145 in order to ascertain the actual possession of the land, nor, we may observe, is there anything to show that there was any probability of a breach of the peace. The proceedings before us, so far as they go, show that the parties are quarrelling regarding their rights to certain property which is claimed on one hand, to be joint in certain shares, and on the other hand to exclusively belong to the other party. It is contended before us by the learned pleader, who appears against the rule, that the order is one within section 144 of the Code of Criminal Procedure, inasmuch as it directs certain persons to abstain from an act, that is, from ploughing more than 12 annas share of certain lands. In our opinion, however, it cannot properly fall within that section, for an order under s. 144 can only be passed on some emergency, and it has effect for only two months. The present order in its operation will have effect and was intended to have effect, until the parties went to the Civil Court to settle their disputes, and no emergency is even suggested. The order therefore is entirely without any authority of law, and must be set aside.

The Magistrate, we observe, represents that he is in a difficulty how to deal with such a matter and he states: "If I had only consulted my own convenience, I should without hesitation have allowed the parties to fight on as the consequent cases of rioting or murder would have required far less expenditure of time and trouble than has been necessary for the purpose of preventing it. In case my order is set aside, I hope the Hon'ble Judges will be so good as to suggest what could have been the proper procedure, as the Criminal law does not, to my mind, provide any clear rule on the subject of what is to be done, when a dispute as to the amount of their shares breaks out between the sharers in what had been joint property, and the case is one which to judge from my short experience arises pretty frequently."

In dealing with this matter, as he has done, we give the Magistrate full credit for a desire to do his duty, and, if possible, to end this dispute which might lead to further trouble. But the Magistrate has exceeded his powers and he has interfered in a manner which was quite unnecessary. It is not because private parties or members of the same family dispute regarding their [921] respective rights to land or crops, that the Magistrate is called upon to interfere. If he has good reason to believe that such a dispute is likely to cause a breach of the peace, the law enables him to ascertain and maintain actual possession. But that is not the case here. The Magistrate did not take proceedings under s. 145; and even if the Magistrate had taken such proceedings he was not competent to do more than to determine actual possession. He could not, as he has done, determine rights of parties under Mahomedan law. Such questions should be left to the Civil Courts. We would also point out that the proper course for a Magistrate to take when it is shown that members of the same family are inclined to break the peace is to bind them all over to keep the peace. The law, therefore, gives the Magistrate ample powers in respect of a dispute such as the present. In this case, the Magistrate has failed to exercise such jurisdiction, and he has acted in a manner altogether beyond his powers. His order must be set aside as without jurisdiction.

D. S.

NOTES.

[See also 24 Mad., 45.]

[27 Cal. 921]

The 11th May, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HANDLEY.

Mahadeo Singh..... ..Petitioner

versus

Queen-Empress..... .. Opposite party.

False charge, prosecution for making --Necessity of examination of complainant—Dismissal of complaint—Order for judicial inquiry or report without examining complainant, legality of—Penal Code (Act XLV of 1860) s. 211—Code of Criminal Procedure (Act V of 1898) ss. 202, 203 and 476.

Where a Magistrate after having examined the complainant and without hearing his witnesses or dismissing the complaint ordered the complainant to be prosecuted under s. 211 of the Penal Code.

Held, that the Magistrate's order was without jurisdiction.

Where a complainant, whose complaint had been reported false by the police, complained to the Magistrate and asked him to try the complaint, and [922] the Magistrate did not examine the complainant himself, but made over the case to a Subordinate Magistrate for judicial inquiry or report.

Held, that the Magistrate had no authority for this procedure.

A complainant must be examined by the Magistrate, who receives the complaint, or by some Magistrate to whom he has transferred the case. When a complainant has been examined he is entitled to have the person accused brought before the Magistrate, and it is only when the Magistrate has reason not to believe the truth of the complaint from his examination that this can properly be refused and an investigation held.

IN this case the petitioner, on the 21st of April 1899, complained to the police in respect of the theft of certain documents. After investigation the police reported the complaint to be false. On the 30th of April the petitioner appeared before the District Magistrate and made a complaint asking to have the matter tried. The District Magistrate deferred passing orders until he was in receipt of the police report, and then, on the 6th of May, he ordered the petitioner to show cause within seven days why he should not be prosecuted under s. 211 of the Penal Code, and at the same time he made over the complaint of the petitioner to the Deputy Magistrate for judicial inquiries and report. The Deputy Magistrate, after examining the petitioner and his witnesses, reported to the District Magistrate that the complaint was in his opinion false. The District Magistrate on this passed an order under s. 476 of the Code of Criminal Procedure directing the petitioner to be prosecuted for an offence under s. 211 of the Penal Code. This matter was then considered on a rule granted by the

* Criminal Revision No. 271 of 1900, made against the order passed by G. Balthasar, Esq., Officiating Deputy Commissioner of Palamau, dated the 12th of March 1900.

High Court, and, inasmuch as the District Magistrate had ordered the petitioner to be prosecuted under s. 211 of the Penal Code for having made a false complaint without ever examining him, the order under s. 476 of the Code of Criminal Procedure was set aside. The District Magistrate then renewed the proceedings and examined the petitioner, and on that examination he again passed an order directing the petitioner to be prosecuted under s. 211 of the Penal Code.

Babu *Preo Nath Sen* for the Petitioner.

1900, MAY 11.—The judgment of the Court (PRINSEP and HANDLEY, J.J.) was delivered by

Prinsep, J.—After investigation, the police reported that the complaint of Mahadeo Singh, in respect of theft of certain [923] documents, was false. On the 30th of April Mahadeo Singh appeared before the District Magistrate and made a complaint asking to have the matter tried. The District Magistrate deferred passing orders on the matter, until he was in receipt of the police report, and then, on the 6th May, he ordered the complainant to show cause within seven days why he should not be prosecuted under s. 211 of the Indian Penal Code, and at the same time he made over the complaint of Mahadeo Singh to the Deputy Magistrate for judicial inquiry and report. On the 10th June, the Deputy Magistrate ordered notice to the complainant to appear before his Court with evidence on the 30th June, and after examining the complainant and his witnesses, he reported to the District Magistrate that the complaint was, in his opinion, false. The District Magistrate on this passed an order under s. 476 of the Code of Criminal Procedure directing the petitioner to be prosecuted for an offence under s. 211 of the Indian Penal Code. This matter was then considered on a rule granted by this Court, and, inasmuch as the District Magistrate had ordered the complainant, Mahadeo Singh, to be prosecuted under s. 211 of the Indian Penal Code for having made a false complaint without ever examining him, the order under s. 476 was set aside.

The Magistrate has renewed these proceedings and has examined the complainant, and on that examination he has again passed an order directing the complainant to be prosecuted under s. 211 of the Indian Penal Code.

A second rule, which is now before us, has been granted, and we have again considered this matter. It has been represented to us, and it would appear from the Magistrate's judgment, which was before us and which was not withheld from us, as the Magistrate in his explanation seems to think, that the Magistrate has proceeded entirely on the statement of the complainant. The Magistrate now represents in his explanation that he acted on the police report and also on the report of the Magistrate, who had held the judicial inquiry, and he further assures us that he had also considered the evidence recorded by that Magistrate before passing the order under s. 476 of the Code of Criminal Procedure.

The proceedings from first to last have been misconceived, and we think that this irregularity has operated very unfairly [924] towards the complainant. He protested against the police investigation to try his complaint. The District Magistrate made over the complaint to the Deputy Magistrate in accordance with law. He made over the complaint to the Deputy Magistrate for judicial inquiry and report. The law requires that a complainant should be examined by the Magistrate, and that, if the Magistrate, after examining the complainant, is satisfied to believe the truth of the complaint, he should order the complaint to be held. That was not the course

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did the Magistrate (as he ought to have done) transfer this case for trial by the Subordinate Magistrate. He retained it in his own Court for trial and he referred it, as we think without any authority, to a Subordinate Magistrate for an "intermediate judicial inquiry," as he terms it. The complainant was entitled to have his case tried out by some officer and to have final orders passed on it. The case before the District Magistrate has never been tried out and has never been dismissed on evidence recorded by him or obtained by him in the manner directed by s. 202. Whatever may be the merits of the case, we think that the proceedings, which have extended much more than one year have been unduly prolonged, and that there is no necessity for continuing them. The Magistrate's order under s. 476 is, in our opinion, without jurisdiction, inasmuch as it has not been properly passed on judicial proceedings before himself, and we think that the protest made by the complainant against the result of an investigation by the police should have received proper attention at the hands of the District Magistrate.

To avoid any misunderstanding we would point out that a complainant must be examined by the Magistrate who receives the complaint, or by some Magistrate to whom he has transferred the case. This was not done. When a complainant has been examined, he is entitled to have the person accused brought before the Magistrate, and it is only when the Magistrate has reason not to believe the truth of the complaint from his examination that this can properly be refused and an investigation held. Here the complainant protested against the police report and he appealed to the Magistrate for redress. It was certainly not fair to the com-[925]plainant to disbelieve his complaint without ever hearing him; to order an investigation by another Magistrate and act on that investigation; and, without hearing the complainant from first to last, to order him to be prosecuted for making a false complaint. That was how the matter stood on the order passed on the first rule. The situation has not been improved since. The complainant has, it is true, been examined, but his witnesses have not been heard by the District Magistrate, who has condemned him on a report made by another Magistrate after an inquiry held irregularly and without jurisdiction. The examination has, in point of fact, been only a compliance with our order on the rule, so as to enable the District Magistrate to repeat the order previously passed by him. Even now the complaint has not been dismissed, and it certainly has not received the judicial trial that the complainant asked for and was entitled to. There was really nothing before the District Magistrate on which he could properly pass an order under s. 476 of the Code of Criminal Procedure. The rule is, therefore, made absolute, and it is directed that no further proceedings be taken in this matter.

D. S.

NOTES.

[This was followed in (1905) 33 Cal., 1. 2 C.L.J. 228. 10 C.W N., 158; (1911) 12 I.C., 515 (Punjab).]

[27 Cal. 926]

The 29th March, and 2nd April, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE STANLEY.

Akboy Kumar Chuckerbutty.....Petitioner

versus

Jagat Chunder Chuckerbutty.....Opposite Party.

Accomplice—Wrongful confinement—Extortion—Money lent in ordinary course of business to pay amount extorted—Lender—Penal Code (Act XLV of 1860), ss. 213, 342 and 384.

The accused, a Sub-Inspector of Police, arrested one *J.*, wrongfully confined him, and extorted from him Rs. 200 under a threat that he, the accused, would not release *J.*, unless the money were paid. This money was paid on this account by *P.*, a money lender, who lent *J.* the money for this purpose. Accused was convicted under ss. 342 and 384 of the Penal Code. In appeal the Sessions Judge held that *P.* was not an accomplice, and having considered his evidence accordingly dismissed the appeal.

Held, that it was sufficiently shown that the money was not voluntarily given, that it was given by *J.* to obtain his release from police custody, in [926] which he was detained on no reasonable or sufficient ground, and it was extorted, because the Sub-Inspector refused to release *J.*, as he was bound to do, unless he were paid that money. That *P.* paying such money under such circumstances could not be regarded as an accomplice of the Sub-Inspector in such misconduct.

IN this case the accused, who was employed as Sub-Inspector of Molgunj thana, arrested one *J.* on the charge of being concerned in the theft of a cart. *J.* was detained at the thana, and ultimately released on payment by him to the accused of the sum of Rs. 200 under a threat, that accused would not release *J.* unless the money were paid. This money was paid on this account by *P.*, a money-lender, who lent *J.* the money for this purpose. The accused was convicted on the 2nd of September 1899 by the Deputy Magistrate of Rangpur, of offences under ss. 342 and 384 of the Penal Code of wrongfully confining *J.*, and of extorting from him Rs. 200 under a threat that he would not be released, unless the money were paid. The accused appealed to the Sessions Judge of Rangpur, and contended that the complainant and all the witnesses for the prosecution, who took any part in the transaction, were accomplices and unworthy of credit. The Sessions Judge, however, being of opinion that the money was advanced by *P.* in the ordinary course of business, and that, therefore, the mere fact that *P.* was aware of the purpose for which money was borrowed, did not make him an accomplice, considered his evidence accordingly, and dismissed the appeal on the 21st of December 1899.

Babu *Dasarathi Sanyal* for the Petitioner.

Babu *Prish Chunder Chowdhry* for the Crown.

ult.

1900, APRIL 2. The judgment of the
was delivered by

(A. J. J.)

Prinsep, J.—The petitioner a Sub-Inspector of Police, arrested one *J.* on the charge of being concerned in the theft of a cart. *J.* was detained at the thana, and ultimately released on payment by him to the accused of the sum of Rs. 200 under a threat, that accused would not release *J.* unless the money were paid. This money was paid on this account by *P.*, a money-lender, who lent *J.* the money for this purpose. The accused was convicted on the 2nd of September 1899 by the Deputy Magistrate of Rangpur, of offences under ss. 342 and 384 of the Penal Code of wrongfully confining *J.*, and of extorting from him Rs. 200 under a threat that he would not be released, unless the money were paid. The accused appealed to the Sessions Judge of Rangpur, and contended that the complainant and all the witnesses for the prosecution, who took any part in the transaction, were accomplices and unworthy of credit. The Sessions Judge, however, being of opinion that the money was advanced by *P.* in the ordinary course of business, and that, therefore, the mere fact that *P.* was aware of the purpose for which money was borrowed, did not make him an accomplice, considered his evidence accordingly, and dismissed the appeal on the 21st of December 1899.

convicted

ultimately

Rs. 200

Chuckerbutty,

Esq.,

* Criminal Revision No. 101 of 1900
Sessions Judge of Rangpur, dated the 21st Dec

unless the money were paid. It is found that this money was paid on this account by Panchu Behari Saha, a money lender, who lent Jagat Chunder [927] the money for this purpose. In hearing this appeal the Sessions Judge held that Panchu was not an accomplice, and he considered his evidence accordingly. A rule has been granted to consider this matter, because if Panchu is an accomplice, the evidence has not been properly considered on the appeal. It is contended before us that the money was an illegal gratification, that, therefore, the offence, if any, committed is under s. 213* of the Penal Code, rather than extortion under s. 384. In one sense the offence may be so regarded, and in that case Panchu might be regarded as an accomplice, but on the evidence we think that it is sufficiently shown that the money was not voluntarily given, and it was not given in consideration of the Sub-Inspector not proceeding against Jagat Chunder for the purpose of bringing him to legal punishment. It was given to obtain his release from police custody in which he was detained on no reasonable or sufficient ground, and it was extorted, because the Sub-Inspector refused to release him, as he was bound to do, unless he were paid that money. A person paying such money under such circumstances cannot be regarded as an accomplice of the Sub-Inspector in such misconduct. There are, therefore, no sufficient grounds for holding that the Sessions Judge on appeal has not properly dealt with the evidence of Panchu as not that of an accomplice.

The rule is discharged.

D. S.

NOTES.

[In a similar case, the testimony of persons who paid the bribe was accepted though uncorroborated :— (1906) 33 Cal., 649 . 10 C. W. N., 669.]

* [Sec. 213 :—Whoever accepts or attempts to obtain, or agrees to accept, any gratification for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing an offence or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment, shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ; and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ; and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.]

Taking gift, &c., to screen an offender from punishment.

If a capital offence.

If punishable with transportation for life or with imprisonment.

[27 Cal. 927]

TESTAMENTARY JURISDICTION.

The 27th March, 1900.

PRESENT :

MR. JUSTICE AMER ALI.

In the Goods of Bhuggobutty Dasí.....Deceased.*

Probate—Caveat—Executor—Propounder of Will—Caveator—Costs.

A party cognisant of proceedings in an action for probate or letters of administration and not objecting to the grant is not as a rule entitled to have the matter reopened and the grant revoked. In this case he was allowed to reopen the case under certain circumstances and upon certain conditions.

ON the 8th May 1899 Prosonnomoyi Dasí applied for probate of the will of the deceased, whereby she had been [928] appointed the sole executrix. A caveat was filed opposing the grant by two persons, Adhore Chunder Dutt and Gopal Chunder Dutt, sister's sons of the deceased, and the matter was set down for hearing as a contentious cause. The hearing lasted for several days, and on 23rd February Babu Akhoy Kumar Mitter, attorney for the caveators, was examined, and his cross-examination had proceeded to a certain extent when the case was adjourned. On that day Mr. Mitter, who was the leading Counsel for the caveators, stated that he had gone through the evidence again, and that he had advised his client to withdraw the caveat, and that he had mentioned this to Mr. Chakravarti, who was the leading Counsel for the propounder and had asked him not to press for costs. Mr. Chakravarti thereupon stated that, if the Court sanctioned it, he would not press for costs, but that, as his client was an executor and trustee, he could not give up costs without the sanction of the Court. It would, however, benefit the estate by avoiding further litigation and trouble, if he gave up costs. The Court thereupon delivered judgment holding that the will had been duly proved, and ordered probate to be granted to the said Prosonnomoyi Dasí.

In the above proceedings one Roma Nath Addy, another sister's son of the deceased, had filed an affidavit in support of the caveat, and given evidence on behalf of the executors, but had filed no caveat. On the same day that the caveat was discharged and probate ordered to issue, Roma Nath Addy, through his attorney Babu Akhoy Kumar Mitter, entered a caveat in the said goods.

Subsequently there was a change of attorney from Babu Akhoy Kumar Mitter, to Mr. N. C. Bose.

Roma Nath Addy also filed an affidavit stating that there were other witnesses besides those examined whom he wanted to call and that the former caveators had withdrawn the caveat upon grounds not known to him.

Mr. O'Kinealy for Roma Nath Addy:—The applicant is not precluded by the former proceedings from having the matter reopened, as he has fresh evidence to put forward. The former proceedings do not preclude him, do not apply to circumstances, and the caveat has been withdrawn [929] by agreement. The person who has had notice of the former proceedings and who is opening up the matter again are Komolothan v. Komolothan, 14 Cal., 360; Brinda Chowdhuran v. Brinda Chowdhuran, 14 Cal., 360; Nestariney Dabba v. Ibrahim, 14 Cal., 492; Nestariney Dabba v. Ibrahim, 14 Cal., 45,

and, *In the matter of Pitamber Girdhar*, (1881) I. L. R., 5 Bom., 638. The circumstances under which a Court will grant a re-hearing are laid down in *Wytcherley v. Andrews*, (1871) L. R., 2 P. & D., 327 and *Peters v. Tilly*, (1886) L. R., 11 P. & D., 145.

Mr. *Chakravarti* (Mr. S. B. Das and Mr. H. D. Bose with him) for the Propounder.—This case does not come within any of the exceptions. There was no compromise here as there was in the case of *Wytcherley v. Andrews*, (1871) L. R., 2 P. & D., 327, and in *Peters v. Tilly*, (1886) L. R., 11 P. & D., 145, it was a question of a fresh will. The case of *Ratcliffe v. Barnes*, (1862) 2 Sw. & Tr., 486, shows that a next of kin, who is cognisant of a suit between the executor of a will and another next of kin ending in the establishment of the will, is not at liberty to oppose probate of the will being taken. That case followed the decision of Sir JOHN NICOLL in the case of *Newell v. Weeks*, (1814) 2 Phil., 224. All the Indian cases are to the same effect.

1900, MARCH 27th. **Ameer Ali, J.**—On the 8th of May 1899 Prosonnomoyi Dasi applied for probate in respect of the will of a Hindu lady named Bhuggobutty. There were various proceedings anterior to that application, but it is not necessary to refer to them for the purposes of the present judgment. It is enough to state that upon Prosonnomoyi applying, as aforesaid, two persons named Adhore Chunder Dutt and Gopal Chunder Dutt entered a caveat against the grant of probate.

The case was, accordingly, set down as a contentious cause and came on for hearing on the 8th of February last. The [930] trial lasted over a considerable number of days, and the propounder's witnesses were cross-examined at enormous length, no detail was left unquestioned, and every single matter open to attack or criticism was subjected to a searching cross-examination.

On the 23rd of February *Akhoy Kumar Mitter*, attorney for the caveator, Gopal Chunder Dutt (his brother Adhore having died previously), was examined, and his cross-examination had proceeded to a certain extent when the case was adjourned.

Before his evidence had commenced Mr. *Mitter*, who was leading Mr. *Chaudri*, stated that that was his last witness, and that, save and except a person with whom some other will was alleged to have been deposited, he would not call any other witness.

The case came on for further hearing on the 27th of February, and on that day, on its being called on, Mr. *Mitter* said as follows:—

"I have had an opportunity of going through the evidence, and of considering what has fallen from the Court, and, having regard to that, I have advised my client to withdraw the caveat, and I mentioned this to Mr. *Chakravarti*, who has stated that he will not press for costs."

With regard to that Mr. *Chakravarti* said: "I did so as I am appearing for a trustee, and the chance of getting costs from the people before the Court on the other side is so small and may put the estate to more expense, that I thought it advisable not to press for costs."

Asks for probate to his client. Upon that I passed the following judgment:

"Mr. *Mitter* in the exercise of his discretion has, in my opinion, very properly taken a course on behalf of his clients, which I was certain on consideration would commend itself to him, and I thoroughly approve of the course taken. He has withdrawn the caveat on behalf of his client, and Mr. *Shakravarti* for the reasons given by him and minuted does not press for costs. I approve also of the course taken by him."

"The caveat being thus withdrawn I am not called upon to [931] express any opinion upon the evidence given on behalf of the caveators, but I am entitled to say that on the evidence given by the propounders, which I consider reliable and satisfactory, the factum of the will is conclusively established. "I my add that it being the question of the estate of a deceased person, had I felt that the evidence of the caveators was such as to raise any doubt in my mind as to the factum of the will, I should have hesitated before giving effect to the application for withdrawal of the caveat, but my opinion on the evidence, so far as it has proceeded, is so clear that, approving, as I do, of the course taken by learned Counsel for the caveators, I unhesitatingly pronounce in favour of the will and direct that probate do issue to the propounders."

On the very same day through the very same attorney, who was acting for Gopal Chunder Dutt and the widow of Adhore Chunder Dutt, Roma Nath Addy, who had given evidence on behalf of Gopal Chunder, filed a fresh caveat against the grant of probate. Naturally the attorney for the plaintiff protested against the proceeding and wrote a letter which runs as follows: "I understand that you, acting as attorney for Babu Roma Nath Addy, have filed a caveat against the grant of probate to my client. All that I can point out to you is that it is a gross abuse of the order of the Court. Babu Roma Nath Addy had notice of the application long ago, and he had given his evidence in Court and the case lasted for so many days, and then at last when the order was made, he files a caveat.

"However I must ask you to file your grounds in support of caveat at once, so that the case may be heard and decided without delay."

In reply to this protest Akhoy Kumar Mitter, on the 1st of March, wrote a letter which need not be set out in full as the commencing passages are sufficient to give an indication of its character.

"My client does not see how he is prevented from questioning the genuineness of the will, because his cousin, Gopal Chunder Dutt, and the wife of one of his deceased cousins, Srimati Shusila Coomaree Dasse, chose to withdraw the caveat entered by them in the above goods."

[932] Something was said about the proceedings being some what hurried. I was surprised at this observation as the Counsel who made it knew from his experience how unadvisable delay in a matter like this is, and if any one expected that I should allow this case to be hung up for a year or eighteen months I can only say he was very much mistaken.

The caveat of Roma Nath Addy having been filed through Babu Akhoy Kumar Mitter, regarding whom I shall say a few words before I finish, a change was made to another attorney, the object of which is obvious. At this stage it is desirable that I should state what the position of Roma Nath Addy was in the case which had been heard by me for such a length of time.

Adhore Chunder Dutt and Gopal Chunder Dutt were the two sons of a sister of the deceased Bhuggobutty Dasi. Roma Nath Addy alleged himself also to be a son of another sister, and stated in his evidence which he gave in Court in support of the caveat, and in denial of his signature to the alleged will that he, Gopal Chunder Dutt and Adhore Chunder Dutt, lived all along in the house of Bhuggobutty Dasi. He stated that he knew of the proceedings which had been taken by his cousins, and that, inasmuch as his interests were assured by their action, to paraphrase his language, he did not think it necessary to file any caveat. He also pleaded want of means. In the course of Gopal Chunder Dutt's deposition, which I am entitled to take into consideration in dealing with the whole matter and with the *bona fides* of the present

application, it appeared beyond a shadow of doubt that not only was Roma Nath privy to the proceedings taken by his cousins—not only was he cognisant of all that was being done, but that he was actively associated with them and managed the case and instructed the attorney.

One word more before I go on to the legal position this man takes up here.

When I stated in my judgment that "the caveat being withdrawn I am not called upon to express any opinion on the evidence given by the caveator," I had in my mind the course which had the case proceeded to a conclusion, I intended to take with regard to the witnesses; for my opinion being as the case progressed, and as I scrutinised the testimony and demeanour of the witnesses for the caveator that some of them at least had grossly perjured themselves, I intended directing their prosecution, and I did not mean to stop there. I also intended calling upon the attorney to explain on affidavit his conduct in holding communication with a witness whom he knew to be the witness of the propounder, and whom he allowed to come into his office in order to get a statement.

But as Mr. Mitter, very properly in my opinion, came to the conclusion that he should advise his client to withdraw the caveat, I did not consider it necessary to proceed further. I may add that, if the case had proceeded to the end, one of the persons against whom I should have ordered proceedings to be taken in the Criminal Court would have been the present applicant.

I mention this only to explain the reserve with which I dealt with the evidence of the caveator, not that I had any doubt, but simply to abstain from giving expression to the distinct impression I had formed. The case for the will was proved incontestably *per testes*.

As I said before the witnesses for the plaintiff were cross-examined most minutely and elaborately. No possible ground was left untouched.

At first Mr. Chaudri and Mr. Sinha appeared for the caveators. At the second stage they were represented by Mr. Mitter and Mr. Chaudri, and the names of those learned gentlemen are enough to carry a guarantee that the case was conducted with ability and vigour. What are the grounds on which Roma Nath Addy now comes in to reopen the entire proceedings that ended on the 27th of February last?

In paragraph 5 of his affidavit, originally filed on the 7th of March 1900 his ground is thus stated:—

"I further say that in consequence of a caveat having been entered by Adhore Chunder Dutt and Gopal Chunder Dutt, two of the sons of Srimatti Rajomoyi Dassi, who is another sister of the said Srimatti Bhuggobutty Dasi, against the grant of probate to the said Prosonnomoyi Dassi of the said document as the will of the said Srimatti Bhuggobutty Dasi, I did not consider it necessary to file a caveat on my own behalf, until I found that [934] for reasons unknown to me, and on account of the death of the said Adhore Chunder Dutt, the caveat filed on behalf of the said Adhore Chunder Dutt and Gopal Chunder Dutt was withdrawn." There can be no doubt that the above statement is false.

In his affidavit Roma Nath says nothing as to when or how he came to know of the withdrawal of the caveat. Nor does he venture to say that he was prevented from intervening in the action, the moment he learnt of the course Gopal Chunder was going to take. It is a bare statement that the former caveat having been withdrawn, he now comes forward to contest the will. Yesterday, the 26th of March, fully a month after the withdrawal of Gopal Chunder's caveat he puts in an affidavit, in the 2nd paragraph of which he states as follows: "I further say that some days after my evidence was concluded I

heard from the said Gopal Chunder Dutt and Adhore Chunder Dutt that they had withdrawn their caveat, but I was not aware what transpired between the date of my examination and the withdrawing of the said caveat or the reasons which led to the said withdrawal."

It may be noticed by the way that Adhore Chunder Dutt had been dead long before the case came on for hearing.

This is sufficient to shew the recklessness with which he has sworn to facts in his affidavits.

He states there are certain witnesses he would have called but whom the persons conducting the proceedings did not call.

It is perfectly clear on the authorities, both here and in England, that, if a party is cognisant of proceedings for letters of administration or probate, and chooses to stand by and allow the proceedings to be concluded in his absence, he will not be allowed to come in afterwards and have the grant revoked or the proceedings reopened. In *Newell v. Weeks* (2 Phil., 224) Sir John Nicoll stated exactly the principle on which matters of this nature are dealt with, and that case has been accepted as an authority both in England and here.

That learned Judge referring to two cases set out in his judgment held that inasmuch as the parties who were applying were spectators of and privy to the whole proceedings and might have intervened at any time it shewed that they had not sustained [935] any prejudice, and had no right to come in to object to the grant of the probate.

In that case also new facts were alleged, but the learned Judge put them aside on the ground that they were too late.

That case was followed in *Ratchiffe v. Barnes*, (1862) 2 Sw. & Tr., 486, which to a large extent is analogous to the present case.

The facts as given in the report were as follows: The plaintiffs in that case were the executors of the will of Joseph Barnes, and the defendant, John Barnes, was the son of the said Joseph Barnes. A sister of the defendant had entered a caveat, and the executors had propounded the will. Several pleas had been raised in opposition to the will and issue was joined on those objections. The issues were tried under an order of the Court before MARTIN, B., and a jury at the Liverpool assizes, and a verdict was returned in favour of the will. An application for a new trial was made and rejected, and the Court had pronounced for the will.

The plaintiffs then applied for probate, when they were met by a caveat entered by the defendant, a brother of the defendant in the previous suit. The plaintiffs thereupon filed a petition praying that probate might pass notwithstanding the caveat, and that the defendant might be condemned in costs. It was admitted that the defendant was cognizant of the former suit, and had assisted his sister in the conduct of it.

The learned Judge in the Court of Probate dismissed the objections summarily, and held upon *Newell v. Weeks* that probate must issue notwithstanding the caveat.

The same question came up in the Bombay High Court before Sir Charles SARGENT in *In the matter of Pitamber Girdha*, (1881) I. L. R., 5 Bom., 638. In that case a will, dated the 5th of February 1879, was propounded by one Navivahoo. The petitioner had entered a caveat, but at the close of the evidence given in support of the will he had without calling any evidence declined to proceed with the case. The Court then found in favour of the will of the 5th [936] February 1879. He subsequently applied for a rule nisi calling on the executors to shew cause why the probate should not be revoked

and cancelled ; and he brought in another will, dated the 1st of February 1879, alleging that that was the real will of the deceased, and that the will of the 5th of February 1879 was a forgery. •

The learned Chief Justice dealing with the matter relating to the right of the petitioner or anybody else to apply for revocation of the probate expressed himself thus :—

“ It was next contended that the petitioner, having been concerned in the proceedings which resulted in the grant of probate, is precluded from now seeking to have the probate revoked. The rule in England is clear, that when once probate in solemn form has been granted, no one who has been cited or who has taken part in the proceedings, or who was cognisant of them, can afterwards seek to have it cancelled ; ” and he held that the rule was applicable to the Courts here. Then dealing with another part of the case he says on page 642 : “ On behalf of the petitioner’s case it was argued that, although the petitioner might be precluded from applying for revocation of the probate by reason of his having been caveator in the former proceedings, the other executors named in the will of the 1st February 1879 did not labour under the same disability, as they had not joined in the caveat, nor had they been cited by the widow, and it was contended that the petition might be amended by inserting their names. It is admitted, however, that they were fully aware of the former proceedings, if indeed they were not actively engaged in supporting the case of the caveator, and I think, therefore, that they are equally bound with him by the decision of the Court, and that the rule laid down in *Radcliffe v. Barnes* and *Newell v. Weeks* prohibits them also from applying for revocation of the probate that has been granted. ”

The two cases cited by Mr. *O’Kinealy* in support of his proposition that in this case the order for probate having been made on withdrawal of the case is not binding on any body else, except the persons directly concerned, seems to me not [937] to apply at all. *Wytcherley v. Andrews*, (1871) L. R., 2 P. & D., 327, was quite an exceptional case. It was on a distinct compromise and one of a suspicious kind upon which the order had been made.

In the case of *Peters v. Tilly*, (1886) L. R., 11 P. & D., 845, the witness who could speak to the second will had been out of the country for many years, and his whereabouts having been ascertained the Court gave liberty for taking his evidence ; at the same time it ordered that the proceedings instituted for the establishment of the second will should be stayed, till the applicant’s costs in the previous case had been paid.

That was a totally different case to the present. In the case before me, I am of opinion on the whole of the evidence which was before me and which I am bound to take into consideration that *Roma Nath Addy* was not only a witness to the case and privy to the proceedings and cognisant of all that was taking place, but that he was closely associated with the caveators. To use the words of Sir John NICOLL he “ was substantially a party to that suit quite as much as if he had actually appeared a spectator to the whole and privy to the whole. If he had been dissatisfied he might have intervened at any moment of the proceedings. ” The case was decided on the evidence of the witnesses carefully tested by cross-examination, and I found in favour of the will. It seems to me it would be lamentable to allow the whole matter to be reopened. It would not only be a gross abuse of the process of the Court, but would turn it into an engine of oppression and be a means of harassment to innocent persons.

On these grounds I think that I am not justified in making an order directing what it would really amount to, a revocation of the order for the grant of probate.

However, and in order to avoid the least semblance of grievance, I am willing to do this.

Holding that Roma Nath Addy was privy to the previous proceedings and fully cognisant of them, if he in the course of a week pays to the plaintiff all the costs both of the former proceedings, and of the present proceedings upon his application up to [938] date to be taxed on scale 2, and gives security within the same period for further costs to the satisfaction of the Registrar, this case will be set down for hearing on Wednesday next, and will be taken up at the stage at which it stopped. In other words I will allow the cross-examination of the attorney to be concluded, and the witnesses mentioned in Roma Nath's affidavit, and no more, to be examined.

If those costs are not paid within the week and security given as aforesaid, the caveat will stand discharged and probate will issue immediately.

The plaintiff's bill can be submitted to the taxing officer at once, and I direct that the taxation of it shall have precedence over other bills.

Attorney for the Propounder: Babu *Romes Chunder Bose*.

Attorney for the Caveator, Roma Nath Addy: Mr *N. C. Bose*.

NOTES.

[The general rule was applied in (1911) 14 O. C. 77: 10 I. C., 717.]

[27 Cal. 938]

PRIVY COUNCIL.

The 15th February, and 24th March, 1900.

PRESENT:

LORDS HOBHOUSE, DAVEY AND ROBERTSON,
AND SIR RICHARD COUCH.

Yeo Htean Sew.....Plaintiff

versus

Abu Zaffer Koreshi.....Defendant.

[On appeal from the Court of the Recorder of Rangoon.]

*Mortgage—Construction of mortgage—Covenants as to payment of interest—
Default in payment of interest.*

A mortgage deed contained covenants for payment at the expiration of a year from its date, with interest to be paid month by month, in the month following that for which it should be due, and to run on from the date of the mortgage at the same rate until the money borrowed and the interest should be paid. It was also covenanted that if before the end of the year the mortgagor should make default in payment of interest during one month after it had become due, in that case the principal and interest should thereupon become claimable. With the latter requirement the mortgagor failed to comply, not paying the interest within the stated time.

Held that, on the true construction of the deed, this default having taken place this suit would lie for both the principal and interest accrued due within the year.

[939] APPEAL from the Recorder's decree (16th May 1899) dismissing the appellant's suit with costs, as prematurely brought.

This suit was brought by the appellant upon a deed of mortgage, dated the 22nd October 1898, in the English form, securing repayment of Rs. 75,000, borrowed for one year from the date of the instrument. The clause for redemption provided for payment of the principal, with interest, at the rate of ten per cent. per annum, from the date of the deed, payable month by month, on the 22nd of each month following that in respect of which it was to be due. The clauses giving rise to the question, whether this suit was prematurely brought, now decided, appear in their Lordships' judgment.

The mortgagor covenanted to pay interest at the same rate until actual payment should be made. There was also a clause that in case of default in payment of the interest for one month from the date fixed for such payment, the whole sum secured, principal and interest, should become due.

On the 22nd November 1898 the defendant had paid Rs. 200 on account of their due, but paid no more. On the 13th January following the plaintiff brought this suit, claiming the principal and interest with it, down to that date.

The defences in the written answer were, first that the claim was for a penalty and not enforceable; secondly, that the suit as brought was premature, the year not having elapsed before suit.

The Officiating Recorder fixed issues on both these points. As to the first he considered that it was to be decided on the ground of authority of judicial decisions against such a claim being regarded as a penalty, from which equity would relieve. But as to the second he held it to be a good ground of defence. His reasons he gave as follows:—

"I now have to consider if at the time when the suit was filed any default had been made in payment of any interest due under the mortgage for the space of one calendar month so as to bring clause 4 into operation. The only provision for payment of interest is made by clause 3, which provides for payment on the 22nd October 1899 of the principal and interest thereon at the rate of 10 per cent. per annum, computed from the date of the instrument, with a further proviso that if the principal shall not be so paid then the mortgagor will pay interest after the rate aforesaid until the same shall be fully paid and will pay all such interest (which can only mean the [940] interest then immediately provided for) month by month on the twenty-second day of each month succeeding that for which it should become due.

"It is true that clause 4 contemplates default by the mortgagor in payment of interest due under the deed before the 22nd October 1899, but as there is no covenant or stipulation by him for payment of mesne interest, I think he is entitled to contend, and to contend successfully, that the suit is premature. Great reliance has been placed by plaintiff's counsel on *Prosad Doss Tult v. Ramdhone Mullick*, 1 Ind. Jur., N. S., 255, but it is clear from the opening words of the judgment of FRACOCK, C.J., that it can be plainly distinguished from this case in that the deed under consideration contained a covenant that the mortgagor would on the 4th September 1866 pay or cause to be paid to the mortgagee, his executors, administrators, representatives and assigns, the sum of Rs. 23,000 and would also in the meantime pay interest for the same; so that, as the learned C. J., pointed out, it was clear that interest was to be paid between the date of the deed and the time fixed for payment of the principal. In the deed before me there is no such stipulation, and it would only be by reading a clause into the deed that is absent that this case could be rendered identical with *Prosad Doss Tult v. Ramdhone Mullick*, and the plaintiff be entitled to a decree.

"The suit is dismissed with costs."

1900, FEBRUARY 15. Mr. J. Fox, for the appellant, argued that the deed of mortgage had not been correctly construed in the judgment. On the true

construction of its clauses, interest was payable from the date of the mortgage, the 22nd October 1898, and regard should be had especially to clauses 4 and 9. Those appeared to have been inserted in contemplation of the case of interest not being paid by the times fixed for payment of it, and they showed the intention of the parties that the effect of default in making that payment should be as stated in clause 4; in other words, to render the whole amount secured, with the interest already accrued due thereon, at once payable, and payable before the expiration of the year, if default should be then made. He referred to the statement and conduct of the defendant, and contended that he was aware that the deed might be so construed.

The respondent did not appear.

Cur. adv. vult.

[941] 1900, MARCH 24. Their Lordships' judgment was afterwards delivered by

Sir Richard Couch :—By a mortgage deed, dated the 22nd of October 1898, the respondent in consideration of Rs. 75,000 granted certain lands in Rangoon to the appellant subject to a proviso for redemption by payment on the 22nd of October 1899 of Rs. 75,000 with interest after the rate of Rs. 10 per cent. per annum computed from the date of the deed and payable as thereafter provided. The mortgagor covenanted with the mortgagee as follows :—

" 3. That the mortgagor will on the 22nd day of October 1899 pay to the mortgagee the sum of Rs. 75,000 and will also pay interest for the same after the rate of Rs. 10 per cent. per annum computed from the date of these presents, and if the said sum of Rs. 75,000 shall not be paid on the said 22nd day of October 1899 then the mortgagor will pay to the mortgagee interest thereon after the rate aforesaid until the same shall be fully paid and satisfied, and will pay all such interest month by month on the 22nd day of each month succeeding that for which it shall become due.

" 4. That if before the said 22nd day of October 1899 the mortgagor shall make default in payment of the interest due hereunder for one calendar month after becoming due then in that case the principal sum of Rs. 75,000 and interest shall thereupon become due and payable."

On the 13th of January 1899 the mortgagee brought a suit against the mortgagor alleging in his plaint that the mortgagor had only paid Rs. 200 for over two months as interest and thereby failed to comply with the requirement of clause 4 of the mortgage deed, and that the sum of Rs. 76,508 was due for principal and interest on the mortgage, and praying for an order to the defendant to pay that sum on a day to be named by the Court and in default that the mortgaged premises might be sold and the proceeds applied in payment.

The defendant by his written statement admitted the allegations in the plaint and submitted that the provision in clause 4 was a penalty which the plaintiff was not entitled to enforce and that the suit was premature. The suit was tried by the Officiating Recorder of Rangoon who on the 16th of May 1899 dismissed it. He held that the provision in clause 4 did not create a penalty, in which their Lordships agree with him, but as there was no covenant or stipulation for payment of "mesne interest" by the [942] mortgagor the suit was premature. The mortgagee has appealed and the question to be determined is whether the mortgage deed contains such a covenant.

In clause 3 the mortgagor covenants that he will on the 22nd of October 1899 pay the principal sum with interest computed from the date of the deed, and if the principal shall not be paid on the 22nd of October 1899 that he will pay interest thereon after the same rate until the principal shall be fully paid. Then follow the words and "will pay all such interest month by month on the

22nd day of each month succeeding that for which it shall become due." According to strictly grammatical construction "such" would refer only to the interest payable after the 22nd of October 1899, but it is capable of meaning the interest for the previous year covenanted in the first part of the clause to be paid, or it may be considered to mean interest at the rate fixed. If it does not mean the interest in the first part of the clause no part of the first year's interest would be payable until the end of that year although after that time the interest is to be paid month by month. It is not reasonable to suppose that the mortgagee would agree to this. Then the introduction of the word "all" is not without significance. If the concluding words of the clause were meant to apply only to the part which immediately precedes them "all" is unnecessary. Combined with "such" it helps to show what is meant, and that the clause should be read as one sentence and not as if the first part is separate from what follows it. Clauses 4 and 9 of the deed support this construction. Clause 4 assumes that there is an obligation to pay interest before the 22nd of October 1899. If there is not there cannot be default before that day in payment of the interest and the clause can have no operation. Clause 9, which provides that if at any time either before or after the 22nd of October 1899 the interest due under the mortgage is in arrear to the extent of Rs. 500 and unpaid for three calendar months after becoming due it shall be lawful for the mortgagee to sell the premises, also assumes that there is a covenant to pay interest at some time during the first year, otherwise the interest could not be in arrear before the 22nd of October 1899. The construction which their Lordships put upon "all such interest" makes the different clauses in the deed consistent, and they are of opinion that the suit ought not to have [943] been dismissed. They will therefore humbly advise Her Majesty to reverse the decree appealed against and to order that upon the defendant paying to the plaintiff within six months from the date of Her Majesty's order the sum of Rs. 75,000 the principal and Rs.1,508 the interest, due on the mortgage mentioned in the plaint, together with the costs of this suit in the Recorder's Court as taxed by the Court, and further interest on the said principal at the rate of Rs. 10 per cent. per annum, from the date of institution of suit, viz., 13th January 1899, till payment, the plaintiff do reconvey to the defendant the said mortgaged premises free and clear from all incumbrances made by him, and do deliver up to the defendant all deeds and writings in his custody or power relating thereto; but in default of the defendant paying to the plaintiff such principal, interest, costs, and further interest as aforesaid, by the time aforesaid, that the said mortgaged premises be sold, and the money to arise by such sale be paid into Court, to the end that the same may be duly applied in payment of what shall be found due to the plaintiff for principal, interest, costs, and further interest as aforesaid, and the balance (if any) shall be paid to the defendant; but if the proceeds of sale shall not be sufficient for the payment in full of such principal, interest, costs, and further interest, then that the defendant do pay to the plaintiff the amount of such deficiency with interest thereon at the rate of six per cent. per annum until such payment. The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. *Hopgoods & Dawson.*

C. B.

[27 Cal. 943]

The 23rd February and 24th March 1900.

PRESENT :

LORDS HOBHOUSE, DAVEY AND ROBERTSON, AND SIR RICHARD COUCH.

Radhamoni Debi.....Plaintiff

versus

The Collector of Khulna and others.....Defendants.

[On appeal from the High Court at Fort William in Bengal.]

*Title—Evidence and Proof of Title—Possession—Alleged title by adverse
* possession for more than the period of limitation.*

Land bordered by the estates of each of the parties contesting its ownership was registered in the Collectorate as a separate mauza, as it also was represented to be in a Revenue survey map of 1856. In a subsequent survey [944] map of 1865 it appeared as being within the limits of the defendants' adjoining talukh. Neither from these maps nor any other documents was there evidence of title in either party, so that possession was all that could be resorted to as the ultimate test of right.

The plaintiff relied on limitation. She asserted more than twelve years' adverse possession by having settled tenants on the disputed ground. To entitle her, it was necessary for her, the burden of proof being upon her, to prove that she had held a possession adequate in continuity, in publicity, and in extent of area. Upon all these points her case was deficient, and therefore her claim failed.

It was also in evidence, which was the more substantial, that the defendant had occupied during that period a part of the land by tenants; and this, as proof of possession on his part, applied not only to the plots actually tenanted under him, but was contradictory to the whole theory of the plaintiffs' claim.

APPEAL from a decree (22nd June 1894) of the High Court reversing a decree (17th May 1892) of the Subordinate Judge of Khulna.

This suit was brought on the 24th May 1887 for the proprietary possession of tracts forming a mauza named Uttar (north) Kulati, otherwise called Durgapur, bordered on the south by the plaintiff's mouza Kulati, and on the north by the defendant's property, a talukh named Bhil Pabla.

Uttar Kulati was entered as a mauza in the Collectorate record of Jessore, and afterwards as a mauza No. 134 in the District of Khulna, when the latter had been in 1882 separated from the Jessore District. At two revenue surveys, one in 1856 and the other 1865, mauza Uttar Kulati was mapped. In the first it was represented as a separate mauza; but in the second it appeared as within the boundary of Bhil Pabla. In 1874, Bhil Pabla being then in the possession of the Collector as part of a trust estate, the Syedpur trust, he leased Bhil Pabla to Jogendra Nath Roy, who sold his interest in 1876 to Prosunnocoomar Mitra, now represented by his two sons, Basant Komar, and Mohendra Nath Komar. His widow Srimoti Shoshimukhi Mitra, and three other Mitras were also defendants. Disputes as to the ownership of mauza Uttar Kulati having arisen between the plaintiff and Prosunnocoomar, on the 31st August 1885, a Magistrate's order directed that the Mitras were to retain the possession

[945] which they then had of the mauza, until they should be evicted in due course of law.

The plaintiff's case was that she and her late husband, Gokal Chander Acharje, before her, had been in possession "adversely to others" by settling tenants on the disputed mauza for more than twelve years, and that she had thus acquired a title. The plaint set forth the survey map of 1856, alleged that the Collector of Jessore had not interfered, and denied the correctness and authenticity of the map of 1865, asking that the order of 31st August 1885 might be set aside, and that possession might be decreed to her.

The substantial defence was a denial that the plaintiff, or her predecessor, had ever been in possession, with an averment that the land was part of the defendants' Bhil Pabla. It was also objected that the Collector of Khulna, who was agent for a four-anna share of the Syedpur trust estate, which owned Bhil Pabla, should have been made a party to the suit. This objection was the first issue. Judgment was given on the 27th February 1889 by the Subordinate Judge in favour of the plaintiff on the issues relating to title by adverse possession. But on appeal, the High Court on the 9th January 1890, having taken up the first issue remanded the suit to the first Court for the Collector to be made a party defendant, and for a new trial.

The Collector's written statement then filed was identical with the defence of the Mitras, but with the addition that possession had not been held by the plaintiff within twelve years of suit brought, which thus was time-barred. A second time an Amin investigated and reported (ss. 392, 393 of the Civil Procedure Code) and confirmed a prior report.

The result was again in favour of the plaintiff after a hearing by the successor in office of the Subordinate Judge. But exception was made of certain highas tenanted by cultivators located by the defendants. These were decreed to the latter.

On an appeal by the defendant to the High Court a Division Bench (O'KINEALY and HILL, JJ.) reversed that judgment and dismissed the suit altogether. The Court found that no part of the mauza in dispute was within the boundaries of the plaintiff's [946] mauza Kulati. From that the mauza Uttar Kulati was quite distinct. Their judgment was that the plaintiff had failed to prove possession of the land for twelve years before the dispossession, which she alleged to have taken place in 1885, when the Magistrate's order under s. 145 of the Criminal Procedure Code, was passed. In 1885 that order had declared that the defendants, and not the plaintiffs, were in possession of about 400 highas; and in 1856 there were only 16 acres under cultivation in the whole mauza. Even now the only residents on the whole of the disputed area were a few people who had grown cocoanut and mango trees, and without doubt they had been in possession for 15 or 16 years. They added that they entirely concurred in the view of the lower Court which gave the highas so occupied to the defendants, but observed that the Judge had passed over the significance of the fact that the only old and permanent tenants residing in the mauza were tenants of the defendants. In dealing with title by prescription the Judicial Committee had remarked that it lay on the plaintiff to give cogent evidence; *Wise v. Brojendro Coomar Roy*, (1872) 18 W.R., (P.C.), 91 and *Wise v. Amirunnissa Khatoon*, (1879) L. R., 7 I. A., 73. The oral evidence was conflicting, but the High Court found that in 1885 the defendants were in possession of more of the disputed land than was held by the plaintiff. It did not appear probable that the Collector's tenant, who had succeeded in establishing a village in the middle of the land now in dispute, would have allowed the plaintiff to obtain possession, where he, the tenant, had become a lessee with a long lease, with

possession delivered to him. Down to 1883 there was but little evidence of any dispute, and the High Court found no proof of possession by the plaintiff in that year.

On this appeal by the plaintiff,

1900, FEBRUARY 23. Mr. C. W. Arathoon, for the Appellant, argued that on the evidence, including that taken by the two amins and their maps and reports, the judgment of the first Court was right. Weight was justly attached to the survey map of 1856, and the finding that Uttar Kulati was unconnected with Bhil Pabla was correct. The thak map, according to [947] the amins, correctly showed that the northern boundary of the mauza Uttar Kulati coincided with the southern boundary of Bhil Pabla. The conclusion should be that the plaintiff and her predecessor in title had located, with title so to do, cultivators on the ground who were there till long past the commencement of the twelve years' period before the institution of this suit. The Subordinate Judge before the remand, and his successor after the remand, rightly held that the plaintiff had substantially proved her title by adverse possession.

Mr. A. Cohen, Q.C., and Mr. J. H. A. Branson, for the Respondents, argued that the appellant's claim to sue was barred by the effect of s. 22, Act XV of 1877, the Limitation Act (providing that a suit is to be deemed to have been instituted when an added defendant has been made a party), coupled with the effect of sch. II, art. 47, fixing the period of limitation of three years to have set aside an order under chap. XI of the Criminal Procedure Code. On the question of possession, on which the title rested, the plaintiff had failed to prove her claim. The evidence had not shown a complete, or shown a continuous possession by her at any period within the twelve years immediately preceding the suit; and there had been no title gained by adverse possession against the defendant for the period of twelve years before the Magistrate's order of the 31st August 1885. The appellant had failed to prove that the land in suit was within the limits of her estate of Kulati, and the Judges of the High Court had rightly held that it was comprised within the respondent's estate of Bhil Pabla, and was occupied by his tenants at the time of the litigation in 1885.

Mr. C. W. Arathoon replied.

Cur. adv. vult.

1900, MARCH 24. Their Lordships' judgment was delivered by

Lord Robertson.—The respondents are in possession of the land in dispute by virtue of a Magistrate's order granted in August 1885. The onus is, therefore, on the appellant who claims the land to make out that she has the better right.

In considering the question thus raised it is well to have in mind the nature of the disputed land. Its area is about 1,400 [948] bighas, but it is a significant fact that the most various estimates on this subject have been made during the period in dispute, the reason being that very few people had occasion to be there or were interested in its size. The decree to which this is the case may be gathered from two facts. It is clearly ascertained that in 1865 there were no human beings living on any part of the ground, and only one-twentieth of the whole area was susceptible of cultivation. At the time of this action there was only one small group of dwellings. The ground, generally speaking, is jungle; but there has been in some parts, more or less of intermittent cultivation.

The two competitors for this territory are, on the one hand, the Collector of Khulna (who will hereafter be referred to as the respondent), whose lessee is in possession and whose theory is that this is southern part of his talukh

of Bhil Pabla, and on the other hand the appellant who is the undoubted proprietor of the mauza of Kulati which lies to the south of the disputed land. An important feature of the case however is that the appellant's theory is not that the land forms part of the mauza Kulati but that it forms a separate mauza bearing the name of Uttar Kulati and lying between Kulati and Bhil Pabla. Although the vicissitudes of this prolonged dispute might naturally have suggested the simpler view, the appellant has never pretended that the disputed ground is part of the mauza Kulati and this is not suggested on the record. The sequel will show that this is not a merely nominal distinction.

With the doubtful exception of a lease of the disputed land said to have been executed in 1846, the history now to be considered opens in 1856. What then happened was that a survey of the ground was made by the Government Collector and a thak map was prepared, depicting the ground as forming a separate mauza of Uttar Kulati. So far as it goes, this directly supports and substantiates the appellant's case. The map, it is true, shows on its face the facts already mentioned as to the entire absence of population and the extremely exiguous amount of cultivable land. Accordingly, it cannot be treated as a contemporaneous record of possession so much as of a publicly asserted claim.

[949] That claim moreover was not allowed for long to stand unchallenged. In 1865 a Government survey was made of Bhil Pabla and the map then prepared records on its face that it was made to rectify the thak map, which had included in other mauzas parts of Bhil Pabla. The ground in dispute is depicted on the plan as having been so treated. As compared with the map of 1856 the map of 1865 has this in its favour that it bears on its face that the survey was made in the presence of the officers and tenants of the owners of the adjoining mauzas, whereas no such circumstance is recorded on the map of 1856. There has been some controversy as to the occasion of this map being made and as to its authorship; but the evidence and the conduct of parties make it clear that it is entitled to no less than the degree of authority which attaches to Government surveys generally. If the map of 1856 records the claim of the appellant, so and with equal authority does the map of 1865 record the repudiation of that claim. The one wipes out the other and leaves the parties to appeal to possession as the ultimate criterion of their rights.

The appellant however cannot escape from this branch of the case without it being noted that the theory of her map is the theory of her record, that this ground was not part of her mauza Kulati but was a mauza of itself, bounded by Kulati and bearing the separate name of Uttar Kulati.

In considering the question of possession it is necessary to remember its twofold bearing on the dispute. The appellant's claim is rested first on her title to the mauza of Uttar Kulati, and second on the statutory limitation, she having had (so she asserts) 12 years adverse possession of the land in dispute. Now what has been to some extent overlooked by the Subordinate Judge is that the evidence of possession affects both questions and not merely the second question. In the view taken by their Lordships of the maps of 1856 and 1865, the appellant has no case on title, unless she has adequately supported by possession her claim embodied in and affirmed by the map of 1856.

When the evidence of possession is examined, it is found to be divisible into two kinds having very different values. On the one hand there is an abundant supply of evidence on paper, leases and documents of various kinds, and on the other hand there is meagre [950] and conflicting evidence of actual physical possession. Neither feature need excite surprise. The ground has in fact been

little used, hence little evidence of physical possession; the ground has for fifty years been the subject of claims, hence paper grants to support those claims.

Now in the inquiry conducted in the Court of the Subordinate Judge the relative values of those two kinds of evidence have scarcely received due appraisal. Even assuming the authenticity of the lease of 1846 (which singularly enough describes the land as "Uttar Kulati *alias* Durgapur"), it is confronted by the appellant's own plan of 1856 which attests the absence of effective occupation. Similar criticism applies to much of the evidence from pottahs and kabuliyats; and, even where some testimony of physical possession emerges from the mass of documentary evidence, it is found to be exiguous in amount, in some instances uncertain in time and place, and in many instances irreconcilable with equally plausible contrary assertions.

Their Lordships find it impossible to hold that from these materials the appellant has made out her claim of title to the land. Her claim under the statute of limitations remains to be considered, but this question gives rise to very much the same observations within a more restricted region of inquiry.

It is necessary to remember that the onus is on the appellant and that what she has to make out is possession adverse to the competitor. That persons deriving from her any right they had have done acts of possession during the twelve years in controversy may be conceded and is indeed evidenced by the dispute which ended in the Magistrate's order of 1885. But the possession required must be adequate in continuity, in publicity, and in extent, to show that it is possession adverse to the competitor. The appellant does not present a case of possession for the twelve years in dispute, which has all or any of these qualities. The best attested cases of possession do not cover the whole period and apply to small portions of the ground. While exhibiting those positive deficiencies, the appellant's case is moreover confronted by tangible evidence of possession by the respondent which is far superior in quality. The only persons living on the ground hold and have held their dwellings and cultivated [951] the ground round it by rights derived through Jogendra from the respondent. As has been justly observed in the High Court, the true significance of this evidence was missed in the Court of the Subordinate Judge. It is not merely negative of the appellant's case so far as that portion of the ground is concerned which has been so possessed by the respondents, but it is directly contradictory of the whole theory of the appellant's case of possession.

Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the Appellant: Messrs. T. L. Wilson & Co.

Solicitors for the Respondent: *The Solicitor, India Office*

C. B.

NOTES.

[The requirements as to adverse possession were applied in these cases.—(1901) 26 Bom., 410; (1903) 28 Bom., 94; (1903) 31 Cal., 397; (1905) 10 C. W. N., 343; (1906) 3 C. L. J., 316; (1907) 35 Cal., 961; 12 C. W. N., 127; 6 C. L. J., 735; (1910) 15 C. L. J., 281.]

[27 Cal. 951]

Th 14th February and 24th March, 1900.

PRESENT :

LORDS HOBHOUSE, DAVEY, AND ROBERTSON. AND SIR RICHARD COUCH.

Grish Chunder Lahiri.....Plaintiff

versus

Shoshi Shikhareswar Roy.....Defendant.

[On appeal from the High Court at Fort William in Bengal.]

Mesne profits—Assessment of mesne profits in execution—Civil Procedure Code Act XIV of 1882), s. 211—Local investigation by amin—Civil Procedure Code, ss. 392, 393—Dakhilas or rent-receipts of tenants—Rents which by ordinary diligence might have been obtained—Interest—Discretion of Court in declining to take evidence after the report.

The Court executing a decree for mesne profits commissioned an amin, under s. 392 of the Civil Procedure Code, to make a local investigation as to them. He was unable to obtain the rent dakhilas of tenants. He inquired as to the prevailing rates of rent for the land which he measured, and included in his estimate of the mesne profits rents which with ordinary diligence might have been obtained.

Upon objections taken the questions arose : (1) whether the assessment should have proceeded only upon the rents actually realized, or the amin was right in taking the rent last mentioned into the account ; (2) whether the evidence of the rent dakhilas was essential ; (3) whether interest, not mentioned in the decree, should have been allowed ; (4) whether or not evidence, on the application of the objector, should have been taken by the Court after return of the evidence taken in the locality by the amin together with his report.

[1902] *Held*, as to (1), that inclusion, in the assessment of mesne profits, of rents which at the prevailing rates might have been received by ordinary diligence, was authorised by s. 211 of the Civil Procedure Code.

As to (2), that the dakhilas were important evidence but not essentially necessary.

As to (3), that the expression "mesne profits" included, under s. 211, interest on them ; but this could only be allowed for not more than three years from the decree, or until possession within that time.

As to (4), the question must be decided on general principles in each case. In this instance judicial discretion had been rightly exercised in the Court executing the decree declining to take fresh evidence.

APPEAL from an order (20th February 1894) of the High Court, reversing an order (31st March 1892) of the Subordinate Judge of Rajshahi, and remanding the proceedings as a whole for further inquiry.

The order now appealed from remanded for disposal, according to principles stated by the High Court, the proceedings of the Subordinate Judge determining in execution the mesne profits of an estate comprising village lands in the district of Rajshahi.

The principal questions decided related to the mode of assessment of mesne profits within s. 211 of the Civil Procedure Code ; to the non-production of rent dakhilas ; to the allowing interest on mesne profits ; and to whether the first Court rightly excluded further evidence after the return of evidence and report of an amin commissioned under s. 392 to make a local investigation as to the amount of mesne profits. The facts are stated in their Lordship's judgment, from which it will be seen that Bireswar Roy left two sons Shikhares-

war and Maheswar, and a daughter, Barodasunderi. The elder son died in 1865 leaving a son, Shoshi Shikhareswar, the respondent in this appeal. The suit was brought by the appellant, a son whom Barodasunderi adopted to her deceased husband and to whom she left her property. Maheswar, the second son, who died in 1873, left three sons, Tarokheswar, Biseswar and Kaseswar, who were co-defendants with their cousin, and parties to the decree in the execution of which these proceedings took place; but they were not parties to this appeal. In 1870 Barodasunderi died, and Grish Chunder became entitled, under her will, to her property consisting mainly [953] of gifts of land made to her by her father, Bireswar, whose estate on the 23rd April 1873 was taken possession of by the Collector as manager of the Court of Wards on behalf of the sons, they being then minors. Grish Chunder was thus deprived of possession of mauzas Benodepur and Harifala, with other land, to recover which he brought on the 15th September 1882 the suit in which the mesne profits awarded to him were the subject-matter of these proceedings. On the 23rd December 1883 he obtained the decree of that date. In 1885 he received possession of all the properties decreed to him, except one called Nyadiar, which was found in the execution proceedings not to have been made over to him till 1891.

On the 8th January 1890, Grish Chunder petitioned for execution of the decree as to mesne profits, applying for them to be assessed for three years prior to his suit commenced in 1882 down to the date of possession delivered to him; that they should be ascertained by an investigation through the amin of the Civil Court; that a measurement and jumabandi of lands ordered to be pointed out by the decree-holder should be made; that reference should be made to the dakhilas of the tenants; and that the proper rents during the period of the judgment-debtors' possession should be ascertained and allowed together with interest.

On the 14th February 1891, the Subordinate Judge commissioned, under s. 392, an amin to report as to the amount of the mesne profits giving him the following directions to inquire:—

1. "What will be the amount of mesne profits of the decreed land from the year 1286 to the month of Bhadro 1289?"

2. "What quantity of crops could with due diligence have been grown during the period of dispossession on the lands, which were in the nij cultivation of the decree-holder in villages Harifala and Sabrul before the period of dispossession, and what would be the value thereof at the bazar rate?"

3. "Whether any portion of the lands decreed lay waste during the time of the plaintiff's possession; if so what was its quantity and what was the rate of rent; and if any land lay waste during the time of the judgment-debtors' possession, what was its quantity and what its rate of rent; and whether the decree-holder has sustained any loss on account of the non-settlement of [954] the said two classes of waste land owing to the laches of the judgment-debtors; and if so, what amount of loss has been sustained by him?"

4. "What may have been the value of the produce of the gardens held in khas by the decree-holder during the period of dispossession?"

5. "What may be the mesne profits of the lands which were settled with tenants during the period of dispossession; and whether any land was settled at a low rate by the judgment-debtors during the period of dispossession; and if so what loss has the decree-holder sustained on that account?"

In order to ascertain these facts it is necessary to make measurements of the lands, and to ascertain the proper rates and rents and to show separately

and in detail the mesne profits of the different items as ascertained after receiving oral and documentary evidence and making a khatian of the dakhilas of tenants."

On the 1st September 1891 the amin made his report, which found that the income of the properties was Rs. 2,686 by the year. The total for five years and a half amounted to Rs. 14,774.

The Subordinate Judge allowed an objection taken by the appellant to the Court's receiving evidence in addition to that embodied in the amin's return. The Judge refused to receive further evidence on the grounds: (1) that it had not been stated what matters would be proved by the new evidence; (2) that it had not appeared that the amin had either omitted to give an opportunity for the evidence to be adduced, or had declined to receive any evidence tendered; (3) that to take fresh evidence without sufficient reason assigned would not be carrying out the object of ss. 392, 393 of the Civil Procedure Code in establishing a local inquiry by a Commissioner for the purposes mentioned.

By his order of the 31st March 1892 he substantially accepted, with a few alterations of detail, the report of the amin.

On appeal the High Court (BEVERLEY and AMEER ALI, JJ.) to a great extent reversed that order. They remanded the proceedings to the Court below, directing further investigation, and they stated principles for the guidance of the Judge in the inquiry as [955] to mesne profits. He had considered the course taken by the amin to be the right one in finding by measurement the area of land, of the several kinds, within each mehal; and in ascertaining by reference to the rates prevailing in the locality the rate at which each bigha could presumably be tenanted. It had been objected before the Subordinate Judge that the amin ought to have ascertained, by inspection of the dakhilas of tenants, the rent actually paid by them.

To this objection the High Court were of opinion that effect should be given, holding that there had been no conduct shown on the part of the defendants, some of whom were minors during the period to which the inquiry related, which threw on them the burden of proving what profits the estate had yielded. For the production of the evidence as to that they were not responsible. In reference to the principle of inquiring as to possibly greater profits with greater diligence the High Court differed from the Court below. As to the most valuable of the estates, Harifala and Benodepur, the Judge said, "what the Subordinate Judge ought to have done was to ascertain the actual assets of the estate, the mesne profits of which were claimed and to award the same to the plaintiff; and that the Judge has not done."

A special point as to Harifala was its measurement. Revenue papers as to this mauza had been produced showing a certain area, while the amin by a measurement of his own made out an area far greater. No evidence whatever had been produced to show what the income as a revenue mehal had been of Harifala. The High Court said, "we therefore think that the proper course as to Harifala, would be to allow both parties to give evidence as to the actual assets received from that jote prior to dispossession. Should the plaintiff be unable to give any satisfactory evidence on that point, we think that it would be right to proceed upon the statement of the defendant if borne out by the revenue entry." Regarding Benodepur there was also a difference of opinion between the Original and the Appellate Court as to the rental obtained about the year 1867.

Moreover, the Subordinate Judge only allowed 5 per cent. as charge for collections. This was raised by the High Court to 10 [956] per cent. as a

matter of ordinary practice well recognised in these Courts, and supported by the evidence in the case.

The Subordinate Judge allowed interest upon the mesne profits of each year. This was disallowed by the High Court on the ground that the original decree did not award interest on mesne profits, and that if it was discretionary to grant interest, the dilatory conduct of the plaintiff disentitled him to it.

The Original Court allowed mesne profits upon Nyadiar up to 1298 (1891), when the plaintiff said he got actual possession. The High Court held that there was nothing to show why he did not get possession in 1885 along with the other property, and therefore rejected his claim as to this.

The High Court did not agree with the Subordinate Judge in the view that he took of the right of the objector to adduce evidence in Court. Additional evidence, if forthcoming, they considered should be taken, referring to a judgment in the case of *Azim Sarung v. Atmooddeen*, (1877) 17 W. R., 270. They set aside the order of the Subordinate Judge, and remanded the case, for the purpose of ascertaining the mesne profits to which the plaintiff was entitled according to the opinions expressed by them.

On this appeal,

1900, FEBRUARY 14. Mr. J. H. A. Branson for the Appellant, argued that the principle on which the mesne profits had been assessed was the right one, and that it should have been upheld by the High Court. The judgment of the High Court on two main points, one relating to the mode of assessment, and the other relating to the interest on the mesne profits, was inconsistent with the explanation in s. 211 of the Civil Procedure Code, which defined mesne profits to mean those profits which the person in wrongful possession actually received, or, with ordinary diligence might have received from the property, together with interest on such profits. The liability enacted in the section in regard to the absence of ordinary diligence was not to be understood to be occasioned only by the wilful default, to which the High Court had referred. On the contrary, to bring into the assessment [957] rents that with ordinary diligence might have been received, but actually were not obtained, was within the direction contained in s. 211. The High Court had said that the Subordinate Judge ought to have ascertained the actual assets of the estate of which the mesne profits were claimed, and that he had not done so. They attributed this as an error. It was submitted that the Subordinate Judge had been right in maintaining the correctness of the amin's course of proceeding in the absence of such evidence as might have been obtained from the dakhilas had they been produced.

Reference was made to *Hurro Durga Chowdrain v. Surut Sundari Debi*, (1881) 1.L.R., 8 Cal., 332; L.R., 9 I.A., 1, where it was stated, as their Lordship's opinion, in a judgment which preceded the alteration in s. 211, that the amount which might have been received from the land, deducting the collection charges, represented the profits of the land.

There was no reason why such importance should be assigned to the dakhilas given to tenants to prove the income of the estate. Among other evidence it might well be considered that they were of the first importance. But they might, in a possible case, indicate rates lowered unreasonably for the landlord's own purposes; and, if they should happen to be withheld, a resort to other materials for arriving at a just assessment of mesne profits was completely consistent with s. 211.

There was also a misapprehension in the High Court's reversing the decision of the Subordinate Judge as to allowing interest on the mesne profits. This the Appellate Court has disallowed on the ground that it was not mentioned in the decree of the 23rd December 1883.

The definition of mesne profits in the explanation in s. 211 rendered it unnecessary that interest should be so specified. This the section did by stating of what mesne profits were to consist. Interest was plainly included therein. The High Court, refusing it, had referred to *Kishna Nand v. Partab Narain Singh*, (1884) I. L. R., 10 Cal., 785 : L. R., 11 I. A., 88, where the Judicial Committee had not interfered [958] with the refusal of the Indian Courts to allow interest on mesne profits. That case, however, hardly supported the argument of the judgment now appealed from ; and it was a case that was decided on the 19th May 1881, before the enactment of the Civil Procedure Code of 1882. And in that case the dispossessed talukhdar was charged with nothing more than was received by him, there being nothing to show that he could be charged with more.

Also, there was no good ground for the remand of the proceedings in regard to the refusal of the Subordinate Judge to hear further evidence after the return of the evidence and the report. No valid objection could be taken as to the conduct and result of the inquiry. In point of fact the present respondent had given no evidence on the local inquiry, but had left the case where the appellant had left it. It was to be observed, moreover, that the remand was irregular, being a remitting of the whole proceedings without specifying points, or framing issues, to which the evidence was to be directed. As to the further evidence reference was made to *Azim Sarung v. Almooddeen*, (1872) 17 W. R., 270, and *Mahabir Pershad v. Radha Pershad Singh*, (1891) I. L. R., 18 Cal., 540.

Mr. J. D. Mayne, for the Respondent, argued that the judgment of the High Court was right in so far as it differed from that of the Subordinate Judge. The amin had not proceeded on the right principle in taking the quantities of land within the mehals together with the prevailing rates as sufficient data for his conclusion. He should have started by getting the details of actual receipts by the landlord from the tenants. He ought to have examined the pottas and dakhilas for rent, ascertaining from them what rents were claimable and what had been paid. This would have been a substantial basis. The authority of the Code, in s. 211 to resort to what might have been collected, with ordinary diligence, was given as an alternative course to be taken. It was consistent with the explanation in that section that there should have been ascertainment of the actual receipts, with a distinction as to what greater profits might with ordinary diligence have been received.

[959] As to the interest awarded in the lower Court, mesne profits did, by the definition in s. 211, include interest. But it did not follow that interest must be allowed by a Court in all cases. It was a matter for the decision of the Court in each case, and here the High Court had pointed out that the decree was silent on the subject while there was good reason for the omission in the appellant's long delay in making his claim, and in the long period that he allowed to elapse without suing out execution. The High Court had rightly corrected the period for which interest could be claimed. As to the general remand by the High Court it was true that the Court had not conformed to s. 566 of the Civil Procedure Code. But that should be regarded as a mere error of procedure which should not prevent the substantial matters from being now decided. On the question of the reception of evidence in addition to that

returned by the amin, it was within the discretion of the Court to receive it, and it would here have been a right exercise of discretion to have done so.

Mr. J. H. A. Branson replied.

Cur. adv. vult.

1900, MARCH 24. Their Lordships judgment was delivered by

Lord Hobhouse.—The defendants in this case are grandsons of one Bireswar Roy who died many years ago. The respondent is the senior of them and the only one who had attained majority when this suit was instituted. It is he who has conducted the defence throughout. The plaintiff, now appellant, is also a grandson of Bireswar in this sense, that Baroda, Bireswar's daughter, adopted him. Bireswar made several grants of property to Baroda which the plaintiff claimed after her death either as heir or as devisee. Possession of them was taken by or on behalf of the defendants, and in the year 1882 the plaintiff sued to recover them. The question to be decided in this appeal arose in the execution of the decree then obtained by the plaintiff.

The decree is dated 23rd December 1883. It declares the plaintiff's right to the villages or estates of which he has been dispossessed, and it proceeds thus: "And that he do get from the defendants khas possession of the same and mesne profits for the period of dispossession, and the Rs. 2,400 claimed for maintenance [960] allowance; that the mesne profits be ascertained on inquiry at the time of the execution of decree; and that the plaintiff do get from the defendants a total of Rs. 1,255 7 annas 9 pies on account of the costs in this suit, with interest from this day till the day of realization at the rate of Rs. 6 per cent. per annum."

In the year 1885 the plaintiff obtained possession of all estates, except one called Nyadiar, of which he did not obtain possession till May 1891. The present proceedings for account and recovery of mesne profits were commenced by petition filed in January 1890. The plaintiff asked for mesne profits for three years prior to the institution of the suit up to the date of recovery of possession.

On the 14th February 1890 the Subordinate Judge appointed an amin to conduct the inquiry and gave him written instructions how to proceed. Another amin was afterwards substituted for the first, but he proceeded on the same instructions.

On 1st September 1891 the second amin made his report which finds a sum of Rs. 14,774 due for mesne profits. The respondent filed a petition of objection on 19th September 1891 afterwards summarized and slightly varied on 28th November 1891. The case was heard by the Subordinate Judge on 31st March 1892. He passed a judgment, which in most respects maintains the amin's report. The respondent appealed to the High Court who, differing from the Subordinate Judge on several points both of principle and detail, set aside his order and remanded the case for the purpose of ascertaining the mesne profits which the plaintiff is entitled to in accordance with their foregoing observations. That is the order from which the plaintiff now appeals. The case runs very much into details, but there are some matters of principle to which their Lordships will first address themselves.

As regards the form of the order which in effect throws the whole account open again, Mr. *Mayne* was asked whether under the provisions of the Code which relate to remands it was not necessary to state more specifically the issues which the Subordinate Judge is required to decide on remand; and he did not dispute that the remand made was incorrect. That miscarriage in procedure, however, though important, does not affect the legal [961] merits

of the questions in dispute between the parties. If on those questions their Lordships agreed in substance with the High Court the decree could be brought into conformity with the directions of ss. 562—566 of the Procedure Code. But with few and unimportant exceptions their Lordships after hearing full argument have to express agreement with the views of the Subordinate Judge.

The most important point on which the High Court hold the Subordinate Judge to be in error is the mode in which the amount of mesne profits is ascertained. The Subordinate Judge directed the amin to ascertain as to certain nij lands, the value of the crop which could have been grown upon them ; as to some waste lands, their rates of rent ; as to some gardens held khas, the value of their produce ; as to land settled with tenants, their mesne profits ; and whether any land was settled at a low rate by the judgment-debtors during the period of dispossession.

He continues—

“ In order to ascertain these facts, it is necessary to make measurement of the lands, and to ascertain the proper rates and rents, and to show separately and in detail the mesne profits of the different items ascertained, after receiving oral and documentary evidence and making a khatian of the dakhilas of tenants.”

From an *interim* report made by the first amin to the Subordinate Judge on 20th September 1890 it appears that the plaintiff was making slow progress. He said there were four or five hundred tenants on the land ; that they would not appear voluntarily, being under the influence of the debtors ; that there was difficulty in finding them, and in serving summonses during the rainy season. The amin adds that he is instructed to inspect the dakhilas of tenants which will take a long time because of their number, and by the time that is done the land will be dry enough for measurement. In the meantime he is putting pressure on the plaintiff who, as he intimates, has not shown sufficient activity. Upon this report being made the plaintiff presented a petition alleging that the delay was due to the amin who would not or could not come to the place before the rains. Shortly afterwards the change of amins took place.

The report of the second amin, who did all the work that [962] was done, again shows the difficulties that beset the plaintiff in the inquiry.

“ It was difficult for the decree-holder to adduce more evidence than that found on the spot, because the judgment-debtors are powerful zemindars of the place and all the tenants are under their control and obedient to them. The decree-holder is a man in ordinary circumstances. He was not a man of influence or power in the mofussil, so that he could duly muster the tenants and prove his cause or make them file their dakhilas, and satisfactorily establish his case Notwithstanding that the judgment-debtor No. 1 (the present respondent) was repeatedly called upon to produce the collection papers, the papers showing the lands and their jummas, no paper were produced on his behalf ; and the evidence that was taken of the few witnesses on his behalf was not sufficient. A sheet of paper containing the rates of rent of Sabrul village, which was produced on his behalf, was an incomplete copy, and it can hardly be relied on.”

Under these circumstances the amin had recourse to other evidence. As regards Harifala, one of the largest properties, he made a map according to the boundaries given in the decree. These boundaries were verified by witnesses on both sides. Then he found the quantity by actual measurement, and ascertained by the collection papers and such other evidence as he could get the

rates at which the land could be let. Apparently he pursued the same course as regards Benodepur, the only other large property.

The defendant's objection is that the amin did not proceed on the basis of the tenants' dakhilas or receipts for rent. The Subordinate Judge holds that the amin did rightly. The High Court think otherwise. They say that the Subordinate Judge has charged the defendant on the basis of wilful default, and that there is no case for such a charge. What he ought to have done was to ascertain the actual assets of the estate. They comment on the absence of rent receipts, and consider that in their absence the evidence is insufficient to show the value of the lands.

There are then two questions raised on this part of the case : 1st, whether the Subordinate Judge was bound to ascertain the actual assets, by which, as their Lordships understand, the learned [963] Judges mean the actual amount of money or value which reached the hands of the defendants ; and 2ndly, whatever was to be ascertained, whether it was essential to resort to the evidence of rent receipts.

It seems to their Lordships that the first question is settled by the Code of Civil Procedure. The original Code of 1859 did not contain any definition of mesne profits. The Code of 1877, s. 211, added an explanation: "Mesne profits of property mean those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom." In the existing Code of 1882 that explanation is repeated with an addition which gives rise to another dispute in this case, *viz.*, "together with interest on such profits." The amin, as directed by the Subordinate Judge, has tried to ascertain the very thing which the Code directs. He called for evidence of actual receipts. Whether if that had been produced it would have satisfied the inquiry cannot be known. It might still have been necessary to enquire into the possibility of larger receipts by ordinary diligence. But the plaintiff could not, and the defendant who was the actual recipient would not, produce the evidence. So the amin turned to the other alternative, *viz.*, to ascertain what might have been received with ordinary diligence. The Subordinate Judge's order does not charge the defendants with wilful default. Indeed, if it did, it would adopt a principle more favourable to the defendant than that of the Code: for there may be values recoverable by ordinary diligence which yet it would not be wilful default not to recover. Wilful default is charged against persons in rightful possession though accountable for their dealings with the property. These defendants were wrongfully in possession. And *prima facie* it is fair to infer that a person in possession of land may by ordinary diligence get rent for it according to the prevailing rates for such land, and that the true owner wrongfully dispossessed has been a loser by that amount.

This view is quite consistent with holding that the proper evidence was not procured. The High Court attach great importance to the dakhilas and quite rightly. They are not indeed so important as they would be if the inquiry was confined to the [964] actual receipts, because from various motives lands may be let at rates lower than the ordinary ones. Still in deciding a dispute on the question what is the ordinary rate, actual payments made by tenants must always be of value. But it is clear from the reports of both amins that the plaintiff had great difficulty in procuring this evidence. The Subordinate Judge says speaking of Harifala:

"As regards this item, the judgment-debtor contends that the amin is wrong in not ascertaining the amount of wasilat by referring to the dakhilas of the tenants, but by finding the quantities of the several kinds of lands contained within the mehal and the rate at which each bigha of land could be let out. I cannot say that the amin is wrong therein. All the

tenants and all the dakhilas of each tenant could not be found. They are mostly ryots of the defendant judgment-debtor. The defendant should have produced all of them and made them produce all their dakhilas; and when he did not produce them and make them produce all their dakhilas, I cannot say that the amin was wrong in not ascertaining the amount by reference to the dakhilas. Again the principle of ascertaining the amount by reference to the dakhilas is wrong. It may be, as urged by the decree-holder, that the judgment-debtor let out the lands at a rate lower than the ordinary one in order to make the tenants come over to his side. I am, therefore, of opinion that the amin was right in ascertaining the amount by finding out the quantities of the lands contained within the mohal and the rate at which each of them could be let out."

Moreover the defendant was the beneficial owner of the rents for which these dakhilas were given, and though he may have been a minor for part of the time the evidences of receipt by his guardians must be in his power. It has been shown above what the second amin says of his silence. It is clear that he could if he pleased have put in evidence which would show whether the inferences of value drawn by the amin would or would not stand the test of actual transactions between lessor and lessee; but he did not call the tenants with their receipts or produce his own accounts. Their Lordships asked Mr. *Mayne* whether the defendant had given any counter-evidence at all to rebut the plaintiff's case, and he answered that none could be found, the plaintiff's case being left precisely as he put it before the amin and the Subordinate Judge.

On this part of the case it appears to their Lordships—1st, that the Subordinate Judge rightly apprehended what is the proper object of an inquiry into mesne profits; and 2ndly, admitting [965] the tenants' receipts to be evidence of value and possibly of great value, they were not necessary evidence; their importance has been overrated owing to a misapprehension of the object of the inquiry; and the defendant's failure to put them in has been visited by the Court on the head of the plaintiff.

Another question, important in principle, though it cannot be ascertained of what practical importance it was to the result of the case, is whether the Subordinate Judge ought to have received further evidence after the amin's report. It seems that after lodging objections the defendant summoned witnesses and on their non-appearance applied for warrants of arrest. The following is the Subordinate Judge's note of what passed in Court:—

"An objection has been preferred on the part of the decree-holder that the judgment-debtor has no right to put in new evidence. It does not appear what matters the judgment-debtor seeks to prove by producing witnesses. An amin is appointed to ascertain the wasilat after taking evidence from the parties, and this was the case in this instance. It appears that both parties have adduced evidence before the amin. The evidence which each party needed to adduce ought to have been produced before the amin. It has not been objected that the amin did not give the judgment-debtor an opportunity to adduce evidence, or that he declined to receive any evidence which has been already presented. No reason appears why the judgment-debtor should now be allowed to adduce evidence, which he might have and ought to have produced before the amin, but which he of his own accord withheld. If such a thing is allowed, then the main purpose connected with ascertainment of wasilat by the amin, and of the laws and circulars relating thereto, will stand defeated. Consequently, additional evidence in this matter cannot now be taken."

The High Court think this decision was wrong and they found their opinion on a judgment delivered by Sir RICHARD COUCH in the case of *Azim Sarung v. Almoodeen*, (1877) 17 W. R., 270. That report is one of the large number contained in *The Weekly Reporter* which are useless or misleading, because the facts of the case are not stated. The only point of law or of practice laid down

in the judgment is that the Court will treat the amin's report as part of the evidence in the suit, and will take other evidence if necessary. If that judgment is taken as laying down that it is necessary to take further evidence whenever one of the parties chooses, it has been misconstrued. The High Court in that case considered the [966] further evidence necessary and the reason given for rejecting it insufficient. Why, we do not know, because no facts are stated except the tender of the evidence and its rejection.

The sections of the Code (392, 393) which relate to local investigations do not contemplate the tender of further evidence after an amin's report, except the examination of the amin himself, but they do not forbid it. They are consistent with either course, and the point must be decided on general principles according to the facts of each case.

In every trial there must come a time when it is proper that the evidence should be closed. After that time new evidence should not be given as a matter of course or without the assent of the Court. As regards local inquiries it may in many cases be clearly proper and convenient to take evidence in Court after taking it in the locality. In others it may be equally clear that the locality is the proper place and the time of inquiry the proper time for bringing the proposed evidence. In this case the most obvious time for closing evidence on the inquiry was the presentation of the amin's report, which is itself made evidence by s. 393. What reason did the defendant give for adducing further evidence? None whatever, either in his written objections to the report or in his grounds of appeal from the Subordinate Judge. He did not even state what was the nature of the evidence he desired to submit, nor does the High Court state it, nor can the Counsel at the bar now state it. It may for all that appears be purely frivolous. The learned Judges below do not in terms affirm the absolute right of every party to a local investigation to adduce evidence before the Court after a Commissioner's report. But their decision cannot be supported unless that right exists; however much the party may have neglected to produce his evidence at the proper time and in the proper place; even though, as in this case, he has disregarded repeated demands of the amin for his evidence, and even though, as in this case, he either cannot or will not state what is the nature of his fresh evidence, nor why he brings it so late, which may be because a discussion in the locality does not suit him so well as a discussion at a distance. Their Lordships agree with the Subordinate Judge that such a practice would, at least to a great extent, defeat the very object of [967] local investigation. The whole case might be tried over again not in the locality but at the distant seat of the Civil Court. It seems to them that the Subordinate Judge has applied sound principles of adjudication to the facts of the case.

Another point on which the High Court reverse the decision of the Subordinate Judge is the allowance of interest on the profits as ascertained year by year. Mr. *Branson* has shown that there is error in supposing that the interest has been calculated with quarterly rests, but that is not the ground of the judgment. The learned Judges below think that the decree did not award any interest at all. That depends on the construction of s. 211 of the Code which imports into the expression "mesne profits" the addition of "interest on those profits."

The learned Judges say that the Court has still jurisdiction to give or refuse interest as it chooses. Their Lordships agree, because mesne profits are in the nature of damages which the Court may mould according to the justice of the case. But the question is, what is the effect of a decree which grants mesne profits, and says nothing about interest, which, as their Lord-

ships think, is the proper construction of the decree in this suit. The learned Judges treat that silence as equivalent to a decision that there be no interest. But then it is difficult to see what effect is given to the alteration made in s. 211 in the year 1882. Its obvious effect is to provide that a simple decree for mesne profits shall carry interest on them. No reason has been assigned for holding the true effect to be other than the obvious one. If the Court does not intend to give interest it should say so. The learned Judges give reasons for thinking that interest ought not to be given in this case. But in execution proceedings we are only construing the decree and not considering its merits. The case which is cited from 11 Indian Appeals, 88 [*Kishna Nand v. Partab Narain Singh*, (1884) I. L. R., 10 Cal., 785], has no bearing on the present one. The defendant there was the manager of an encumbered estate under special statute and not in wrongful possession at all. The decree for account expressly disallowed interest. On appeal this Board refused to interfere with the discretion of the Courts below. Speaking in 1884, their Lordships declined to say "whether in [968] the present state of the law, having regard to the provision in the Procedure Act in which there is an explanation of mesne profits, interest was allowable."

Another question arises out of a tankha, or annuity, of Rs. 400 per annum granted in perpetuity by Bireswar to Baroda. It was specially secured to her by providing that she might deduct the amount out of the rent reserved and payable by her upon grants made to her of the Benodepur and Harifala estates by Bireswar. Of these properties the plaintiff was dispossessed. The amount of tankha up to date was recovered by decree. In estimating mesne profits after decree the defendant claimed to be allowed the reserved rent which was not disputed. But then the plaintiff claimed to set off the tankha against it, and the Subordinate Judge allowed it. The High Court have disallowed it. Their Lordships confess themselves unable to understand the reasons of this disallowance as printed in the report; nor could Mr. *Mayne* explain them. It is not alleged that in any way the plaintiff has got the benefit of the tankha twice over. He is certainly entitled to it once. It must be held that the Subordinate Judge was right.

On two small items, 3 and 4, in the amin's index, relating to a property called Sabrul, an unusual kind of controversy has arisen. The Subordinate Judge states that no party raised any objection to these items. At the hearing of the appeal before the High Court the defendant's Counsel denied this statement and produced an affidavit from one of the defendant's amlas to the effect that objection was taken. The learned Judges, observing that no contrary affidavit had been produced, thought that the two items should be the subject of adjudication. In point of fact there was a contrary affidavit by the plaintiff himself, who was in Court during the whole hearing before the Subordinate Judge, instructing his pleaders; but this must somehow have been overlooked. It has been shown by the amin's report that the defendant produced to him a paper relating to the rates of rent in Sabrul, but in such an imperfect state as to be useless. In the defendant's detailed objections to the amin's report Sabrul is not mentioned. In the summary Sabrul is placed among a list of five properties of which it is alleged in general terms that the rates of rent and the classification of lands are wrong. It [969] strikes their Lordships as highly inexpedient that such a controversy should be raised by affidavit before the High Court without any application to the Subordinate Judge himself. If these items stood alone they would not, on the materials before them, feel justified in sending the case back to the Subordinate Judge; but as this must be done on other points it may be more satisfactory to have this dispute cleared up.

Other items which constitute points of difference, all comparatively small, may be briefly disposed of. On the question of collection charges, whether they should be 5 or 10 per cent., which is not made the subject of evidence, their Lordships think it right to follow the High Court. As to the village of Nyadiar their Lordships agree with the High Court. The Subordinate Judge gives the plaintiff mesne profits up to the date of possession. But that is more than three years from the date of the decree and to the extent of the excess is unauthorised by s. 211 of the Code. As regards Chakran Pakuria and Ghosepara, in which cases the learned Judges think that the Subordinate Judge has made mistakes of a clerical kind, the mistakes have not been shown to their Lordships, and the amounts must be very small, such as of themselves would hardly justify further inquiry. But as the account has to be rectified in some particulars it may be reviewed on these points also.

There are several subjects on which the High Court state that the evidence is unsatisfactory to them, such as charges for fruit trees, for fruit-bearing land, and for cesses; and the existence and extent of khamar land in Benodepur. Their Lordships make the general observation that the appreciation of evidence by the High Court is and necessarily must be subordinated to their view of the proper issue to be tried, as to which their Lordships have expressed agreement with the Subordinate Judge. None of these subjects has been laid before their Lordships in any detail, and they see no reason why the conclusions arrived at, first by the amia and afterwards by the Subordinate Judge, should be disturbed under a general re-opening of the whole account.

Their Lordships will state the heads of the decree which they think the High Court should have made on the appeal to them. [970] Declare that the collection charges should be at the rate of 10 instead of 5 per cent. and refer it to the Subordinate Judge to remodel the account accordingly. Declare that mesne profits for Nyadiar should not be allowed for any later time than three years from the date of the decree, and refer it to the Subordinate Judge to remodel the account accordingly. Refer it to the Subordinate Judge to ascertain whether he has erroneously allowed mesne profits for Ghosepara twice over, and whether he has in his final estimate allowed mesne profits for Chakran Pakuria which in his detailed judgment he disallowed. Refer it to the Subordinate Judge to make a formal adjudication on items 3 and 4 in the amia's index. Let the Subordinate Judge finally readjust the amount recoverable by the plaintiff in accordance with his findings on the foregoing references. *Quoad ultra* dismiss the appeal with costs in proportion to the amounts in respect of which the parties may, after the inquiry has been completed, be found to have succeeded and failed respectively.

That is the decree which their Lordships will humbly advise Her Majesty to make in lieu of the decree now appealed from which will be discharged.

As regards the costs of this appeal, in which the rule of proportion observed in India does not prevail, their Lordships consider the success of the defendant to be so minute in proportion to the whole controversy that it ought not to weigh on the question of costs. The mesne profits of Nyadiar constitute the only point of principle on which the respondent has succeeded. Nyadiar is valued at Rs. 68 and a fraction, and the time of excessive mesne profits is less than 4½ years; so there is little over Rs. 300 in question. On all the important points the respondent is held to be wrong. He must pay the costs.

Appeal allowed; decree varied.

Solicitors for the Appellant: Messrs. Withers, Pollock & Crow.

Solicitors for the Respondent: Messrs. T. L. Wilson & Co.

C. B.

NOTES.

[I. Mesne-Profits—

In the subsequent stage of this litigation, it was held that the decree-holder was entitled to interest upon the mesne profits due to him until such mesne profits are actually paid to him by the judgment-debtors :—(1905) 33 Cal., 329.

“ They (27 Cal., 951 ; 33 Cal., 329) are, no doubt, authorities for the proposition that where a decree declares that the plaintiff is entitled to mesne profits and says nothing about interest, if the amount of mesne profits is left for determination by the Court of execution, the decree-holder is entitled to interest upon the mesne-profits and to have such interest added to the mesne profits when they are ascertained. But these cases do not lay down that, if the Court which ascertains the mesne-profits has omitted to allow interest, it is open to the Court which executes the decree for mesne profits to allow interest in execution proceedings. It is an elementary principle that the Court which executes a decree must execute it as it stands. Besides, there is no rule which makes it obligatory upon the Court to allow interest on mesne profits ; it is a matter of judicial discretion, to be exercised according to the circumstances of the case, (10 Cal., 785 ; 27 Cal., 951). If, therefore, the Court which assessed mesne profits improperly exercised its discretion and disallowed interest on erroneous grounds, the remedy of the decree-holders was by way of an appeal” :— (1907) 6 C. L. J., 162, *per* MOOKERJEE, J. See also (1907) 7 C. L. J., 197.

II. Construction of decree—

A Court in execution can only construe the decree as it stands and cannot consider its merits :—(1910) 10 I. C., 975 ; 4 S.L.R., 244 ; (1912) 15 I. C., 735 (Cal.) ; (1912) 15 I.C., 719 (Cal.) ; (1914) 20 C. L. J., 512.

III. Collection Charges—

In (1902) 24 All., 376 it was held that the charges of collection etc., should not be allowed in favour of one whose trespass is altogether tortious and malicious ; see also (1901) 23 All., 252. The costs of collection were allowed at 10 per cent. on the gross rental in (1912) 16 I. C., 866 (Oudh).

IV. Commissioner's Report—

As regards the examination of the Commissioner upon his report, see also (1914) 22 I. C., 526 (Punjab).]

[971] *The 10th May and 19th June, 1900.*

PRESENT :

LORD DAVEY, LORD ROBERTSON, SIR RICHARD COUCH, SIR HENRY
DE VILLIERS, AND SIR FORD NORTH.

Luchmi Koer.....Plaintiff

versus

Roghu Nath DasDefendant.

[On appeal from the High Court at Fort William in Bengal.]

*Hindu Law—Marriage—Evidence of marriage—Inferences and probabilities
weighed against direct testimony.*

Upon a widow's claim for maintenance the question was whether the relation between her and a person, deceased many years before her suit, whom she alleged to have been her husband, had been the relation of marriage or of concubinage. The decision of this question, one way or the other, rested on considerations whether the substantial testimony of witnesses, who gave their testimony to the fact of the marriage in their presence was, or was not, outweighed and negatived in judicial estimation by the antecedent and inherent improbability that such a marriage, under the circumstances of the parties alleged to have entered into it, would have taken place. The oral evidence was, however, corroborated by inferences drawn from several facts well established. The present suit was defended by the successor in estate of the deceased, and it was common ground between this defendant and the plaintiff that there had been co-habitation between the deceased and the latter. This narrowed the effect of the condition and circumstances of the deceased at the time of the alleged marriage upon the question whether it was a fact. The ordinary criteria afforded by conduct contributed but little aid to remove doubt.

In the result, the conclusion of the Judicial Committee was that the direct oral testimony had not been overborne; but should prevail against the improbability presented by the case that such a marriage should have taken place. The affirmative of it was maintained, and the widow's claim allowed.

APPEAL from a decree (10th September 1895) of the High Court reversing a decree (19th September 1892) of the Subordinate Judge of Tirhut.

The plaintiff, now appellant, whose mother was Gopi Bai, a Baid practising medicine at Mozafferpur, claimed by her plaint (22nd November 1890) as sole widow of one described as Raja Ram Das, a zemindar, calling himself a mohant, to be entitled after his death to a suitable allowance for her maintenance, charged on the estate which had belonged to the deceased, who died on the 27th November 1878. The defendant, respondent, who had succeeded to that estate in consequence of the provisions of the will of the late Raja Ram Das (of which probate was decreed to [972] issue on the 21st February 1851), denied that the plaintiff had been the married wife of the deceased.

On the testimony of witnesses to the ceremony, whom the Court considered trustworthy, the Subordinate Judge of Tirhut found that the alleged marriage had taken place in 1878, some months before the death of the husband. The decision was that the plaintiff as the widow was entitled to be maintained out of the estate at a suitable rate, which the Judge fixed at Rs. 750 a month, a sum which on the present appeal was reduced to Rs. 500.

The High Court (PRINSEP and GHOSE, JJ.), on the defendant's appeal, reversed the decree, and dismissed the suit on the ground that the plaintiff had failed to prove that she was the widow of Raja Ram Das.

PRINSEP, J., summarized his JUDGMENT as follows, after examining the facts in evidence in detail :—

"I find myself unable to agree with the Subordinate Judge that the plaintiff is the widow of the deceased Raja Ram Das, and as such entitled to maintenance. The plaintiff's case really depends upon the evidence of the witnesses to the marriage. This evidence is by no means satisfactory for reasons already stated, and it is completely negatived by the conduct of the parties both before and after the alleged marriage. The visit of Gopi Bai at that time seems to have been for medical attendance on the mohant, and it would seem that advantage was taken of his dissolute and immoral habits to entangle him into living with the plaintiff. Her age was unmistakably not that stated by her, seven or eight years, and in this respect we agree with the Subordinate Judge; and I here draw attention to the fact that the condition under which the mohant is said to have married this girl, viz., that he should acknowledge and appoint her brother as his successor in the mohantship, which was set up in the proceedings relating to the application for probate, is no part of the evidence in the present case. Moreover, the conduct of the mohant himself and the absence of such evidence as might be expected, that the marriage was announced either by him or by persons connected with his estate at Jaintpore when Gopi Bai and her family came to Jaintpore, and indeed was even openly asserted until the application for probate of the deceased mohant made on behalf of defendant, tends to throw discredit on the evidence of the witnesses to the marriage. Lastly, the conduct of the defendant since that time does not prove any admission of the plaintiff's status as widow."

GHOSE, J., also, after reviewing the evidence at length, concluded on a general balance of the improbabilities of such a [973] marriage having taken place, against the oral evidence, affirming it, that it would not be safe to rely upon the latter.

On this appeal,

1900, MAY 10. Mr. C. W. Anathoon appeared for the Appellant.

Mr. G. E. A. Ross for the Respondent.

Cur. adv. vult.

1900, JUNE 19. Their Lordships' judgment was delivered by **Lord Robertson**.—The question raised by this appeal is whether the appellant was the wife and is now the widow of Raja Ram Das, who died on 27th November 1878. The suit was initiated by the appellant on 22nd November 1890 in the Court of the Subordinate Judge of Tirhut. The plaint and the written statement of the respondent, who, being heir of the deceased, appeared as defendant, involved other questions on which issue was joined ; but these it is now unnecessary to rehearse. Many witnesses were examined and many exhibits were filed. On 19th September 1892, the Subordinate Judge of Tirhut found that the plaintiff was the lawfully married wife of Raja Ram Das and is now his widow, and he pronounced a decree for maintenance at the rate of Rs. 750 a month. An appeal having been taken to the High Court of Judicature at Fort William in Bengal, that Court on 10th September 1895 set aside the Subordinate Judge's decree and dismissed the suit with costs. The present appeal is brought from that judgment of the High Court.

Raja Ram Das was zemindar of Jaintpore and a person of considerable wealth and position. He called himself mohant but he was not in fact a mohant. Prior to the disputed period he was unmarried, but he was free to marry ; he was greatly addicted to women, and he died, under thirty years of age, of diseases induced by his excesses. At the time of the alleged marriage, which was seven months before his death, he was suffering from those ailments.

Of the personal facts relating to the appellant, it is difficult to say anything that is quite certain. She and her mother, for a purpose collateral to the present issue, have thought well to represent her as of the tender age of seven or eight at the time of her marriage ; but it may be assumed that she was in fact older, [974] and had attained puberty. Her father is a most shadowy figure in the evidence, and his identity is not certainly ascertained. Her mother's part in these proceedings is much more prominent. The respondent suggests that she was an adventuress ; and both she and her daughter are, to say the least, not uniformly truthful even in matters dangerously near the essence of their claim ; and they are persons whose own statements must be received with caution and whose case it is necessary to test with vigilance. At the time of the alleged marriage, Gopi Bai, the mother, was practising medicine ; and, contrary to her own statement, she does not seem to have withheld the benefits of her skill from either sex. She was a Bairagi, as was also the Raja, and the Judge of the High Court, who has formed the most adverse opinion of the appellant's case, considers that Gopi Bai attended the Raja professionally and "took advantage of his dissolute and immoral habits to entangle him into living with the plaintiff."

This observation may well introduce what is the central fact in the case, a fact which it is necessary to keep steadily in mind throughout the examination of the evidence, and which narrows the true scope of the controversy. It is common ground between the parties that Raja Ram Das and the appellant lived together for the last seven months of his life ; and the only question is whether this took place on the footing of marriage or of concubinage. Had the fact been otherwise, the inherent improbabilities of the plaintiff's case arising from the alleged age of the bride and the health of the bridegroom would have been extremely difficult to overcome. But, if these two persons, whatever her age and whatever his health, did in fact cohabit during the period in controversy, objections have no relevancy which strike no more at the theory of marriage than at the theory of concubinage but really at facts common to both. Accordingly, so far as the appellant's age is concerned, the true inference is not that the story of the marriage must be rejected but only that she was older than she allows, and that the credibility of herself and her witnesses

is to that extent affected. Again, the surprise and disgust excited by Gopi Bai having given her daughter to a person in the Raja's condition of health arise equally on either theory, and have scarcely any influence in the election between the two.

[975] The case of the appellant then, as presented in evidence, is that she was married to the Raja Ram Das at Benares on a day early in May 1878. The long interval between the alleged marriage and the trial of the issue must be allowed for in considering the evidence of the witnesses examined. It does not, however, give rise to any just suspicion that the appellant's claim is an afterthought; for, immediately after the death of Raja Ram Das, the appellant judicially asserted herself as his widow, and she received maintenance out of his estate from his death down to the dispute which led to the present litigation. These points will be hereafter more fully examined.

The appellant has submitted to their Lordships' consideration the evidence of eleven witnesses who assert that they were present at the marriage ceremony, and two who assert that they were present at the procession immediately preceding but not at the ceremony itself. The marriage rites to which the witnesses depose were appropriate to the fact that both parties were Bairagis. The body of evidence thus presented is so substantial that it is difficult to disregard it, unless analysis shows its quality to render it unreliable. The respondent has boldly faced this difficulty and asked their Lordships to follow the High Court in entirely rejecting it. It is to be observed, however, that neither of the learned Judges of the High Court has presented any destructive criticism of that evidence, founded on inherent defects, the conclusion of both is rested on the antecedent improbability of such a marriage and on the subsequent events of the case. Their Lordships have had the benefit of a close and careful examination of the evidence by the respondent's Counsel and they are unable to find adequate grounds for believing that witnesses who are not only numerous but of various social positions have been suborned, and the respectability of some of them is vouched for by the learned Judges in the High Court. But further, all the witnesses were cross-examined, and the cross-examination has in no instance shaken the evidence, while in several cases it has brought out circumstantial and striking additions to its verisimilitude. There is no monotony in the evidence, while at the same time there are no contradictions; each witness speaks from his own point of view and some saw more and some less.

[976] On one point indeed the respondent has succeeded in raising the suspicion that some of the witnesses have spoken rather on the suggestion of the appellant's mother than from their own knowledge, and that is the appellant's age. It seems certain that at the time of the marriage the plaintiff was not so young as 7 or 8, and many of the witnesses give that as her age. But even assuming that those witnesses have too facily accepted the appellant's story as to her age, their Lordships do not regard this as an adequate ground for rejecting the whole of their evidence as tutored. The age of the bride (whose dress precluded any accurate inferences from her face or figure) was not a matter on which they had personal knowledge or could do otherwise than rely on information, whereas the matter which they came to attest was the *factum proprium* that at Benares, on a certain day they saw certain things done.

On the whole, the solid body of direct testimony presented by the appellant as to the fact of marriage can only be rebutted by the most cogent contrary inferences from the circumstances of the parties. Before ascertaining whether such exist it is well to gather together those proved facts which corroborate the affirmative evidence.

Of these, one is supplied by the respondent. In cross-examination the appellant seems to have been challenged by the respondent to say whether any persons were with the Raja when he was at Benares on the occasion of his marriage, and she named two persons, both of whom were afterwards put into the witness-box by the respondent. Both these men were very likely to have been with the Raja on the occasion in question, if he himself was there, for they were close attendants and confidants, as their own depositions show. It was manifestly the duty of the respondent, if the appellant had spoken falsely on this crucial test of her story which he himself had selected, to disprove her statement by these witnesses; yet neither was asked a question on the subject. The appellant may fairly claim, and the Subordinate Judge has held, that her statement that they were present is to be accepted as true.

The next fact in the order of time is one which has substantial importance and has been treated much too lightly in the [977] High Court. After the death of the Raja, the executor under his will applied for (and ultimately obtained) probate. But on 18th January 1879, within two months of his death, the appellant filed a caveat in the Probate Court designing herself as widow of the Raja, and she followed this up by a written statement in which her marriage was specifically alleged. It is unnecessary to consider the main contention which she maintained on that occasion, for the Judge held that even assuming everything she said to be true no valid objection was stated to the prayer of the executor for probate. The point is not merely that the appellant immediately showed herself in the character of widow, but that she thus came forward, not asserting her marriage (as if assertion were needed), but assuming it, in order to enforce what she alleged to have been a condition of her marriage, *viz.*, that her brother should be adopted as son of the Raja.

This tone of the appellant's pleading, implying that the marriage itself was undisputed, is in harmony with certain admissions by the respondent, who it is true was only a boy at the time of the Raja's death but who says that five or six months before that event (that is to say just after the alleged marriage) he had heard the appellant and her mother say that the appellant was married to the Raja. The position taken by the appellant in the probate proceedings throws a strong light also on the subsequent payment to her of maintenance, for there could be no dubiety as to the footing on which she received it. These payments were made regularly until the respondent got into pecuniary embarrassment and there are extant tankhas in which the allowance is expressly said to be on account of maintenance. The respondent has sought to assimilate these payments to payments to certain prostitutes who had been the mistresses of the Raja, on the ground that in a statement of liabilities the allowance of the appellant appears in juxtaposition to those doles. But even in this juxtaposition the appellant's name is distinguished by the honourable prefix of Musummat, while the amount of her allowance is in marked contrast to those of the others. Among the minor corroborations of the appellant's claim she points to the fact that in certain letters to her the respondent [978] addressed her as Bhouji (brother's wife) and although the amatory tone of the letters precludes the reader from taking everything literally, this is to be noted along with the other facts of the appellant's case. The circumstances now noticed, derived from the period after the Raja's death, furnish strong corroboration of the direct evidence of the fact of marriage. (Their Lordships do not rely on some words uttered by the Raja himself for they may possibly have been intended merely as an evasion of an unwelcome inquiry).

Against this evidence the respondent has mainly relied on the general improbabilities arising from the alleged age of the appellant and the health of the Raja, on the inferiority of her position, on the absence of religious motive

for the marriage, and on a variety of other objections such as the unlikelihood of a personage like the Raja going to Benares for his marriage without a retinue. • Several of these matters have been already touched on ; and there is this further general observation to be made,—that the disorders of the Raja's life make the ordinary criteria of conduct misleading guides to the truth of what he allowed himself to do or was induced to do. It may very well be that Gopi Bai had established an influence over this invalid and voluptuary to which her medical skill contributed, and that the Raja did not court publicity for a marriage upon which reflections might be made.

The respondent however has advanced a few specific facts which, so far as they go, bear directly against the marriage. The Raja had made his will before the alleged marriage and in it of course there was no provision for the appellant. When he did make provision for her, it was by furnishing the larger part (if not the whole) of the price of a property, which was conveyed by the seller to the appellant. Now the purchase and the terms of the conveyance were arranged by two persons; of whom one was a servant of the Raja and the other a servant of Gopi Bai, and the respondent's point is that the appellant is not described as the Raja's wife but as if she were unmarried. *Prima facie* this is an argument against the appellant ; but it is not of a very conclusive character, and the respondent did not bring home either to the appellant or Gopi Bai or to the Raja any [979] knowledge of the terms of the conveyance. As regards the testamentary intentions of the Raja towards the appellant, it may very well have been that he relied, as he justly might, on the provision of the law to secure this lady maintenance, over and above the property conveyed by this deed of sale.

On a full consideration of the whole case their Lordships deemed the marriage to be established. On the question of the amount of maintenance their Lordships agree with the High Court in fixing Rs. 500 a month as the sum which the appellant ought to receive. They will humbly advise Her Majesty that the judgment of the High Court should be reversed, and that of the Subordinate Judge should be restored with this variation that the amount of maintenance be Rs. 500 a month instead of Rs. 750 a month, and that the respondent pay the costs in the High Court and proportionate costs in the Court of the Subordinate Judge. The respondent will also pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellant : Messrs. *Watkins & Lempriere*.

Solicitors for the Respondent : Messrs. *T. L. Wilson & Co.*

C. B.

[27 Cal. 979]

CRIMINAL REVISION.

The 11th May, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HANDLEY.

Golapdy Sheikh and others.....Petitioners

versus

Queen-Empress.....Opposite Party.*

Magistrate, Jurisdiction of—Reference of case for trial of offence by Subordinate Court—Power of District Magistrate to issue warrants for arrest of other persons concerned in that offence.

Where cognizance was taken of an offence on a police report and the case was made over to a Subordinate Magistrate, *Held*, that, so long as the case connected with that offence

*Criminal Revision, No. 298 of 1900, made against the order passed by H. F. Samman, Esq., District Magistrate of Bogra, dated the 12th of August 1899.

remained with the Subordinate Magistrate, no other Magistrate was competent to deal with it, and that applications for warrants against other persons concerned in that offence should be made to the Magistrate before whom the case was, and to no other Magistrate. .

[980] ON an investigation made by the police in respect of looting a house, one person, Jagira, who could alone be apprehended, was sent in for trial and the case was made over to a Subordinate Magistrate, who discharged Jagira. The other persons who were charged in the case could not be arrested, and were not placed on their trial. A representation was made by the District Superintendent of Police to the District Magistrate of Bogra who ordered warrants to issue for the arrest of the other persons in order that they might be tried under ss. 143 and 147 of the Penal Code.

Mr. *P. L. Roy* (with him *Babu Kritanto Kumar Bose*) for the Petitioners.

The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

Prinsep, J.—In this case it appears that, on an investigation made by the police in respect of what may be termed looting a house, one person who could alone be apprehended, Jagira, was sent in for trial and the case was made over to a Subordinate Magistrate who discharged Jagira. The others who were charged in that case could not be arrested and were, therefore, not placed on their trial. On a representation to the District Magistrate by the District Superintendent of Police, he has thought proper to issue warrants against these other persons in order that they might also be tried. The jurisdiction of the District Magistrate to make this order has been questioned on the rule granted by us. Cognizance was taken of the offence on the police report and the case was made over to a Subordinate Magistrate, and so long as the case connected with that offence remained with the Subordinate Magistrate no other Magistrate was competent to deal with it; the case has never been withdrawn by the District Magistrate for trial by himself, so that he could properly pass an order directing proceedings to be taken against other persons. Application for the warrants against other persons accused of that offence should have been made to the Magistrate before whom the case was and to no other Magistrate. The District Magistrate in his explanation in answer to this rule, seems to think that the case only as against Jagira was made over to the Subordinate Magistrate for trial. But that is not so. The case regarding the offence charged alleged to have been committed as shown in the **[981]** police report was before that Magistrate, and he was alone competent, on the police report, to proceed against other persons concerned in that offence if he thought proper to do so; and no further orders from the District Magistrate were necessary or indeed could be passed so long as the case remained in his Court. The orders of the District Magistrate of the 12th August last are set aside as without jurisdiction, the rule being made absolute.

D. S.

Rule made absolute

NOTES.

[For similar decisions, see also 30 Cal., 449; 32 Cal., 783; 9 C.W.N., 810; 39 Cal., 119; 3 C. L. J., 87.]

[27 Cal. 981]

The 5th June 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HANDLEY.

Mohesh Sowar and others (2nd Party).....Petitioners

versus

Narain Bag (1st Party).....Opposite Party.*

Possession, Order of Criminal Court as to—Order instituting proceedings under s. 145 of the Code of Criminal Procedure (Act V of 1895)—

Contents of such order—Irregularity in order, making proceedings without jurisdiction.

Unless a Magistrate complies strictly with the terms of s. 145 of the Code of Criminal Procedure by stating in his written order all the particulars necessary to enable him to act under that section, his proceedings are without jurisdiction. It is not sufficient that the Magistrate should have before him a Police report and that he should have given orders thereon that a written order be drawn up within the terms of s. 145. It is his duty to draw up, or have drawn up, an order which in all respects satisfies the requirements of the law. It is absolutely necessary that the written order should be correct and complete in its terms.

IN this case at the time of the *aus* paddy getting ripe the first party complained to the Police that the second party would cut their (the first party's) crops. Thereupon proceedings under s. 145 of the Criminal Procedure Code were instituted, but owing to there being no certainty as to what was in dispute, the case was struck off, the Police reaping the paddy. A further report was called for, and on the 11th of January 1900, fresh proceedings under s. 145 were instituted by the Deputy Magistrate of Serampore.

[982] The order was as follows :—

“Whereas it appears that there is a likelihood of a breach of the peace in respect of eight *bighas* three cottas in ten plots of land in village Tegri P. S. Haripal, in consequence of Narain Bag on the one hand and Mohesh Sowar, Brojo Dass and Gossair Das on the other, each claiming to be in possession, I order the parties to appear before me on January 22nd at Tarkoswar at 11 A.M., in person or by pleader, and put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute and produce their witnesses on that day.”

On the 7th of February the Deputy Magistrate ordered the first party to remain in possession of the disputed land.

On the 20th of April the second party obtained a rule from the High Court calling on the District Magistrate to show cause why the order under s. 145 of the Code of Criminal Procedure should not be set aside on the ground that in his order purporting to be under sub-section (1) of s. 145 instituting such proceedings, the Magistrate had not set out the grounds upon which he was satisfied that it was necessary for him to take such action.

Mr. P. L. Roy (with him Babu Agore Nath Seal), for the Petitioners.

Mr. Dunne (with him Babu Dasarathi Sanyal), for the Opposite Party.

The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

Prinsep, J.—Section 145, Code of Criminal Procedure, requires that in order to institute proceedings thereunder, the Magistrate shall make an order in writing stating the grounds of his being satisfied that a dispute likely to cause

* Criminal Revision No. 272 of 1900, made against the order passed by H. P. Duval, Esq., Deputy Magistrate of Serampur, dated the 7th of February 1900.

a breach of the peace exists concerning land, &c., and it also requires that, before he makes such an order, the Magistrate should be so satisfied from a Police report or other information. The matter has been so frequently before this Court in reported cases that we are much surprised to find that errors are still constantly committed which have the effect of rendering null and void proceedings taken which have occupied Magistrates for several days, and have otherwise been conducted with care. It has been frequently held by this Court in reported cases that unless a Magistrate complies strictly with the terms of s. 145 by stating in his written order all the particulars necessary to enable him to act under that section, his proceedings are without [983] jurisdiction. It is not sufficient, as contended by the learned Counsel before us, that the Magistrate should have before him a Police report of this description, and that he should have given orders thereon, that a written order be drawn up within the terms of s. 145. It is his duty to draw up or have drawn up an order which in all respects satisfies the requirements of the law. It is absolutely necessary, as has been held by this Court, that the written order should be correct and complete in its terms. The proceedings must, therefore, be set aside as without jurisdiction.

D. S.

NOTES.

[As a general rule the source of information ought to be indicated in the order :—(1904) 27 All., 296 ; see also (1903) 25 All., 537. In (1902) 7 C. W. N., 599, it was held that where the parties became aware of the source of the information during the course of the inquiry, the fact that the Magistrate did not embody it in his order did not vitiate the proceedings. As regards reference to police reports, see also (1905) 32 Cal., 771 ; (1905) 33 Cal., 352 F.B.]

[27 Cal. 983]

The 5th June, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HANDLEY.

Sheo Bhajan Singh and others.....Petitioners

versus

S. A. Mosawi.....Opposite Party.*

Recognizance to keep peace—Conviction under s. 143 of the Penal Code (Act XLV of 1860)—Code of Criminal Procedure (Act V of 1898), s. 106.

An offence under s. 143 of the Penal Code is not one of the offences specified in s. 106 of the Code of Criminal Procedure which would justify an order directing a person or persons to furnish security to keep the peace.

There may be findings in the case which would justify such an order if such findings can be brought within the terms of s. 106. *Jib Lal Gir v. Jogmohun Gir*, (1899) I. L. R., 26 Cal., 576, referred to.

Where the accused were convicted under s. 143 of the Penal Code and ordered under s. 106 of the Code of Criminal Procedure to furnish security to keep the peace, and it was alleged that the facts as proved showed that the accused came in a body, some of whom were armed with *lathis* and some of whom used threats and did other acts, showing an evident intention to commit breaches of the peace. *Held*, that there should have been an

* Criminal Revision, No. 256 of 1900, made against the order passed by Mohini Mohun Chakravarti, Sub-Divisional Magistrate of Jahanabad, dated 8th March 1900.

express finding to that effect; that if the accused or any of them acted in such a manner, they should have been convicted of criminal intimidation or other offence which would enable the Magistrate to bind them over to keep the peace; and that the order under s. 106 should be set aside.

IN this case the Circle Officer of the 9 annas Tikari Court of Wards at Jahanabad camped at Ghasi, and, having called the ryots of the neighbouring villages including the three accused, he found differences between their statements of rents and those [984] entered in the local *putwari* papers. He thereupon sent for the duplicates from the *Sadar* office of Jahanabad and told the ryots to pay up according to the *Sadar* papers, owing to which larger amounts were realized from the accused and others. In the evening the Circle Officer retired to his tent; shortly afterwards he heard loud *hullahs* and noises outside, his peons informed him that a large crowd had assembled outside and were using threatening words as "*maro*" and "*khima jala do.*" The Circle Officer ordered his men not to say anything likely to provoke a breach of the peace and at once wrote a letter to the Sub-Divisional Magistrate and sent it by a *sowar*. Shortly afterwards the crowd dispersed.

The accused were convicted on the 8th of March 1900 by the Sub-Divisional Magistrate of Jahanabad under s. 143 of the Penal Code and were also ordered under s. 106 of the Code of Criminal Procedure to furnish security to keep the peace.

Babu *Luchmi Narain Singh* for the Petitioners.

The *Deputy Legal Remembrancer* (Mr. *Gordon Leith*) for the Crown.

The **judgment** of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

Prinsep, J.—The Magistrate, in convicting the petitioners under s. 143, Penal Code, added to the sentence an order under s. 106, Code of Criminal Procedure, directing them to furnish security to keep the peace.

Now, an offence under s. 143, Penal Code, is not one of the offences specified in s. 106, which would justify such an order. As has been pointed out in the case of *Jib Lal Gir v. Jogmohun Gir* (1899) I. L. R., 26 Cal., 576, there may be findings in the case which would justify such an order if such findings can be brought within the terms of s. 106, but in the present case there are no such findings at all. The Magistrate in his explanation attempts to justify his order by stating that "the facts as proved showed that the accused came in a body, some of whom were armed with *lathis* and some of whom used threats and did other [985] acts intending evidently to commit breaches of peace." We can find no express finding to this effect, and we would observe further that if the accused or any of them acted in this manner, they should have been convicted of criminal intimidation or other offence which might enable the Magistrate to bind them over to keep the peace. We are inclined to think that difficulties arise in cases such as the present because Magistrates, instead of trying an accused for the offence constituted by all the acts proved, prefer to charge and try him for an offence under s. 143, Penal Code, because such a trial can be held under the summary procedure; and we take this opportunity of expressing our strong disapproval of such a course. The order under s. 106, Code of Criminal Procedure, is accordingly set aside.

D. S.

NOTES.

[This was followed in (1907) 7 C. L. J., 172 ; (1908) 8 C. W. N., 517. See also (1904) 31 Cal., 419.]

[27 Cal. 985]

The 15th June, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HANDLEY.

Durga Das Rakhit and another.....Petitioners

versus

Umesh Chandra Sen.....Opposite Party.*

Complaint—Institution of complaint and necessary preliminaries—Charge of furnishing false information in Land Acquisition Proceedings—Omission to refer to particular false statement on which accusation made—Penal Code (Act XLV of 1860), s. 177—Land Acquisition Act (I of 1894), ss. 9 and 10—Summons case—Non-attendance on service of summons—Appearance of accused by mukhtar—Contempt of Court—Code of Criminal Procedure (Act V of 1898), s. 205—Penal Code (Act XLV of 1860), s. 174.

A Magistrate issued processes for the attendance of the accused on the complaint of the Land Acquisition Deputy Collector for having given false information within the terms of s. 177 of the Penal Code and s. 10 of the Land Acquisition Act in certain written statements that they had made to the Collector. The complaint was that the written statements were false. The documents, however, contained more than one statements of fact ; neither in the complaint made by the Deputy Collector nor in his examination by the Magistrate was any reference made to any particular statement made by either of the accused as being a false statement, nor had the Deputy Collector put in the written statements, upon which he desired to proceed, either with his written complaint or at the time of his examination by the Magistrate.

[1906] *Held*, that the complaint was bad and the case should not be allowed to proceed in its present form. The Magistrate was bound to require from the complainant the written statements on which the proceedings were founded, and also to ascertain from him the particular statement or statements on which the accusation was made.

In a summons case on the day fixed for trial an appearance was made on behalf of an accused person by his mukhtar who asked the Magistrate under s. 205 of the Code of Criminal Procedure to dispense with the personal attendance of the accused. The Magistrate, however, regarding the non-attendance of the accused as a contempt of Court, called upon him to show cause why he should not be prosecuted under s. 174 of the Penal Code for non-attendance on service of summons.

Held, that the accused did make an appearance, though not a personal appearance, on service of summons, but that he did not personally attend should not under the circumstances have been regarded as an offence under s. 174 of the Penal Code.

A COMPLAINT was made by the Land Acquisition Deputy Collector against the two accused, Durga Das Rakhit, the lessor, and Abhoy Charan Dey, the

* Criminal Revision No. 381 of 1900, made against the order passed by H. F. Samman, Esq., District Magistrate of Midnapur, dated the 18th of April 1900.

lessee, claiming to hold a portion of the land taken up under the Land Acquisition Act, charging them with having given false information within the terms of s. 177 of the Penal Code and s. 10 of the Land Acquisition Act in certain written statements which they made to the Collector in response to a call from him under s. 9 of the latter Act. The complaint was that the written statements put in were false. The documents, however, contained more than one statement of fact. Neither in the complaint made by the Deputy Collector nor in his examination by the Magistrate was any reference made to any particular statement made by either of the accused as being a false statement and the Deputy Collector had not put in the written statements upon which he desired to proceed either with his written complaint or at the time of his examination by the Magistrate. The Magistrate issued processes for the attendance of the accused. On the day fixed for trial, the case being a summons case, Abhoy Charan Dey appeared and appearance was made on behalf of Durga Das Rakhit by his mukhtar, who asked the Magistrate under s. 205 of the Code of Criminal Procedure to dispense with the personal attendance of the accused. Abhoy Charan Dey asked for and obtained an order from the Magistrate excusing his further personal attendance and allowing him to appear by a mukhtar. The Magistrate, however, refused to allow the application made on behalf of Durga Das Rakhit, and, regarding his non-attendance as a contempt of Court, called upon him to show cause why he should not be prosecuted under s. 174 of the Penal Code for non-attendance on service of summons.

Mr. Jackson (with him Babu Atulya Charan Bose) for the Petitioners.

Babu Srish Chandra Chowdhry for the Crown.

The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

Prinsep, J.—This matter has already once been before this Court under circumstances somewhat similar to those now before us. The petitioners were then being prosecuted for perjury and forgery, alleged to have been committed in proceedings taken before the Deputy Collector under the Land Acquisition Act? And for reasons stated by the Judges of the Criminal Bench of this Court, on a rule granted, the proceedings were quashed as premature and without jurisdiction. The Collector, finding that the bar has been removed because the Civil Court has, in his opinion, finally decided the matter under the Land Acquisition Act, has renewed his complaint before the Magistrate and he has put the offence under s. 177, Indian Penal Code, which is declared to be applicable to such proceedings by s. 10 of the Land Acquisition Act.

The complaint was made against two persons, Durga Das Rakhit, the lessor, and Abhoy Charan Dey, the lessee, claiming to hold a portion of the land taken up under the Act, and they have been accused of having given false information within the terms of s. 177, Indian Penal Code, and s. 10, Land Acquisition Act, in certain written statements that they made to the Collector in response to a call from him under s. 9. We may first of all observe that neither in the complaint made by the Deputy Collector nor in his examination by the Magistrate has any reference been made to any particular statement made by either of the accused as being a false statement. The complaint is that the written statements put in were false. It is clear that those documents contained more than one statement of fact. We also [988] find that the Deputy Collector had not put in the written statements upon which the Collector desired to proceed either with his written complaint or at the time of his examination by the Magistrate. The Magistrate, therefore, had not before him the facts constituting the offence regarding which he was

called upon to act, and notwithstanding this, he issued processes for the attendance of the accused.

Now in this respect we think that the Magistrate has acted without proper discretion. He was bound to require from the complainant the written statements on which the proceedings were founded, and also to ascertain from the complainant the particular statement or statements on which the accusation was made.

On the day fixed for trial, the case being a summons case, Abhoy Charan Dey appeared and appearance was made on behalf of Durga Das Rakhit by his mukhtar who asked the Magistrate under s. 205 to dispense with the personal attendance of that accused. At the same time Abhoy Charan Dey, who did personally attend, asked for and obtained an order from the Magistrate excusing his further personal attendance and allowing him to appear by a mukhtar. The Magistrate, however, refused to allow the application made on behalf of Durga Das Rakhit, and he regarded his non-attendance as a contempt of Court, misapplying that term as it is generally used. He accordingly called upon Durga Das Rakhit to shew cause why he should not be prosecuted under s. 174, Indian Penal Code, for non-attendance, on service of summons, and the Magistrate has, in his explanation, expressed himself strongly regarding the conduct of Durga Das Rakhit in this respect.

We think that the Magistrate has taken an entirely mistaken view of this part of the case. He seems to have been animated by some feeling that Durga Das Rakhit was acting contemptuously towards the Court. There was no reason for this supposition. The Magistrate should rather have told the mukhtar that he required the personal attendance of Durga Das Rakhit on some fixed day, or that if he did not choose to appear he would issue a warrant of arrest. That in our opinion would have answered sufficiently. [989] The Magistrate, however, appears to have regarded it as an aggravation of the offence that Durga Das Rakhit should instead of attending his Court have proceeded to Calcutta in order to apply to the High Court, and that he also applied to the District Magistrate for bail as well as for an order directing the Subordinate Magistrate to dispense with the personal attendance of the accused. He considers that by making this application Durga Das Rakhit was "doubly guilty of contempt of Court." Throughout, the Magistrate has failed to appreciate what he was entitled to expect from Durga Das Rakhit. There was no possible reason why he should not proceed to the High Court to make an application regarding this case, and he was also within his rights in making his application to the District Magistrate. He did make an appearance, though not a personal appearance, on service of summons, but that he did not personally attend, should not under the circumstances have been regarded as an offence under s. 174. We think, therefore, that the proceedings under s. 174, Indian Penal Code, against Durga Das Rakhit were misconceived and that they should cease.

In regard to the prosecution under s. 177, we are of opinion that, as now taken, the complaint is bad, and that the case should not be allowed to proceed in its present form. We are further of opinion that inasmuch as the proceedings are still before the High Court in respect of Abhoy Charan Dey, no prosecution should be taken in the Magistrate's Court, until at least the final orders of the High Court shall have been obtained. No doubt there was a reference made by the Deputy Collector to the District Judge in respect of the objection to the award made by Durga Das Rakhit, and we understand that, in consequence of his absence, that reference has been summarily dismissed. But the matter still remains in regard to Abhoy Charan Dey whose case the Deputy

Collector refused to refer. It is difficult to understand how the cases of these two persons claiming to be lessor and lessee can be distinguished, and on this ground and because there are proceedings now before the High Court, we think that there should be no proceedings at all against either Abhoy Charan Dey or Durga Das Rakhit until orders of the High Court shall have been obtained. We would again point out that in the [990] Magistrate's Court the complaint was made against these two jointly. But any offence committed by each is a distinct and separate offence and should be tried separately. The rule is, therefore, made absolute.

D. S.

NOTES.

[See also 10 C. W. N., 1090 ; 16 C. W. N., 1105.]

[27 Cal. 990]

The 6th June, 1900.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HANDLEY.

Rahimuddi and others.....Petitioners

versus

Asgar Ali.....Opposite party.*

Charge—Alteration of charge—Conviction of Rioting with the common object of Theft—Finding by Appellate Court of different common object—Legality of conviction on such finding—Penal Code (Act XLV of 1860), ss. 147 and 379—Code of Criminal Procedure (V of 1898), s. 423.

The accused were convicted by a Magistrate of theft of mangoes and also of rioting, the common object of the unlawful assembly being the forcibly taking away of mangoes belonging to the complainant. On appeal the Sessions Judge not only found that the common object was not the taking of the mangoes but that the dispute between the parties was as to certain land. He however dismissed the appeal and confirmed the conviction. *Held*, that as the accused were convicted on a different finding of fact from that to which they were called upon to plead and to defend themselves at the trial they were entitled to an acquittal.

IN this case it was alleged on behalf of the prosecution that the accused with several others forcibly plucked and took away mangoes from trees belonging to the complainant, and when the complainant resisted he was beaten by the accused and their party with *lathis*.

The accused were tried, and on the 7th of February 1900 were convicted by the Magistrate of Dacca under s. 379 of the Penal Code of the theft of the mangoes, and under s. 147 of the Penal Code of rioting, the common object of the assembly being the forcibly taking away of the mangoes, and were sentenced to rigorous imprisonment of three months each and to pay a fine of Rs. 20 each under s. 147 only.

* Criminal Revision No. 299 of 1900 made against the order passed by G. Gordon, Esq., Sessions Judge of Dacca, dated the 31st of March 1900.

On appeal the Sessions Judge of Dacca disbelieved the evidence relating to the taking of the mangoes, and found that the common object was not the taking of the mangoes but that the [991] parties were disputing with regard to certain land. He, however, on the 31st of March 1900, dismissed the appeal and confirmed the conviction and sentence.

Mr. P. L. Roy for the Petitioners.

The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

Prinsep, J.—The Magistrate has convicted the petitioners of theft of mangoes and also of rioting, the common object of the unlawful assembly being the forcible taking away of mangoes belonging to the complainant.

In appeal the Sessions Judge has entirely disbelieved the evidence relating to the taking of the mangoes or that that was the common object of the unlawful assembly. He, however, finds (and about this there is no doubt) that a fight took place between the two parties, and on this he has endeavoured to ascertain from the evidence what the common object of the assembly was which caused this fight; and, so far as we understand his judgment, he has not only found that the cause was not the taking of the mangoes but that it was something else. The Sessions Judge has accordingly dismissed the appeal confirming the conviction and sentence, but on a different finding of fact from that to which the petitioners were called upon to plead and to defend themselves at the trial. The petitioners have accordingly been convicted by the Appellate Court of an offence for which they have never been tried. They are consequently entitled to an acquittal. The result may be unfortunate, if the petitioners have broken the peace and caused bodily injuries to persons in a fight; but on the findings of the lower Court they cannot possibly be convicted. The sentences are accordingly set aside and the fine, if paid, must be refunded.

D. S.

NOTES.

[This was followed in (1905) 33 Cal., 295.]

[992] *The 6th June, 1900.*

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HANDLEY.

Bhagirathi Naik.....Petitioner

versus

Gangadhar Mahanty.....Opposite party.

Cattle Trespass Act (I of 1891), s. 22—Illegal seizure of cattle—Fine—Compensation.

A Magistrate is not competent under s. 22 of the Cattle Trespass Act to pass any sentence of fine; he can only award compensation for the illegal seizure of cattle.

* Criminal Revision, No. 313 of 1900, made against the order passed by Syed Abdul Malek, Deputy Magistrate of Balasore, dated the 2nd of March 1900.

IN this case the accused, on the 2nd of March 1900, was found guilty under s. 22 of the Cattle Trespass Act by the Deputy Magistrate of Balasore, of having illegally* impounded four cows belonging to the complainant, and directed to pay a fine of Rs. 10, and the costs of the case. Out of the fine complainant was to get Rs. 5 and accused to suffer a week's simple imprisonment in default of payment of the fine.

Babu *Provash Chunder Mitter* for the Petitioners.

The **judgment** of the Court (PRINSEP and HANDLEY, JJ.), was delivered by

Prinsep, J.—The Magistrate, in a case under s. 22 of the Cattle Trespass Act, 1891, has fined the petitioner Rs. 10, and the costs of the case, and he has directed that out of this sum Rs. 5 be paid to the complainant. He has also ordered that, in default of payment of the fine, the petitioner do suffer one week's simple imprisonment.

The order throughout is bad and not in accordance with the terms of s. 22 of the Cattle Trespass Act. The Magistrate is not competent under that law to pass any sentence of fine. He can only award compensation for an illegal seizure of cattle. In this view we must set aside the order of fine, and direct that in substitution thereof, the accused do pay the sum of Rs. 5 as compensation to the complainant, and do also pay the costs of the case. The order of imprisonment in default of payment of this fine is also illegal and must be set aside.

D. S.

[993] *The 6th June, 1900.*

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE HANDLEY.

Ketaboi and others.....Petitioners

versus

Queen-Empress.....Opposite party.*

Security for good behaviour—Jurisdiction of Magistrate over person not residing within his jurisdiction—Reputation—Code of Criminal Procedure (Act V of 1898), s. 110.

It is only when a person within the limits of a Magistrate's jurisdiction, that is, who is residing within the limits of such jurisdiction, is found to be a person of the description

* Criminal Revision No. 321 of 1900, made against the order passed by S. J. Douglas, Esq., Sessions Judge of Dacca, dated the 26th of February 1900.

given in s. 110 of the Code of Criminal Procedure, that the Magistrate can take action under that section, and it is not contemplated that the Magistrate in such a case should issue a warrant so as to pursue the person concerned into another jurisdiction.

Under the terms of s. 110 of the Criminal Procedure Code, the reputation which the person is found to have means the reputation of that person in the neighbourhood in which he resides.

IN this case a dacoity having been reported to have taken place within the District of Naraingunge, a Sub-Division of the District of Dacca, the Sub-Inspector of Naraingunge arrested the petitioners, who were inhabitants and residents of the village of Nalchar in the District of Tipperah, and sent them up in custody to the Sub-Divisional Magistrate of Naraingunge. On being brought up before the Magistrate he at once drew up a proceeding under s. 110 of the Code of Criminal Procedure, requiring the petitioners to shew cause why they should not execute bonds and find sureties to be of good behaviour for three years.

The petitioners submitted that as they were residents of a different district, the Magistrate of Naraingunge had no jurisdiction to institute any proceeding against them under s. 110 of the Code. The Magistrate, however, overruled the objection, and on the 9th of January 1900 ordered the petitioners to furnish sureties for their good behaviour for three years and in default to undergo rigorous imprisonment for that period.

The material portion of the Magistrate's judgment was as follows :—

“ One further question remains for me to consider and that is raised in the *jawab* of the defendants. It is held that I have no jurisdiction. The words [994] of the section are :— ‘ Whenever a Sub-Divisional Magistrate receives information that any person within the local limits of his jurisdiction is by habit a robber, house-breaker or thief . . . such Magistrate may, &c.’

“ These words may of course be read to include only persons residing within the Magistrate's jurisdiction, but I can find nothing in the Code to show that the words should be restricted to this use. The words can equally well be interpreted to mean, ‘ habitually commits theft and robbery and house-breaking within his jurisdiction, &c.’, it appears to me that the section is carefully worded in such a way as to embrace both these meanings.....I therefore find I have jurisdiction and I order, &c.”

On reference to the Sessions Judge of Dacca under s. 123 of the Code of Criminal Procedure, he on the 26th of February 1900 confirmed the order passed by the Magistrate, holding that the Magistrate had jurisdiction to try the case.

Mr. K. N. Sen Gupta for the Petitioners.

The Deputy Legal Remembrancer (Mr. Gordon Leith) for the Crown.

The following **judgments** were delivered by the Court (PRINSEP and HANDLEY, JJ.) :—

‘**Prinsep, J.**—The petitioners who are residents of the District of Tipperah were under arrest and in confinement in the under trial ward of the lock-up at Naraingunge, when proceedings were taken against them under s. 110, Code of Criminal Procedure, with the object of requiring them to give security for good behaviour.’

It was objected before the Magistrate that he, as Magistrate of Naraingunge within the District of Dacca, had no jurisdiction to try this matter concerning persons who were residents of another district.

The Magistrate has overruled this objection and, on reference to the Sessions Judge under s. 123 for confirming the order passed by the Magistrate, the Sessions Judge has adopted the same view. The law runs thus :

"Whenever a Magistrate receives information that any person within the local limits of his jurisdiction—

- (a) is by habit a robber, house-breaker or thief, or,
- (b)" and so forth.

The Magistrate has found that the terms of the section enable [995] him to try such a case because the law may be read thus:—"Whenever a Magistrate receives information that any person is by habit a robber, house-breaker or thief within the local limits of his jurisdiction." But the law is not so expressed and, under the ordinary rules of construction, it would not bear that interpretation. In my opinion it is when a person within the limits of a Magistrate's jurisdiction, that is, who is residing within the limits of such jurisdiction, is found to be a person of the description given above, that the Magistrate can take action, and it is not contemplated the Magistrate in such a case should issue a warrant so as to pursue the persons concerned into another jurisdiction. It also seems to me that, under the terms of this section, the reputation which the person is found to have must necessarily mean the reputation of that person in the neighbourhood, and the persons residing in that locality could be best able to speak to his character; moreover that, if he were called upon for his defence, he would naturally produce witnesses of that neighbourhood. Thus a trial held in another district and at some distance from his residence would probably result in his being unable to obtain the attendance of his witnesses or to obtain them at an expense which it would be unreasonable to call upon him to bear. In my experience I would add that I have never come across a case of this description in which jurisdiction has been assumed by a Magistrate of another district, and from this I take it that the practice has been universal in regard to restricting the jurisdiction of a Magistrate to cases of persons reputed to be of bad character and residing in his own district. The proceedings, therefore, are without jurisdiction and the order must accordingly be set aside. If the petitioners are in jail in consequence of their failure to give the security required they must be released.

Handley, J —I am of the same opinion and I entirely concur in the observations made by Mr. Justice PRINSEP.

D. S.

NOTES.

[Residence was held to be non-essential in 9 Bom. L. R., 244 ; (1904) 23 M L.J., 535.]

[996] PRIVY COUNCIL.

The 8th and 9th November, 1899, and the 2nd May, 1900.

PRESENT :

LORDS HOBHOUSE, MORRIS, DAVEY AND ROBERTSON,
AND SIR RICHARD COUCH.

Amrito Lal Dutt.....Plaintiff

versus

Surnomoye Dasi and others.....Defendants.

[On appeal from the High Court at Fort William in Bengal.]

Hindu law—Adoption—Construction of will—Invalidity of authority purporting to be given to a widow jointly with others to adopt.

That no one except the widow, authorized for the purpose by her husband, can adopt a son to him after his decease is a principle in the Hindu law of adoption. The power is exercisable by the widow alone, though restriction may be placed upon her choice of a boy by the husband's having made it a condition that persons named by him should concur in the choice.

A husband had by his will purported to authorize his widow, whom he made his executrix jointly with two other persons whom he appointed his executors, to adopt a son to him. *Held*, that by this no valid authority to adopt was given to the widow. The conjecture that the testator really meant to give authority to the widow to adopt, restricting her power merely to the extent that there should be others, his executors, who were to consent to the choice of a boy to be adopted by her, could not be accepted as a legitimate construction of the will. The authority was expressed in clear terms to be to the three.

It would also be beyond the range of judicial interpretation to construe the will as meaning that the testator only intended to provide for the appointment of a male successor to him in the property.

APPEAL from a decree (5th April 1898) of the Appellate High Court, I. L. R., 25 Cal., 663, reversing a decree (9th March 1897) of the High Court in the ordinary original jurisdiction.

This suit was brought on the 1st August 1894 by the appellant who claimed to be the adopted son and heir of the late Hurridas Dutt, deceased on the 30th October 1875, on which date he executed a will containing the authority in question. Of this the plaintiff sued for the true construction as well as possession of the estate left by the testator, alleging his adoption by the [997] sole widow Surnomoye Dasi, the first defendant, now respondent, under a power given by the will.

The principal question decided on this appeal was whether the adoption had constituted the plaintiff, appellant, the lawfully adopted son of the testator, the authority to adopt having been given, not to the widow alone, but to her in conjunction with two other persons appointed executors of the will.

The widow by her answer left the construction of the authority in the will to the judgment of the Court, submitting that, under another clause in the will, in no case should the adopted son have any part of the testator's estate until her death; and she asked that the suit should be dismissed.

Besides the widow, the testator's two daughters, and three minor sons of one of them, were defendants and were now respondents. The defence in their

answers set up was that there had been no lawful adoption of the plaintiff, the authority to adopt given by the will having been invalid in law.

The will of Hurridas Dutt, who was a Sudra subject to the law of the Dayabhaga, was in English. Its material provisions are set forth in their Lordships' judgment. The testator appointed his wife to be executrix, and his father Madhusudan Dutt, and his uncle Dwarka Nath, to be executors and trustees. Then followed the words, "I hereby authorize and empower my wife and executrix Srimati Surnomoye Dasi and my executors and trustees to whom I give full permission and authority to adopt after my decease a son."

The will was proved by the widow and the uncle, who took upon them the administration, the father taking no part.

On the 9th August 1876 the widow, with the consent of Dwarka Nath, adopted a son, but he died in 1881. She adopted on the 9th February 1881 the present plaintiff. At this adoption Dwarka Nath was present. Madhusudan was then dead. The adopted boy attained his majority on the 1st August 1894, and on that day filed this suit.

Of the issues fixed in the Original Court two only were now material :— Whether the power of adoption was valid ; and was it validly exercised.

[998] A question, considered below, as to whether an accumulation directed under the will, was or was not in excess of what the law would permit, did not arise here, as the appeal was disposed of on the above issues.

The judgment of the Original Court was that the testator, desiring the adoption of a son to himself, gave his wife the power to adopt after his death, and associated the executors whom he appointed with his wife for the purpose of securing a good exercise of her discretion in the selection of a child for the adoption. It did not appear to the Judge that the testator intended to make it an essential condition of the adoption that the executors should take part in the adoption itself, from which they were by law excluded. Therefore in his opinion the power to adopt was a good one and rightly given. Upon the second issue his judgment was that the power of adoption was not lost by the death of one of the executors, the condition that their consent to the choice of the child should be given having been sufficiently complied with by the survivor having consented ; and he concluded that the authority given in the will had been validly exercised in the adoption of the plaintiff by the widow.

From the decree that followed this, the plaintiff, in April 1897, was the first to appeal in so far that it declared him not entitled to accumulations in the will directed, nor to immediate possession. The defendants on the 1st June 1897 filed cross-objections asserting the invalidity of the adoption.

The Appellate High Court held that according to the true construction of the will, the power to adopt was a joint power given to the widow and the executors, and that such a power was not in law valid. The suit was dismissed.

The judgments of both the Courts are given at length in the I. L. R., 25 Cal., 663.

The plaintiff now appealed.

1899, NOV. 8 AND 9. The Right Hon'ble H. H. Asquith, Mr. J. D. Mayne, Mr. J. H. A. Branson and Mr. W. C. Bonnerjee, for the Appellant, argued that by the 8th clause of the will authority had been validly given to the widow to adopt as she had adopted. The will should be so construed as to give [999] effect to the testator's intention that governed—that there should be an adoption. The authority given was indeed taken literally to three persons jointly ; but only one of the three, the widow, could receive and act upon that power, according to Hindu law. The will was capable of the construction to

the effect that it gave authority to her to adopt, subject to the condition that she obtained the consent of her co-executors in the choice of the boy to be adopted by her alone. The testators knew, as it was a matter of common knowledge among Hindus, that the widow alone could be authorized by him to adopt a son to him after his death. It should only be in the case of no other construction being possible that a Court should attribute to the testator that he had intended to give to his executors a power which he must have known could not be exercised. Their authority stopped at consenting, or refusing to consent, in the choice of a boy. Such of the three persons, the executors and the widow, had a separate duty; but only the act of the widow operated to effect a valid adoption, and its validity was not affected by the fact that the co-operation of the others was ineffectual, except in so far as fulfilling the condition on which the widow's authority vested in her. The power given to each of the three should be considered a separate power in respect of what each could perform, and the duty of the executors was merely to aid in the selection of a child suitable to be adopted. The will could hardly be said to direct anything to be done that would be contrary to the Hindu law, seeing that every act in the way of the actual adoption had to be done by the widow alone, and that any such act if done by an executor would be merely inoperative and of no assistance or effect.

On the construction of powers in Hindu wills reference was made to *Bai Motivahu v. Bai Mamubai*, (1897) I L. R., 21 Bom., 709; L. R., 24 I. A., 93. The fair view would be that the testator only intended that there should be the concurrence of the three persons in the choice of a boy.

Mr. A. Cohen, Q. C., Mr. M. Crakanthorpe, Q. C., and Mr. A. Phillips, for the Respondents, argued in support of the judgment of the High Court. The joint power which the will purported to confer upon the widow, appointed executrix, and upon the father and uncle of the testator, appointed executors, to adopt a son to [1000] him, was invalid, because it did not accord with the Hindu law. The language of the will purporting to empower the executors was clear. If the widow were to die in their life-time the executors were to adopt. No such limit as that they should merely concur in the choice of a child to be adopted was found in the will, nor was there, on the words of the will, any intimation that the testator intended that the widow should adopt, either with or without the concurrence of the co-executors, by her sole authority. The authority being a joint one all the three must act or no one. The widow was not empowered to adopt separately. Even if the power to adopt had not been invalid on account of its having joined with the widow persons who could not be legally authorized by the testator to adopt, it would remain that it could not be exercised unless the three were acting together, and could not be validly exercised after the death, which had occurred, of one of them. If the intention of the testator was as had been represented in the case argued for the appellant, this intention had not been expressed in this will. This intention had been founded on conjecture, and there was no substantial ground for accepting the suggestion.

Hunter v. Attorney-General, (1899) L. R., Ap. Cas., 309 (317); and *Abbott v. Middleton*, (1858) 7 H. L. C., 68 (114), were cited.

The Right Hon'ble H. H. Asquith replied.

Cur. adv. vult.

1900, MAY 2. The judgment of their Lordships was delivered by

Lord Hobhouse.—This is a suit instituted before the High Court of Judicature in Calcutta in its original jurisdiction for administration of the estate of Hurridas Dutt, who died on the 30th October 1875, having executed a

will on the same day. He had no son, but left a widow Surnomoye Dasi and two daughters who were all defendants below and now are respondents. The plaintiff in the suit, now appellant, claims to be the son of the testator adopted by virtue of a power contained in his will; and the cardinal question in the suit is whether or no he bears that character.

[1001] The material passages in the will, which was written in English, are as follows:—

"I appoint my wife Srimati Surnomoyi Dasi the executrix, and my father Babu Madhusudan Dutt of Mullick's Street aforesaid, and my uncle Babu Dwarka Nath Dutt of Thuntoneah in Calcutta aforesaid, the executors and trustees of this my will.

Para. 8. "Whereas having no son born to me of my body I am desirous of adopting one in my life-time, but in case I depart this life before carrying such my desire into effect, I hereby authorise and empower my wife and executrix Srimati Surnomoyi Dasi, and my executors and trustees, to whom I give full permission and liberty, to adopt after my decease a son, and in case of his death during his minority or on attaining his full age and without leaving male issue, to adopt a second son, and in case of his death during minority or on attaining such age and without leaving male issue, to adopt a third son, and no more. In any of the above cases of adoption, should the adopted son die leaving a son or sons, the power of adoption shall cease or remain in abeyance during the life or life-time of such son or sons of such adopted son, but shall revive on the death of such son or sons during minority.

Para. 13. "I authorise and empower my said executrix and executors and trustees and the survivor of them and the trustee for the time being of this my will, to appoint any other person or persons to succeed them or him in the execution of the trusts of this my will.

Para. 15. "In case of any accident arising to cause my wife to depart her natural life before adoption of a male child my surviving executors are empowered to act with my full consent and direction to adopt a male issue. Dated this 30th October 1875."

By the ninth clause the testator provided an income for his wife and adopted son during the life of his wife and directed accumulation of the surplus income. The adopted son is to take the property if he survives the widow and attains the age of 18, otherwise it is given over to the daughters.

The will was proved by the testator's widow and his uncle Dwarkanath Dutt. The testator's father Madhusudan Dutt did not renounce probate, but he never took any part in the administration of the estate.

On the 9th August 1876 a deed was executed by which the widow purported with the consent of Dwarkanath Dutt as executor to accept Joti Pershad Mullick a boy five years old as the adopted son of the testator. In the year 1877 Madhusudan [1002] Dutt died, and in January 1881 Joti died being then ten years old. On the 9th February 1881 a deed was executed by which the widow purported, by virtue of the authority given to her by the will, and with the consent of Dwarkanath Dutt as executor, to accept the plaintiff then a boy of eight years old as the adopted son of the testator. After attaining his majority the plaintiff instituted this suit in the year 1894.

The cause was heard in the first instance before Mr. Justice JENKINS who held that the plaintiff was rightly adopted and proceeded to determine the other questions arising under the will. He held 1st, that the testator had given the power of adoption to his widow subject only to the assent of the other executors, 2ndly, that the death of Madhusudan did not destroy the power; and 3rdly, that the terms of the adoption deed were in sufficient conformity with those of the will. Both parties appealed from his decision.

The Court of Appeal consisting of Chief Justice MACLEAN and, Justices MACPHERSON and TREVELYAN were unanimous in holding that there was no adoption of the plaintiff. Their main ground was that the power of adoption which the testator purported to give was one which the law does not allow.

They further intimated an opinion that even if the power could be held valid by virtue of the construction adopted by JENKINS, J., it could not be exercised after the death of Madhusudan. They therefore dismissed the suit.

Their Lordships felt no doubt during the argument that the testator could not confer any such power as he desired. That no one can adopt a son to a dead man except his widow is such a rudimentary principle of Hindu law, and one so constantly occurring in ordinary life, that it is difficult to suppose any educated man to be ignorant of it. That the widow's choice of a boy may be restricted in various ways, and among them by requiring the consent of persons named by the husband, is also familiar law. If it turns out that such consent cannot be procured she has no authority to adopt, and that is the question which has been raised in this case with reference to the death of Madhusudan. But the fundamental objection arises not on the events that have happened but on the provisions of the will as it stood at the [1003] testator's death. It never gave any authority at all to the widow. In terms, the literal construction of which admits of no doubt, he authorised an appointment not by his wife, but by her and the two others whom he had appointed executors and trustees. Whether he intended the authority to be attached to the office can make no difference; or if it did make any it would not be favourable to the plaintiff. It was given not to a single person but to several. Not only so, but the testator went on to authorise his surviving executors to adopt a boy after his wife's death; while rather significantly he did not authorise her to adopt after their death; and yet she was more likely to be the survivor than the members of the elder generation.

The suggestion that the testator really meant to give authority to the widow restricted by the consent of the others cannot be accepted as a legitimate construction of his will. It is a mere speculation, and we may speculate in other directions. When using the term adoption the testator may have been thinking merely of the choice of a male successor in the property; seeing that he does not leave the adoption to carry with it the ordinary right of succession, but subjects the inheritance to rather capricious conditions; postponing enjoyment during the widow's life, and making the boy's interest in the corpus contingent on his surviving the wife, and attaining 18. Such speculations however are, in a case in which the language conferring the authority is clear, and there is nothing in other parts of the will inconsistent with it, quite beyond the legitimate range of judicial interpretation.

The joint power conferred on the three executors being invalid, the plaintiff has no status in the family and his suit was rightly dismissed. Their Lordships will humbly advise Her Majesty to dismiss this appeal and the appellant must pay the costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Watkins and Lempriere*.

Solicitors for the Respondents: Messrs. *Gush, Phillips, Walters, and Williams*.

C. B.

NOTES.

[In *Narasimha v. Parthasarathy*, (1914) 37 Mad., 199, upon the construction of a power to adopt given jointly, the Privy Council held that unless exercised by both together, it could not be exercised at all.

The further litigation in this case is reported in (1908) 35 Cal., 896 P.C.; (1905) 9 C. W. N., 1083.]

[1004] *The 16th February and 24th March, 1900.*

PRESENT :

LORDS HOBHOUSE, DAVEY AND ROBERTSON, AND SIR R. COUCH.

Fatimatulnissa Begum and others.....Plaintiffs

versus

Sundar Das and others.....Defendants.

[On appeal from the High Court at Fort William in Bengal.]

*Limitation Act, XIV of 1859, s. 1, cl. 15—Act IX of 1871, s. 29 and
Art. 148—Usufructuary mortgage—Limitation of suit—Extinction
of mortgagor's title—New starting point by acknowledgment.*

The representatives in estate of a mortgagor, who executed a usufructuary mortgage dated 17th October 1788, sued the heirs of the mortgagee in 1893, alleging payment of the mortgage in 1881, and claiming the possession of the mortgaged property or other relief.

The suit, in the absence of acknowledgment made within sixty years satisfying the requirements of the law of limitation for extension of that period, was barred on the 17th October 1848, by the effect of Act XIV of 1859, section 1, clause 15, which barred the suit after the 1st January 1862. Afterwards, by the effect of Act IX of 1871, section 29, the right of property in the mortgagor was extinguished.

In none of the documentary evidence adduced by the plaintiffs was there shown to have been made during the sixty years from the date of the mortgage onwards, any written acknowledgment, satisfying the requirements of the above clause 15, and thereby giving ground for computing limitation from the date of such acknowledgment. Nor did the fact that a lease was made on the 8th January 1872 of some of the mortgaged property by one of the then mortgagees to one of the mortgagors, the lessor describing himself as usufructuary mortgagee, preclude the defendants from asserting their true title. The description neither estopped the alleged mortgagee from denying that he was in that character at the time of this suit, nor was it a representation which required that he should make it good. It was no essential part of a contract between these parties, and it did not effect the issue now raised. The judgment in *Citizens Bank of Louisiana v. First National Bank of New Orleans*, (1873) L.R., 6 E. & I. App., 352 (360), referred to.

APPEAL from a decree (16th June 1896) of the High Court reversing a decree (30th March 1894) of the Subordinate Judge of Shahabad.

This suit was brought on the 20th February 1893 by the appellants who represented the estate of a mortgagor, an ancestor common to them and to three of the seven defendants. To secure a debt, he executed, on the 17th October 1788, a usufructuary mortgage of villages in Shahabad to three creditors, one of whom [1005] was Sadhu Ram, now represented by the other defendants, three of them being his heirs. The first had come in as a purchaser of part of the property in suit. These four alone defended the suit, the others having answered favourably to the plaintiffs. The sum originally secured was Rs. 1,27,720. In 1806 a part having been paid a fourteen annas share of the debt was excluded from the security, a proportionate part of which remained charged with only the two annas share belonging to Sadhu Ram. Of this property the plaintiffs, alleging that the debt had been paid off in 1881, claimed possession, or that the right to redeem should be declared.

The defence was that the suit was barred by lapse of time in 1848 by the enactment of Act XIV of 1859, and that the plaintiffs' title had been extinguished by the Limitation Act, IX of 1871, section 29. The issues, besides relating

to these points, included the question, which was also raised by this appeal—from what date was the period of limitation to be computed. This involved whether the defendants' position as usufructuary mortgagees had been acknowledged, during the sixty years terminating in 1848, in a manner satisfying the requirements of clause 15.

Copies of decrees in suits of 1817, and of 1819, reciting pleadings, were referred to in the first Court, having been alleged by the plaintiffs to show that the defendants retained the character of mortgagees. Also written transactions, comprising entry in the collectorate register, leases, and receipts for rent, were received in evidence in that Court.

The Subordinate Judge's decree was in favour of the plaintiffs. In his opinion the evidence had shown that the mortgage had been satisfied by the usufruct of the mortgaged property as far back as in 1830, and he held it to have been clearly established that the defendants were in possession as mortgagees, who had acknowledged the title of the plaintiffs' predecessors as mortgagors, by written acknowledgments coming within clause 15, and made within the period of limitation, so that they had given rise to a starting point, bringing the suit within the sixty years' limit.

That decree was reversed on the defendants' appeal to the High Court (TREVELYAN and BEVERLEY, JJ.), who dismissed the **[1006]** suit as barred by time under Act XIV of 1859. The material part of their judgment was the following:—

"The first question is from what date limitation began to run. As we have already pointed out, there is nothing whatever in this case to show that there was any new arrangement which effaced the original mortgage. The rights both of the mortgagor and mortgagee continued to be determinable by the original mortgage, although a portion of the debt had been cleared off and a portion of the property released. As we have pointed out, we can find no trace of any such arrangement in any portion of the previous litigation. The plaintiffs' ancestors throughout that litigation based their rights on the original deed. In their present plaint, the plaintiffs do the same. We do not find that the suggestion of a new arrangement was made in the Court below. We have no hesitation in coming to the conclusion that the time ran from 1788, and that unless there be evidence of an acknowledgment such as to satisfy the requirements of section 1, clause 15 of Act XIV of 1859, the sixty years expired in 1848, and therefore the suit was barred if not brought before the 1st January 1862. Was there such an acknowledgment? The acknowledgments relied upon by the plaintiffs between the years 1788 and 1848 are to be found in decrees made in the previous litigation, which purport to recite a plaint of the ancestors of the present defendants on the 14th of July 1817, and a written statement of the 1st of June 1820. The learned Judge of the Court below has relied upon admissions in those pleadings. The first question is, whether any case has been made for secondary evidence of the plaint and written statement. The second question is, whether secondary evidence according to law has been given. And the third question is whether, even if the copies of the plaint and written statement set out in the decrees amount in law to secondary evidence of such plaint and written statement, they are sufficient to take the case out of the operation of the law of limitation.

"On the first question we hold that a case has been made for secondary evidence. It is not very clear whether the records of suits relating to the Shahabad district but decided by the Provincial Court at Patna, would be kept at Arrah or at Patna; but as far as we can see they would have been probably kept in the Shahabad Court. Apart from the evidence in this case, it is a matter of notoriety that during the Mutiny the records of the Civil Courts at Arrah were destroyed.

"It is not necessary for us to decide the second question. If we had to decide it, we should have to consider how far we could follow the decision of this Court in the case of *Parbutty Dassi v. Purno Chunder Singh*, (1883) I.L.R., 9 Cal., 586.

"We think it quite clear that we must hold, on the third question, that the requirements of the Limitation Act have not been satisfied. The case of *Luchmee Buksh Roy v. Runjeet Ram Panday*, (1873) 13 B. L. R., 177 : 20 W. R., 375, decides that it is [1007] only an acknowledgment signed by the hand of the mortgagee himself, which will take the case out of the operation of the Act. If according to the law of procedure in force at the time the plaint or written statement was required to be signed by the party himself, we might have been able to decide this question in favor of the plaintiffs; but on referring to Regulation IV of 1793, which contained the law of procedure then in force in Civil Courts, we find that the plaint might be signed by the plaintiff or his pleader, and that a written statement did not require any signature at all. It follows that it is consistent with the evidence in this case, that the plaint of 1817 was signed by the pleader and that the written statement of 1820 was either signed by the pleader or not at all. We cannot therefore hold that the acknowledgments were signed in the way provided by section 1, clause 15.

"Holding, as we do, the view that between 1783 and 1848 there was no acknowledgment to take the case out of the Act, it is unnecessary for us to consider the documents which have been put forward as acknowledgments after 1848."

On this appeal,

1900. FEB. 16. Mr. R. B. Haldane, Q. C., and Mr. J. D. Mayne, for the appellants, argued that there was error in the judgment of the High Court in their dismissing the suit as barred by limitation under Act XIV of 1859, section 1, clause 15. It was contended that the period of limitation had not run from the date of the mortgage in October 1788, and that the finding of the High Court as to there having been no sufficient acknowledgment proved to have been made before the expiration of the sixty years from the date of the mortgage was not according to the evidence. The High Court, moreover, had recorded no finding as to the date when they considered the debt to have been paid off, although there was no evidence to support the finding of the first Court that it had been paid as far back as 1830; and there was no evidence as to when it was paid off. The appellants' claim that they were entitled to possession, or, if any money remained due, to redemption, was supported by the respondents having recognized their position as mortgagees, and if the repeated recognitions fell short of being acknowledgments within the requirements of the Act XIV of 1859, section 1, clause 15, at all events, they afforded relevant evidence of the fact of the continuance of the mortgage and of the defendants having treated it as a subsisting fact. As an acknowledgment within the Act, the writing, if duly signed, fixed a date for a starting point, but as a piece of [1008] evidence not having that effect, but showing or tending to show the relation of mortgagee and mortgagor at the time, the documentary evidence was of value, and supported the case of the appellants. The application of the sixty years' bar to run from the date of the instrument, whilst it was uncertain whether the usufruct had realized the debt or not, had been made by the judgment of the High Court. Besides the above contention, a main argument was that the respondents were precluded by their own acts and statements from denying that, at the time of suit brought, they were holding the land as usufructuary mortgagees. Reliance was placed on the fact adverted to in the judgments below, of the lease having been made in 1872, under the circumstances, and with the description therein, of the lessor as usufructuary mortgagee. They referred to *Luchmee Buksh Roy v. Runjeet Ram Panday*, (1873) 13 B. L. R., 177 : 20 W. R., 375. The description in the lease was a representation that the relation of the defendants to the plaintiffs as mortgagors continued.

Mr. A. Cohen, Q. C., Mr. J. H. A. Branson, and Mr. G. A. H. Branson for the respondents, argued that the judgment of the High Court had rightly

been that the appellant's claim was barred by the sixty years limitation in October 1848; there not having been shown to be any writing signed by the mortgagee, or some person claiming under him, which could give a fresh date, or one other than the 17th October 1788, from which the period of limitation could be reckoned. By the Regulation Law of Bengal any such suit as the present, claiming immoveable property, was subject to an utmost limit "of sixty years" title by non-claim. They referred to Regulations XV of 1793 and II of 1805, which showed upon their language that the bar of a suit was accompanied by the extinction of title.

The High Court had rightly grounded the decision of the case upon Act XIV of 1859, which applied the law of limitation to mortgages, and therefore barred this suit, in the absence of any acknowledgment, sufficient within that Act, to extend the period and the title of the plaintiffs as mortgagors had been extinguished by the subsequent enactment of the Act IX of 1871, section 29. They referred to the abovementioned case of *Luchmee Buksh Roy v. [1009] Runjeet Ram Panday*, (1873) 13 B. L. R., 177: 20 W. R., 375, of the year 1873, and to *Dharma Vithal v. Govind Sadvalkar*, (1883) 1. I. R., 8 Bom., 99 (102), where the observations of WEST, J., in the matter of the intention in acknowledgment are to be found.

Mr. R. B. Haldane, Q.C., replied.

Cur. adv. vult.

1900. MARCH 24. Their Lordships' judgment was delivered by

Lord Hobhouse.—The plaintiffs below, now appellants, are the representatives in estate of one Nurud Hossein Khan, who on the 17th of October 1788 effected a usufructuary mortgage of the property now in dispute along with other property to secure the sum of Rs. 105,783 due on bonds to three several persons. One of the mortgagees was named Sadhu Ram to whom one of the bonds was owing. In some way not now apparent a settlement was made in or about the year 1806 by virtue of which the other creditors were satisfied and 14 annas of the property released. A two anna share remained as a security to Sadhu Ram, but on the terms of the original mortgage adjusted to the division of interest. It will be convenient to speak of the parties and their successors respectively as mortgagors and mortgagees. The terms of the mortgage are as follows:—

"Until the whole and entire sum the principal aforementioned and interest thereon, whatever that may be by account, is not repaid to the aforementioned persons, the said villages shall remain in the possession and enjoyment of the aforementioned persons: they will year by year take the proceeds thereof and then give, without objection, receipt annually for Rs. 6,201 in part payment of the aforementioned debt. They will with confidence keep cultivating the aforesaid mouzahs. If there be an increase in the proceeds derived from the villages or if there be a decrease, which God forbid, they will take the profit and loss on themselves. I have and will have by no means any concern with the increase or decrease."

In the year 1817 the mortgagees, having been dispossessed by the mortgagors, sued for possession of their two anna share, and the Court granted them a decree on that footing, adding that "if the defendants have any objection as the money of the usufructuary mortgage having been liquidated they are at liberty to bring a separate suit."

The mortgagors did bring a suit accordingly in the year [1010] 1819 praying for possession of the land and return of their bonds on the ground that the mortgagees had been overpaid. By the decree of the District Judge dated 3rd October 1820, it was found that the mortgagees had not been paid; and the suit was dismissed, but with some directions for the final payment in liquidation of the mortgage and for the restoration of the land in the year 1231

Fasli, A.D. 1824 or thereabouts. This litigation was continued by appeals to the Provincial Court and thence to the Sudder Dewani Adawlat. On 27th August 1833 a final decree was passed finding that the mortgagees were not paid and dismissing the 'mortgagors' appeal. The mortgagees have been in possession ever since.

On the 20th February 1893 the present suit was commenced by the mortgagors who allege that the whole debt was discharged in 1288 Fasli (A. D. 1881), and pray for possession and other relief. It is not necessary to consider any other defence than that of bar by time.

The earliest law which placed a limit of time upon suits by mortgagors to recover the mortgaged property is Act XIV of 1859. It was thereby provided (section 1, clause 15) that no suit shall be maintained against a mortgagee of immovable property for recovery of the same unless it is instituted within 60 years from the time of the mortgage; or, if in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given in writing signed by the mortgagee or some person claiming under him, from the date of such acknowledgment in writing. This Act remained in force till repealed by the Limitation Act of 1871. By section 18, coupled with a subsequent Act XI of 1861, suits instituted before the 1st January 1862 were to be determined as if the Act had not been passed.

According to the terms of this law suits by the mortgagors of 1788 were barred on the 17th October 1848 unless in the meantime the required acknowledgment was given. Their right to sue was kept alive till 1862; but as they did not sue, the Act remains unqualified by that proviso.

The Act of 1871 provided the same limits of time for suits of this kind, and it added the provision (section 29) that at the ex-[1011]piration of the period thereby limited to any person for instituting a suit for the possession of any land his right to such land shall be extinguished. The period thereby limited in the case of this mortgage was the 17th October 1848 and the title of the mortgagors was extinguished on that day unless they can show a previous acknowledgment in writing.

The Subordinate Judge decided in their favour on this point. He relied on the proceedings in the suits of 1817 and 1819. The records had been destroyed in the Mutiny, but the mortgagors produced copies of the decrees which recited the pleadings. The plaint in the earlier suit and the written statement in the later asserted the title of the mortgagees as such. The Subordinate Judge considered that he was bound to presume that these pleadings were signed by the mortgagees because the law required them to do it. The High Court, however, point out that there was no such law then existing; plaints might be and were signed by Vakils, and written statements did not require any signature at all. Therefore there could be no presumption that any such acknowledgment as the Acts of 1859 and 1871 require was given by the mortgagees.

These pleadings constitute the only ground for alleging that prior to the 17th October 1848 any written acknowledgment of title was given by the mortgagees to the mortgagors. As this ground fails, it follows that as from the 17th October 1848 the right of the mortgagors to sue was barred by force of the Act of 1859, and their right to the land was extinguished by force of the Act of 1871.

The Subordinate Judge also relies on a number of transactions which go to show that the mortgagees considered that they still retained that character. In that character they applied for mutation of names in the Collectorate

Register, and they granted leases, and they gave receipts for rent. The High Court did not think it necessary, nor do their Lordships, to examine those transactions in detail. Only one took place prior to the extinction of the mortgagors' title in 1848, and that is an application 'for mutation of names in 1839 which was not an acknowledgment made to the mortgagors, but only an official proceeding to substitute the [1012] successor of a mortgagee for his predecessor under the title which then actually existed.

Only one of these transactions has been seriously insisted upon during the present argument. On the 8th January 1872 Beni Prashad, a mortgagee, granted to Makbul Fatima, a mortgagor, a lease of the mortgaged property or part of it for a term of 10 years. In this grant the lessor is described as usufructuary mortgagee. This is not now put forward as an acknowledgment which gave a new starting point of time for limitation. But Mr. *Haldane* contended that it estopped the mortgagee from repudiating that character in a litigation with the mortgagor. If the lessor were seeking to impeach the lease on the ground that he was not usufructuary mortgagee he would be estopped. But the lessee had the full benefit of the lease, and for matters outside the lease it contains nothing to preclude the lessor from asserting his true title.

But it is further contended that this description of the lessor amounts to a representation which he is bound to make good. In order to succeed on this ground the mortgagors must show that the description of the lessor was an essential part of the contract, that the lessee made the contract in reliance on those terms, and that her position was in some way altered by the terms in which her lessor spoke of himself. See *Citizens Bank of Louisiana v. First National Bank of New Orleans*, (1873) L. R., 6 E. & I. App. (360); and unless the lessee could show at least so much she would have no foundation for contending that her extinct right was revived or rather re-granted by the terms of the lease. In effect what is asserted for her is the creation of a new right. But there is not a vestige of evidence for any such case, nor any reason to believe that the description of the lessor was anything but a mere continuance of the description by which the mortgagees were entered as proprietors in the Collector's books in 1839.

The case is a singular one. Probably the time at which the title of the mortgagors to sue became extinct or at which their right was barred was not clearly present to the minds of the mortgagees or indeed of either party. But that does not [1013] prevent the operation of the law which lays down fixed rules for the bar of suits by time. The High Court have rightly interpreted it and their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellants must pay the costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Watkins & Lempriere.*

C. B.

NOTES.

I. As regards the effect of an acknowledgment as mortgagee, see also (1908) 10 Bom. L.R., 385; (1909) 11 Bom.L.R., 318; (1913) 11 A.L.J., 86.

II. As regards the running of time in the case of usufructuary mortgages, see also (1906) 28 All., 333; (1913) 35 All., 227.

III. As regards estoppel, see also (1902) 5 Bom.L.R., 97; (1904) 6 Bom.L.R., 864.

IV. A right that is extinguished is not revived by a new Act:—(1903) 31 Cal., 314.]

[21 Cal. 1013]

ORIGINAL CIVIL.

The 31st July, and 1st and 6th August, 1900.

PRESENT :

MR. JUSTICE STANLEY.

Sarat Chunder Singh

versus

Nitye Sunder Singh*

Hindu law—Joint family—Partition—Right to an account—suit for Partition referred to arbitration but property not wholly partitioned—Infant's right to an account of his share of the property partitioned, and unpartitioned.

A, a member of a Hindu joint family, died leaving a widow and no issue. By his will he appointed B, C, and D, members of the joint family, his executors, and gave his widow power to adopt. In pursuance of that power the widow adopted E.

The executors instituted a suit for partition of the joint estates, and the suit was referred to the arbitration of Z. He died without having partitioned the whole of the property, and an application was then made to the Court to determine the partition. The Court granted the application and the suit came on for trial. The infant E asked for an account to be taken of the dealings of the joint property, and of the rents and profits, on behalf of the estate of his late father, from the death of his father up to the appointment of a Receiver.

Held, that in respect of the properties remaining unpartitioned the infant was entitled to an account of the dealing of the joint-property, and of the rent and profits from the death of his father up to the time a Receiver was appointed, but as to the properties already partitioned, he was not so entitled.

THIS was a suit for partition of a Hindu joint family estate, the property having been partly partitioned by reference to arbitration.

The following are the facts in this case :—

An action was brought in the year 1889 (suit 285 of that year) [1014] by Sarat Chunder Singh against the other joint owners with him of an estate in Calcutta known as the Pykeparah Raj estate, for partition of the estate and other relief prayed for. In this partition suit two brothers, viz., Protap Chunder Singh and Issur Chunder Singh were the owners of the estates.

Upon the death of Protap Chunder Singh, his four sons, viz., Grish Chunder Singh, Poorno Chunder Singh, Kanti Chunder Singh, and the plaintiff Sarat Chunder Singh, became entitled to an undivided moiety of the estate.

Upon the death of Issur Chunder Singh, his son, Indra Chunder Singh, became entitled to his undivided moiety. Kanti Chunder Singh afterwards died having by his will left his share to his two brothers, Poorno Chunder Singh, and Sarat Chunder Singh.

Grish Chunder Singh afterwards died having also left a will whereof he appointed Poorno Chunder Singh, Kanti Chunder Singh, Indra Chunder Singh and Sarat Chunder Singh, the executors. Under the provisions of that will, Grish Chunder Singh, who is now a defendant, was adopted by Grish Chunder's widow, and he was entitled to the share of Grish Chunder Singh, i.e., a two annas share in the estate. Poorno Chunder Singh and Sarat Chunder Singh

* Original Civil Suit, No. 41 of 1899.

were each entitled to a three annas share, and Indra Chunder Singh, who had since died, became entitled to the remaining eight annas share.

In the month of September 1866, the management of the estate was taken over by the Court of Wards, and the Collector divided the surplus income amongst the beneficiaries in proportion to their shares as above stated, and kept separate accounts of the shares of each member of the family. In the case of the share of Grish Chunder Singh, he made over his share to the executors of his will, including the surplus income and the investments therefrom. As each of the members of the family attained full age, he obtained from the Court of Wards his share of the property, and releases were executed in favour of the Secretary of State

Subsequently the parties appointed a Mr. Robert Harvey manager of the property, for the purpose of economical and proper management.

[1015] Srish Chunder Singh was then still a minor and his property had been throughout under the control and management of the executors of Grish Chunder Singh. Under these circumstances the plaint was filed by Sarat Chunder Singh, for partition, and by agreement of the parties, which was sanctioned and approved of by the Court, and found to be beneficial for the minor, it was referred to Mr. Phillips, as arbitrator, to adjust and settle all matters in difference between the parties. By the reference to arbitration, the arbitrators were empowered to make separate awards. Mr. Phillips entered upon the arbitration and made an award in respect of certain properties, which were found to be debutter properties, and he also determined the question of maintenance of the widow of Protap Chunder Singh. He, however, left India, whereupon it became necessary either to proceed with the suit in the ordinary course as regards the matters which had been left undetermined by him, or else to appoint another arbitrator. By agreement of the parties the late Sir Romesh Chunder Mitter was selected as an arbitrator to complete the work which was left unfinished by Mr. Phillips, and the agreement of reference left it open to him as in the case of Mr. Phillips to make separate awards. Sir Romesh Chunder Mitter entered upon the arbitration, and he partitioned a considerable portion of the estate, but died before the arbitration was completed.

Under these circumstances an application was made to the Court with a view of having such proceedings directed, as might be necessary for the purpose of terminating the suit, and upon the hearing of that application the Court gave the parties leave to proceed with the suit, in the event of their not agreeing to the appointment of another arbitrator to determine all matters left undetermined. The Court accordingly directed that the suit should proceed and that any of the defendants, if so advised, should be at liberty to file written statements. Written statements were filed by two of the parties, viz., by the Administrator-General of Bengal, who now represented the deceased Indra Chunder Singh, and by Srish Chunder Singh.

1900, JULY 31, AUGUST 1.—The *Advocate General* (Mr. J. T. Woodroffe) (Mr. Pugh with him) for the Plaintiff.—No account can be gone into in this case, at this stage. The Court cannot [1016] enlarge the accounts beyond the accounts asked for in this suit. When the case went before the arbitrator, there was no suggestion of any account being wanted by any of the parties. The estate remained in Mr. Harvey's hands till a few months before the suit, and he managed for all of them. The awards were made and confirmed, and the Receivers' books destroyed, except as to Srish Chunder Singh's share. All accounts necessary to ascertain the value of the property were before the arbitrator. What took place in suit No. 285 of 1889 is really the cause of this application. In the plaint of that suit, the same facts were stated as are now

attempted to be raised in this suit. Sarat Chunder filed his written statement in that case, and a decree was made on the 16th of February 1891. The executor defendants have not attempted to surcharge and falsify the accounts, but they have insisted on every payment over Rs. 20 being vouched. For the space of 11 years no claim has been made in respect of the accounts now demanded. No such accounts can be taken under the decrees made. The properties were divided and Sir Romesh Chunder Mitter examined the accounts. Each of the parties has got the separate books and papers showing what is due to each of them.

Mr. O'Kinealy (Mr. Chowdhry with him) for the defendant Satis Chunder Singh supported the contention of the *Advocate-General*, and submitted that everything had been partitioned, except a dwelling house and some minor portions of the property—Mayne's Hindu Law (5th edition), para. 429, p. 529.

Mr. S. P. Sinha (with Mr. W. C. Bonnerjee) for the Administrator General, supported the contention of the *Advocate-General*, and submitted that in a joint family questions as to whether or not each of the members of the joint family has overdrawn are matters which cannot be gone into.

Each of the members of the joint family is living apart, and therefore the accounts required by the defendants could not possibly be joint family accounts.

Mr. Harvey was appointed to manage the property of each of the members of the family, and he was responsible to each of them. Only one paragraph of the plaint speaks of a joint family.

[1017] The accounts are not within the scope of this suit, and further, the defendants are estopped from being allowed to ask for accounts to be taken.

Mr. Hill (Mr. R. Mitter and Mr. Chakravarti with him) for the infant defendant.—This is a suit for partition of a joint estate. Has anything been done in the previous proceedings which would bar the infant from applying for accounts to be taken? He is entitled to an account. Has that right been waived? No account has yet been taken and the matters of which the infant defendant complain are not legitimate family expenses. This is a joint family; see paras. 25, 27 and 1 of the plaint.

The fact of its being a partition suit gives the Court the right to order accounts.—Mayne's Hindu Law, paras. 262 and 429. *Chuckun Lall Singh v. Poran Chunder Singh*, (1868) 9 W. R., 483; *Abhay Chandra Roy Chowdhry v. Pyari Mohan Guho*, (1870) 5 B. L. R., 347. The order of the 13th September 1893 shows there is a right to an account; see proceedings in the reference in Indra Chunder Singh's suit. The infant's claim is not barred by the orders made in Indra Chunder Singh's suit. There has never been any division of any money in the Receiver's hands.

The account the infant defendant claims is:—(a) An account of whether the surplus profits were properly credited to his share, and (b) an account of the arrears collected by the executors as trustees for him under the award.

The *Advocate-General* (Mr. J. T. Woodroffe) in reply.—The accounts of a joint family are only for the purpose of ascertaining the accounts of shares of the co-partners—*Sookhmoy Chandra Das v. Monohari Das*, (1885) I. L. R., 11 Cal., 684 (693); L. R., 12 I. A., 103 (111); *Abhay Chundra Roy Chowdhry v. Pyari Mohan Guho*, (1870) 5 B. L. R., 347.

The family were joint in worship; that is the last link that is snapped in a joint Hindu family. They were joint in estate, and they were living separately.

The Court of Wards collected the whole income of the pro-[1018]perty as a joint matter. The second account cannot be taken, there is no allegation with

regard to it. As the first account, it cannot be gone into now owing to the order in Indra Chunder Singh's suit. The case has been referred to arbitration.—Simpson on Infants, 491. A Receiver was appointed in 1889, and Sir Romesh Chunder Mitter was appointed, and made his award in 1889. The joint property of the family has been divided, and if now this claim were granted it would involve the re-opening of the whole matter. Sir Romesh Chunder Mitter made all the necessary accounts, and it is submitted they cannot be gone into now. The infant must raise the defence, if he wishes to rely on it.

Cur adv. vult.

1900, AUGUST 6. **Stanley, J.**—(After stating the facts as above) continued.

Under these circumstances an application was made to me with a view to having such proceedings directed as might be necessary for the purpose of terminating the suit, and upon the hearing of that application I came to the conclusion that the only course open to the parties in the event of their not agreeing to the appointment of another arbitrator to determine all matters left undetermined was to proceed with the suit according to the ordinary course of the Court, and I accordingly directed that the suit should proceed and that any of the defendants, if so advised, should be at liberty to file written statements. Written statements have been filed by two of the parties, *viz.*, the Administrator General of Bengal who now represents the deceased Indra Chunder Singh and on the part also of Srish Chunder Singh.

Upon the case coming on for hearing a question was raised as to what matters remained to be determined in the action. There was some suggestion that evidence might be necessary, but I do not understand that the parties want this, and this question was discussed at considerable length.

The question, therefore, for my determination is what matters remain to be determined in this action for the purpose of having this suit wound up. So far as regards the matters in difference which have been determined by the arbitrators they have been embodied in decretal orders and cannot be disturbed. [1019] It is admitted that portions of the joint property of the parties have not yet been partitioned. As to this there must be a reference to the Registrar to enquire and report what property, moveable and immoveable, remains joint and unpartitioned and a division and partition of this property must be directed so far as the same is partible. There is no dispute as to this.

The defendant, Srish Chunder Singh, who is an infant, has through his guardian filed a written statement and in this statement he alleges that no account has been taken of the dealings with the joint property and of the rents and profits thereof on behalf of the estate of his father, the late Grish Chunder Singh, who died on the 13th of October 1877, and he claims that such account should now be taken up to the time when a Receiver was appointed. Mr. Hill on behalf of the infant asks that an account should be taken to ascertain whether the minor's share of the surplus profits were credited to the minor, and also an account of the arrears of rent of the zemindaries.

The learned *Advocate-General*, on behalf of the plaintiff, contends that the minor could not have asked for the account which he now seeks when the matter was referred to arbitration inasmuch as in the plaint the plaintiff only asked for accounts of the dealings with his property and of the rents issues and profits thereof respectively from the month of August 1888, and that it would be to enlarge the scope of the suit to direct such accounts for any period anterior to the month of August 1888.

It appears to me that it is not an enlargement of the scope of a partition suit to direct the accounts to be taken from a date anterior to a day named by the plaintiff for the taking of the accounts in his prayer for relief. The suit is a suit for partition and it is the duty of the Court in such a suit to ascertain and determine what are the proper accounts to be taken and over what period the accounts should extend. If the date from which the accounts were to be directed depended on the wish of the plaintiff, as expressed in the prayer of his plaint, the result would be that any party to such an action who might be aggrieved by the fixing of an improper date for the taking of accounts, would be obliged to institute a fresh suit in order to have the accounts taken for any anterior period of time.

[1020] Then it is argued that the accounts have been waived and abandoned. It appears that Indra Chunder Singh on the 17th of March 1886 filed a plaint in which the other co-owners of the Pykeparah Estates were the defendants. In this plaint the plaintiff alleged acts of waste and misappropriation of the family property on the part of Protap Chunder Singh, who was then dead, and he prayed for an account of the property which belonged to the family at the time of the death of Issur Chunder Singh, and also for an account of the dealings of Protap Chunder Singh with the property, and the rents, issues and profits thereof, and for a partition. He also among other things sought that in taking the account all sums and property which might be found to have been wasted, lost or misappropriated by Protap Chunder Singh might be debited to his share in the property. This action was withdrawn by leave of the Court on the 16th of January 1888 on terms that the plaintiff should be at liberty to institute a fresh suit only for partition of the joint properties, but not for any account of the estate or for any accumulations of income thereof for any period prior to the date of the withdrawal, the plaintiff having abandoned his claim in respect thereof. Before this order was made it had been referred to the Registrar to inquire and report whether or not the settlement was for the benefit of the minor Srish Chunder Singh and the Registrar had reported that it was for his benefit. This order is now relied upon as in effect a settlement of the accounts now sought for and as precluding the minor from seeking for an account anterior to the 16th January 1888.

I do not so construe the order. The sole matter which was referred to the Registrar for his report was whether or not it was for the benefit of the minor that a suit brought against him and others for the accounts, the nature of which I have stated, should be withdrawn. For the purpose of his report upon the reference it was not necessary, I think, that the Registrar should inquire whether the minor had any cross claims against the plaintiff or to consider such claims, if any, before he could arrive at a conclusion upon the reference. He was not asked to consider whether it was for the benefit of the minor that there should be a mutual abandonment of claims to account. Such a reference would have entailed much larger considerations than the matter which was referred and obviously could not be properly dealt with by the [1021] Registrar without a consideration of materials, which from his report were evidently not placed before him or considered.

I am of opinion for these reasons that the order of the 16th of January 1888 is no bar to the minor's present claim.

But then it is said that the whole course of the proceedings in this action and the conduct of the parties show that there was a waiver and abandonment by all parties including the infant of their right to an account. I fail to see how this contention can prevail in a case where a minor is concerned unless

such abandonment had been sanctioned and approved of by the Court as being beneficial to the minor. No such sanction is here alleged or proved. It was merely found by the Court that it would be for the benefit of the minor, that an arbitrator should be appointed for the purpose of determining all matters in difference in the suit between the parties and of effecting a partition of the joint estate, with the exception of such properties as in his opinion might be debutter or otherwise not liable to be partitioned.

But does the course and conduct of the arbitrators show that the claim to accounts was abandoned? I think not. One of the matters which Counsel for the minor now asks for is an account of the arrears of rent of the zemindaries. In his award of the 24th of June 1893, I observe that the arbitrator, Sir Romesh Chunder Mitter, deals with arrears of rent. In this award he directs, among other things, that the properties mentioned in the schedule annexed thereto, marked D, together with all arrears of rent due in respect thereof up to the date of the decree to be made on the award should be allotted to Indra Chunder Singh, and that Indra Chunder Singh should hold so much of the arrears as he should actually realize, or might with ordinary diligence realize, in trust for himself to the extent of eight annas, for Sarat Chunder Singh to the extent of three annas, for the representatives of Poorno Chunder Singh to the extent of three annas and for Srish Chunder Singh, that is, the minor, to the extent of two annas. He deals in the same manner with the properties allotted to Sarat Chunder Singh, the representative of Poorno Chunder Singh, Srish Chunder Singh and Puddomokhee Dasi, respectively. It thus appears that the arrears of rent were by this award dealt with.

[1022] This award was remitted to Sir Romesh Chunder Mitter by an order of the 7th of August 1893, and with respect to the properties and arrears allotted to Srish Chunder Singh the award was modified and these properties and arrears were by an award of the 19th of September 1893 allotted to Indra Chunder Singh and Sarat Chunder Singh, the surviving executor of the will of Grish Chunder Singh, in trust as to the arrears for Srish Chunder Singh to the extent of two annas, and as to the balance upon trust for the other beneficiaries as thereby provided.

It may be open to doubt whether this was a satisfactory way of dealing with the arrears, but it is not open to the parties now to question the award. It has been confirmed and a decretal order passed upon it. So far as regards the arrears of rent of the partitioned properties the respective parties to whom the properties were respectively allotted must account for the arrears as trustees in an independent proceeding. Such an account cannot be obtained in this action. It may be that if a separate action were brought upon the award and the decree therein that action and the present action might be consolidated or dealt with at the same time. I do not see how the account of the arrears of the properties which have been already partitioned can be taken in this action unless it be by consent of all parties. It is unfortunate, I think, that the accounts were not disposed of by the arbitrators. The omission to deal with them will no doubt occasion a great expenditure of time and money.

As regards the properties which remain unpartitioned the minor is, in my opinion, clearly entitled to the accounts which he seeks. I shall direct accordingly.

As regards the income of the estate of Grish Chunder Singh, and of the minor Srish Chunder Singh of the joint properties no account has, up to the present time, been taken in this action. In my opinion he, Srish Chunder Singh, is clearly entitled to an account of the income up to the date of appointment of a Receiver and from the date of the death of his father Grish Chunder Singh in 1877.

Mr. Mitter.—Proceedings before the arbitrators by agreement of the parties to be taken as evidence in this case.

Stanley, J.—Very well, the plaint in Indra Chunder Singh's [1023] suit and the order of the 16th of January 1888 to be treated as evidence. I shall refer it to the Registrar to take these two accounts.

I direct that such Commissioner as the parties agree upon be appointed and in default as the Court shall direct. All costs to be reserved. And then as to the costs of partition the usual rule, they shall be borne by the parties in proportion to their shares.

Infant's costs to be paid by the Receiver out of his share. Costs on scale 2 as this has been a hearing.

Mr. O'Kinealy asked the Court to decide the nature of the account to be taken and referred to the case of *Dnmodardas Maneklal v. Uttamram Maneklal*, I. L. R., 17 Bom., 271 (280), as deciding what books, etc., it was necessary to produce when a joint family account is ordered.

Stanley, J.—There being no objection on the part of the minor I direct that the books of account of the estate, so far as the same have been made up, shall be accepted as a statement of facts of the accounting parties, and in so far as the same have not been made up, the accounting parties shall file written statements of facts; and the minor defendant is to be at liberty to take such objections to the accounts appearing in the books of account filed by the accounting parties as he may be advised.

Attorneys for the Plaintiff: Messrs. *G. C. Chunder & Co.*

Attorneys for the Defendants: Messrs. *Morgan & Co.*, Messrs. *Remfry & Son*, and Mr. *N. C. Bose*.

R. G. M.

[27 Cal. 1023]
CIVIL REFERENCE.

The 15th May, and 7th and 30th June, and 26th July, 1899.

PRESENT :

MR. JUSTICE GHOSE, MR. JUSTICE RAMPINI AND MR. JUSTICE HILL.

In the matter of Purna Chunder Pal, Mukhtar.*

Legal Practitioners' Act (XVIII of 1879 as amended by Act XI of 1896), ss. 13, cl. (f), 14—Professional misconduct—Misconduct prior to enrolment as legal practitioner—"Any other reasonable cause"—Ejusdem generis—Permanent defect of character—"Taking Instructions" and "Misconduct"—Authority of Subordinate Courts to proceed under s. 14 of the Legal Practitioners' Act—Departmental enquiry—Legal proof.

One P, a Sub-Inspector of Police, was committed for trial to the Court of Sessions on charges of bribery, forgery, and other offences, but was [1024] acquitted. He was, however, departmentally found guilty of misconduct and was dismissed from the Government service in 1891. In 1893, suppressing the fact of his dismissal, he obtained a certificate of good moral character from a pleader, and on the strength of that certificate gained admission to the mukhtarship examination which he passed, and was enrolled as a mukhtar and was practising as such for six years in the District of Bhagalpore apparently without any fault. The Sessions Judge of Bhagalpore having made a reference under s. 14 of the Legal Practitioners' Act recommending his dismissal for the aforesaid misconduct,

Held, per GHOSE, J.—The misconduct on the part of P being antecedent to his passing the mukhtarship examination and enrolment as a mukhtar, and consequently having no relation to his business as mukhtar, it is extremely doubtful whether such misconduct is "any other reasonable cause" for his suspension or dismissal within the meaning of s. 13, cl. (f) of the Legal Practitioners' Act. And it is also doubtful whether when he applied to the pleader for a certificate, P was bound to relate to him the past history of his life.

Per RAMPINI, J.—The misconduct of P constituted a "reasonable cause" for his dismissal under the provisions of s. 13, cl. (f) of the Legal Practitioners' Act.

Per HILL, J. (agreeing with RAMPINI, J.)—S. 13, cl. (f) of the Legal Practitioners' Act was intended to cover misconduct other than professional misconduct and to embrace all causes other than those previously enumerated in the section, which might reasonably be regarded as disqualifying a person for retaining the office of pleader or mukhtar. *In the matter of Gholab Khan* (1871) 7 B. L. R., 179, relied on. An offence committed prior to admission may be made the foundation of proceedings under s. 13 of the Legal Practitioners' Act provided it is of such a nature as to imply a permanent defect of character of a disqualifying kind.

Held per HILL, J. (agreeing with GHOSE, J.)—That P, while a Sub-Inspector of Police, having been "departmentally," and not on legal proof, found guilty of misconduct, no case either for suspension or dismissal from the profession of mukhtar has been made out against him.* *In the matter of the petition of Ahmeenooddeen Ahmed*, (1866) 6 W. R., Mis., 5, referred to.

Held, further, per HILL, J., that "taking instructions" and "misconduct" referred to in s. 14 of the Legal Practitioners' Act relate to clauses (a) and (b) respectively of s. 13 of the Act, and it is only in such cases that a Subordinate Court is authorized to proceed under s. 14. The charges in the present case not falling under either of these heads the proceedings were bad. The inquiry ought to have been held by the High Court. *In the matter of Southehal Krishna Rao*, (1887) I. L. R., 15 Cal., 152; L. R. 14 I. A. 154, referred to.

* Civil Reference. No. 2 of 1899, made by C. M. W. Brett, Esq., Sessions Judge of Bhagalpore, dated February 2, 1899.

[1025] THIS was a reference made by the Sessions Judge of Bhagalpore under s. 14 of the Legal Practitioners' Act (XVIII of 1879 as amended by Act XI of 1896), on a report of the Sub-Divisional Magistrate of Madhipura, recommending the dismissal for misconduct of Purna Chunder Pal, a mukhtar, practising in the Court of the Sub-Divisional Magistrate, in the following terms :—

"It appears that Babu Purna Chunder Pal was enrolled as mukhtar on the 17th July 1893 after passing the mukhtarship examination in 1893. Prior to the examination he produced, as required by the rules of the High Court, a certificate of good moral character which was given to him by a pleader, Babu Mon Mohun Ghose, and on the strength of that certificate he was admitted to the examination.

"It has been satisfactorily proved and is admitted by Purna Chunder Pal that, prior to 1891, he was serving as a Sub-Inspector in the Bengal Police force, and that on the 11th September 1891 when serving as a Sub-Inspector in the District of Durbhanga he was dismissed from Government service for misconduct. That fact he appears to have concealed from the pleader Babu Mon Mohun Ghose, and by such concealment he obtained from the pleader a certificate which otherwise would not have been given; and by means of such certificate he obtained admission to the examination.

"The Magistrate appears to hold that this conduct on the part of Babu Purna Chunder Pal amounted to grossly improper conduct in discharge of his professional duty (s. 13 of the Legal Practitioners' Act, clause G). As however Babu Purna Chunder Pal had not then been enrolled as a mukhtar his conduct cannot, I think, be taken as falling under that clause.

"In my opinion, however, his case properly falls under clause (f) of the same section. It appears from a reference to the proceedings ending in his dismissal that he was dismissed for conniving, with a Court Sub-Inspector at Durbhanga, at systematic frauds in connection with release on improper security of convicted bad characters. It is true that he had previously been acquitted by the Sessions Court after being committed for trial on charges of forgery and other offences which he was said to have committed in those transactions, but this fact was considered at the time of his dismissal. Babu Purna Chunder Pal by concealment of his previous history obtained the certificate of good moral character from Babu Mon Mohun Ghose while that pleader was practising at Alipur, and by means of the certificate, thus improperly obtained, he gained admission to the examination. Without such a certificate he could not have presented himself for examination. This conduct on his part appears to me to be a reasonable cause for the dismissal of Babu Purna Chunder Pal from his employment as a mukhtar.

[1026] "In the written defence which he submitted he did not appear to answer the charge before the Magistrate. Babu Purna Chunder Pal said that Babu Mon Mohun Ghose was aware of his dismissal from Government service when he gave the certificate. This, however, the pleader has denied."

On the 15th of May 1899 the reference came on for hearing before GHOSE and RAMPINI, JJ.

Babu *Digamber Chatterjee* and Babu *Khetra Mohun Sen* for Purna Chunder Pal.—The provisions of ss. 13 and 14 of the Legal Practitioners' Act have no application to this case. The words "any other reasonable cause" in s. 13, cl. (f) of the Act mean any other misconduct of the nature referred to in that section, *i.e.*, professional misconduct while practising as a pleader or a mukhtar. The certificates granted to him by the officer before whom he has practised, since he passed as a mukhtar in 1893, show that he has not in any way misconducted himself while practising his profession.

Cur. adv. vult.

1899, JUNE 7. The following judgments were delivered by the Court (GHOSE and RAMPINI, JJ.) that first heard the case :—

Ghose, J.—This is a reference by the Sessions Judge of Bhagalpore under s. 14 of the Legal Practitioners' Act (XVIII of 1879 as amended by Act XI of

1896), recommending that a certain mukhtar, Purna Chunder Pal, who had been practising as a mukhtar in the Criminal Courts, should be dismissed. The grounds for this recommendation are that the mukhtar was dismissed in 1891 from the office of Sub-Inspector of Police, which he then held, for gross misconduct; and that in 1893, he procured a certificate of good moral character from a pleader, Babu Mon Mohun Ghose, by concealing his previous history, and by means of that certificate, thus improperly obtained, he gained admission to the examination for mukhtars. The Sessions Judge considers that this is "any other reasonable cause" within the meaning of s. 13, cl. (f) of the Legal Practitioners' Act, for which the mukhtar is liable to be dismissed.

The questions which arise upon this reference are: (1) whether the reason assigned is "any other reasonable cause" within the meaning of s. 13; (2) whether in the circumstances of the case, Purna Chunder Pal should either be dismissed or suspended.

[1027] Section 13 of the Legal Practitioners' Act, as it originally stood, before certain amendments were made in 1896 which I shall presently notice, was as follows (omitting the last portion which is not material in the present case): "The High Court may also, after such inquiry as it thinks fit, suspend or dismiss any pleader holding a certificate as aforesaid who takes instructions in any case except from the party on whose behalf he is retained, or a private servant of such party, or some person who is the recognized agent of such party within the meaning of the Code of Civil Procedure, or any pleader or mukhtar holding a certificate as aforesaid who is guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, or for any other reasonable cause."

It will be observed that the words "or for any other reasonable cause" immediately followed the expression "grossly improper conduct in the discharge of his professional duty."

Section 36 of the Act laid down touting for legal business, and payment of any gratification for procuring such business, to be offences, for which the offender was liable to imprisonment or fine. It ran as follows: Whoever commits any of the following offences:—(a) Solicits or receives from any legal practitioner any gratification in consideration of procuring or having procured his employment in any legal business; (b) retains any gratification out of remuneration paid or delivered or agreed to be paid or delivered to any legal practitioner for such employment; (c) being a legal practitioner, tenders, gives or consents to the retention of any gratification for procuring or having procured the employment in any legal business of himself or any other legal practitioner, shall be punished with simple imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees or with both."

In 1896, the Legislature thought it proper to amend the Act. By Act XI of that year, they, among some other matters, rescinded s. 36 and incorporated in s. 13 the several cases of misconduct in a pleader or mukhtar, as falling within that section. Section 13 now runs as follows: "The High Court may also after such inquiry as it thinks fit, suspend or dismiss any pleader or mukhtar holding a certificate as aforesaid; (a) who takes instructions in any case except from the party on whose behalf he is retained, or some **[1028]** person who is the recognized agent of such party within the meaning of the Code of Civil Procedure, of some servant, relative or friend authorized by the party to give such instruction, or (b) who is guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, or (c) who tenders, gives or consents to the retention, out of any fee paid or payable to him for his services of any

gratification for procuring or having procured the employment in any legal business of himself or any other pleader or mukhtar, or (d) who, directly, or indirectly, procures or attempts to procure the employment of himself as such pleader or mukhtar through or by the intervention of, any person to whom any remuneration for obtaining such employment had been given by him, or agreed or promised to be so given, or (e) who accepts any employment in any legal business through a person who has been proclaimed as a tout under s. 36, or (f) for any other reasonable cause." The Legislature evidently considered that touting for any legal business or the payment of any gratification for such business on the part of a pleader or mukhtar, ought not to be regarded as an offence; and that it should be regarded as professional misconduct or unprofessional conduct.

It will be observed that while amending the Act of 1879 the Legislature did not think it necessary to amend s. 14, which lays down the procedure to be followed in case of misconduct in a practitioner in a Subordinate Court; and the words in the first paragraph of that section are "or with any such misconduct as aforesaid"—referring to the misconduct as laid down in s. 13.

The question here arises whether, when the Legislature in s. 13, after enumerating several particular cases of professional misconduct or unprofessional conduct, use the words "or for any other reasonable cause," they use them as meaning something *ejusdem generis* with the cases of professional misconduct or unprofessional conduct, as specifically enumerated therein—or is it intended to apply to any improper act, be it either professional or otherwise, and occurring before or after the enrolment of a person as a pleader or mukhtar.

In construing the words of a statute, the rule that is ordinarily followed is that when general words follow particular words of [1029] the same nature, they are presumed to be restricted to the same genus as those words, unless it can be seen from an inspection of the scope of the legislation that the general words were meant in a wider sense (see Maxwell on the Interpretation of Statutes, pp. 469, 475).

The misconduct on the part of Purna Chunder Pal was antecedent to his passing the mukhtarship examination and enrolment as a mukhtar, and consequently had no relation to his business as a mukhtar. And it seems to me that, if the said rule of construction be followed, it is extremely doubtful whether such misconduct is "any other reasonable cause" within the meaning of s. 13. I doubt whether the Legislature ever intended to provide for a case like this. The man, according to the rules framed by the High Court, appeared at the examination, passed the examination, and was duly enrolled. The fact of his having procured a certificate of good moral character by concealing his previous history, and thereby having obtained admission to the examination may be a ground for cancelling his examination, and the certificate granted to him, and thereby disqualifying him from practising as a mukhtar (see s. 10); but I doubt whether he could be for this reason dismissed or suspended under s. 13 of the Act.

As bearing upon this question, I desire to refer to s. 12 of the Act, which lays down that a pleader or mukhtar "holding a certificate issued under s. 7 may be suspended or dismissed, if he is convicted of any criminal offence implying a defect of character which unfits him to be a pleader or mukhtar as the case may be." This could only refer to a conviction subsequent to his enrolment as a pleader or mukhtar.

I observe that the marginal note to s. 13 of the Act, as published in the Official Gazette, is "suspension and dismissal of pleaders and mukhtars."

guilty of unprofessional conduct ; " and to s. 14, it is " procedure when charge of unprofessional conduct is brought in subordinate Court or Revenue Office." It is however doubtful whether in construing the meaning of the sections, we could refer to such marginal notes. And I therefore base my judgment upon the words of the sections themselves.

Passing then to the question whether Purna Chunder Pal [1030] obtained a certificate of good moral character from the pleader, Babu Mon Mohun Ghose, by concealment of the fact of his having been dismissed for misconduct, I observe that there is a conflict between the statement of the mukhtar, and that of the pleader. Purna Chunder was dismissed in 1891, and the certificate was obtained in 1893. The mukhtar says in his verified petition that the fact of his dismissal was known at the time to the pleader, while the pleader denies such knowledge. If the pleader knew Purna Chunder so well in 1893 as to be able to certify that he was a person of good moral character, it may well be presumed that he was aware of his having been in Government service, and dismissed from that service. I am not, however, prepared to say that the pleader has spoken an untruth ; but the question is whether it is so certain that what the mukhtar says is absolutely untrue. I should say that, to my mind, it is not so certain. In the next place, I doubt whether, when he applied to the pleader for a certificate, Purna Chunder Pal was bound to relate to him the past history of his life. If the certificate of the pleader be accepted, he knew him well (for he was able to certify that Purna Chunder bore a good moral character)—and, in this circumstance, a relation to him of Purna Chunder's past history was unnecessary. For these reasons, I am unable to hold that Purna Chunder obtained the certificate in question by concealing the fact of his dismissal for misconduct.

I now turn to the circumstances under which Purna Chunder was dismissed. Referring to the proceeding of the District Magistrate of Bhagalpore, dated the 12th August 1891, it appears that Purna Chunder held the office of Sub-Inspector of Police, and was committed to the Sessions for trial on several counts, viz., " taking illegal gratification in respect of an official act, abetment of forgery, abetment of fabrication of false evidence and forgery "—offences which it was stated he had committed in connection with his office as Sub-Inspector. He was tried and acquitted, because the Sessions Judge found that the evidence for the prosecution was " altogether tainted and unreliable." The District Magistrate, however, held a departmental inquiry and " going back to the initial stage of the proceedings," and proceeding upon certain facts which he thought " were accepted as proved by the [1031] Judge," he was of opinion that " the whole of the facts point so conclusively to connivances at systematic fraud in manipulating the documents designed to procure the release of bad characters on the part of Purna Chunder Pal," and that therefore he was unfit to be retained in Government service. Unfortunately we have not before us the judgment of the Sessions Judge, the whole of the record having been destroyed. We are not therefore in a position to say whether the District Magistrate took a correct view of the facts as were to be gathered from the judgment of the Sessions Judge. So far, however, as the proceeding of the Magistrate itself is concerned, it strikes me that he found Purna Chunder Pal guilty of very nearly (though not perhaps precisely) the same offences for which he was tried and acquitted by the Sessions Judge.

The fact, however, remains that the man was departmentally found guilty of misconduct and dismissed, and he is not now in a position to contradict the facts upon which the order of the Magistrate was based.

We have, on the other hand, the fact that since his passing the mukhtarship examination, Purna Chunder Pal has been practising for about six years as a mukhtar, apparently without any fault; and the learned Vakil who appeared before us, read to us certificates granted to him by certain officers before whom he has practised. And it seems to me that it would be rather hard to dismiss him altogether. I should think that, if his misconduct antecedent to his passing the mukhtarship examination comes within the scope of s. 13 of the Legal Practitioners' Act, suspension from practice for a year would perhaps meet the requirements of the case.

There being however a difference of opinion between my learned colleague (RAMPINI, J.) and myself in this reference, the matter will have to be referred to a third Judge. Let the case be placed before the Chief Justice for orders.

Rampini, J.—This is a reference by the District Judge of Bhagalpore under the Legal Practitioners' Act. He recommends that a mukhtar, named Purna Chunder Pal, be dismissed on the following grounds: (1) that in 1891 he was dismissed from the Police for misconduct and gazetted out of the service; [1032] (2) that in 1893, when he desired to appear at the mukhtarship examination, he suppressed the fact of his having been dismissed from the Police and so induced a pleader of Alipore, Babu Mon Mohun Ghose, to give him a certificate of good moral character which the pleader would not have done if he had known that Purna Chunder Pal had been dismissed from the Police, and without which certificate Purna Chunder Pal could not have appeared at the examination.

About the facts of the case, there can be no doubt. Purna Chunder Pal was formerly Court Sub-Inspector at Durbhanga. He was tried by the Sessions Judge for taking bribes, and for forgery and abetment of the fabrication of false evidence, but was acquitted. A departmental inquiry was then held into his conduct in respect of other matters, and he was dismissed for systematic fraud in manipulating documents calculated to procure the release of bad characters on improper security. His dismissal was notified in the *Police Gazette*. In 1893 he went to Babu Mon Mohun Ghose and induced him to give him a certificate of good character. Babu Mon Mohun Ghose distinctly says, Purna Chunder Pal never told him anything of his past history, that he was not aware of it and would never have given him the certificate, if he had known of it.

I therefore consider that Purna Chunder Pal should be dismissed as a mukhtar under s. 13, Act XVIII of 1879. Under cl. (f) of that section we have power to dismiss a mukhtar "for any other reasonable cause." The misconduct of the mukhtar in the above two particulars in my opinion constitutes a reasonable cause for his dismissal.

The pleader who appears for Purna Chunder Pal argues that the words "any other reasonable cause" in s. 13, cl. (f) mean any other misconduct of the nature referred to in the section, that is, misconduct as a mukhtar. But I see no reason to think that the words are limited in this manner. On the contrary, in my opinion they are intended to give this Court the widest discretion in the matter.

The pleader for the appellant further urges that Purna Chunder Pal has not misconducted himself since he passed as [1033] a mukhtar in 1893. That may be so, but I consider that his past history shows him to be unfit to be a mukhtar. I would, therefore, dismiss him under s. 13 as recommended by the Judge.

[The Judges (GHOSE and RAMPINI, JJ.) having differed in opinion the case was referred to HILL, J., under s. 575 of the Code of Civil Procedure.]

1899, JUNE 30. *Mr. Pugh, Babu Digamber Chatterjee and Babu Khettra Mohun Sen*, for Purna Chunder Pal, at the re-hearing of the case.

Cur. add. vult.

1899, JULY 26. **Hill, J.**—This case has been referred to me for my opinion by order of the Chief Justice under s. 575 read with s. 647 of the Code of Civil Procedure, the learned Judges composing the Bench which dealt with it having differed in opinion.

The case arises out of proceedings taken against a mukhtar, named Purna Chunder Pal, under s. 14 of the Legal Practitioners' Act, 1879, as amended by Act XI of 1896, and the learned Judges have differed, not only as to the applicability of the Act under the circumstances of the case, but also as to the punishment which, if it be taken that the Act is applicable, ought to be inflicted upon the mukhtar, Mr. Justice RAMPINI being of opinion that the Act applies and that the proper punishment is dismissal, while Mr. Justice GHOSH considers that the Act is not applicable, and that, even if it were applicable (as I have his authority for saying), the case is not one which should be visited with any punishment.

It appears from such materials as are to be found in the records of the case that Purna Chunder Pal was at one time a member of the Bengal Police, and that from the year 1883 to 1891, he filled the office of Court Sub-Inspector. In the latter year, suspicion fell upon him of complicity in certain frauds in connection with bad livelihood cases, and, after an inquiry by the Magistrate of the District, he was suspended on the 18th May 1891 and committed for trial to the Court of Sessions. The records of this trial have been destroyed, but the nature [1034] of the charges preferred against him, as well as the result of the trial, may be gathered from a proceeding held departmentally on the 12th August 1891 by the Magistrate of the district. From this it would appear that the charges embraced the taking of an illegal gratification in respect of an official act, abetment of forgery, and abetment of the fabrication of false evidence and forgery. It also appears that Purna Chunder Pal was acquitted on all these charges, the Sessions Judge considering "the evidence of the approver and the witnesses brought forward by him altogether tainted and unreliable." These are the words of the District Magistrate and, as he had at the time the judgment of the Sessions Judge before him, they no doubt accurately represent the view of the evidence taken by the latter. The acquittal of Purna Chunder Pal took place on the 23rd June 1891 and, in the following August, the Magistrate of the District, as his departmental superior, took up the question whether he should be reinstated in office or dismissed, there being in his opinion no middle course, and that was the occasion of the proceeding referred to above. So far as appears, no notice was given to Purna Chunder Pal of this proceeding, nor does it appear that he was called upon for any explanation or was heard in his own defence by the Magistrate during the course of the proceeding, and the materials upon which the Magistrate formed his opinion, so far as can be gathered from his order, were the judgment of the Sessions Judge and "the facts which the inquiry disclosed," by which I understand the inquiry held by the Magistrate prior to the committal of Purna Chunder Pal to the Court of Sessions for trial. With these materials before him, the Magistrate came to the conclusion that Purna Chunder Pal had been guilty of conduct which rendered him unfit to be retained in the service of Government, and he accordingly dismissed him from the Police. The order of dismissal is dated the 12th August 1891.

It hardly seems necessary to examine in much detail the grounds of the Magistrate's order. He believed, however, that Purna Chunder Pal had been

"mixed up with a systematic practice of obtaining the release of persons ordered to find security on bogus security or by false personation." This conclusion was founded on the following considerations, putting them generally. [1035] One Khuda Bux who had signed certain petitions in connection with the cases in question as the identifier of the petitioners had stated that he had so signed by the direction of Purna Chunder Pal and at his lodging. That a pleader of the Munsif's Court who admitted having written the petitions was a relative of Purna Chunder Pal and lived at his lodging at the time when the petitions were written. That this pleader had sprung into a regular practice in bad livelihood cases, a circumstance only to be rationally accounted for by the fact that he was a relation of the Court Sub-Inspector, and lastly, that this same pleader had twice "telegraphed to the Sub-Inspector to return," though at what particular time does not appear.

It may be here remarked that Khuda Bux was the "approver" whom the Sessions Judge had declined to believe on the trial of Purna Chunder Pal and with reference to whom the Magistrate in the introductory part of the order now under consideration observes:—"There is no doubt that Khuda Bux, who had an idea that his own safety depended on the conviction of the accused (Purna Chunder Pal), did tutor witnesses and introduce a quantity of matters as to the evidence for the prosecution which was clearly false."

Then the Magistrate goes on to comment on the case of one Maharaj Singh, who had been committed to the Court of Sessions but not yet tried. What the precise charge was in Maharaj Singh's case is not stated, but it appears that he had signed a petition in a security case signing his own name and the name of one Bechu Kaout, but the latter without authority. Maharaj Singh is said first to have confessed, then to have withdrawn his confession; and lastly, "after Khuda Bux had given his evidence," to have stated (under what circumstances however does not appear) that he had paid some money to the Court Sub-Inspector for procuring the release of bad characters, describing in detail how the sum was made up and stating further that "all the transactions took place at the Court Sub-Inspector's lodging." Then the Magistrate remarks that, whatever credence may be given to the statements of Maharaj Singh, there could be no doubt that the Court Sub-Inspector had a lively dread of what he might say if driven into a corner, because, when a warrant [1036] was issued and Maharaj Singh was arrested and committed to jail, the Court Sub-Inspector interested himself to get him released on bail to the extent of paying Rs. 40 to a mukhtar to stand security. Lastly, the Magistrate refers to certain petitions relating to the release of bad characters and the reinstatement of chowkidars written by the Munsif's Court pleader already mentioned and witnessed by one Gopal Panda, a peon attached to the Court Sub-Inspector's office and who lived with the Court Sub-Inspector in his private lodging. Whether there is anything incriminating about these petitions is, however, not stated.

In one of the concluding paragraphs of the order, the Magistrate goes on to express his sense of how unfortunate it was that all these facts had not been so placed before the Court of Session as to secure the conviction of Purna Chunder Pal, but he observes seemingly in extenuation,—"A Criminal Court cannot perhaps permit itself to act upon what we call moral conviction."

In 1893, Purna Chunder Pal having obtained a certificate of good character from a pleader named Mon Mohun Ghose presented himself for the mukhtarship examination which he passed, and he was duly admitted to practise as a mukhtar. He was afterwards enrolled in the District of Bhagalpore and practised in the Court of the Sub-Divisional Magistrate of Madhipura. From

the time of his admission down to the present he has apparently conducted himself with professional propriety and holds certificates of a satisfactory kind from Magistrates in whose Courts he has practised.

The present proceedings were initiated by the District Magistrate of Bhagalpore on the 23rd July 1898. It appears that he was then informed by the District Superintendent of Police of the antecedents of Purna Chunder Pal, and he thereupon charged him with misconduct under s. 13 of the Legal Practitioners' Act, and directed the Sub-Divisional Magistrate of Madhipura to try him. The charges preferred by the District Magistrate were twofold, namely, (1) that Purna Chunder Pal had committed misconduct by withholding from the District Judge (whose duty it is to satisfy himself of the sufficiency of the certificates of character presented by mukhtarship candidates) the fact of his having been dismissed from the Police, [1037] and (2) that he had, in fact, been dismissed from the Police, which latter fact the District Magistrate regarded as reasonable cause under s. 13, cl. (f) of the Legal Practitioners' Act, for his dismissal as a mukhtar. The District Magistrate, in forwarding the case to the Sub-Divisional Magistrate, directed him to "restrict the inquiry carefully to the matter of the charge."

As the result of the inquiry which followed, the Sub-Divisional Magistrate found that Purna Chunder Pal had withheld the fact of his dismissal from the Police both from Babu Mon Mohun Ghose, who had certified to his character, and from the District Judge and, further, that he had, in point of fact, been dismissed from the Police, and he recommended his dismissal.

The case was then referred through the usual channels to this Court with the result which has been already mentioned.

The first question which presents itself is, as it is formulated in the opinion of Mr. Justice GHOSE, whether the words of s. 13, cl. (f) of the Legal Practitioners' Act are used as meaning something *ejusdem generis* with the case of professional misconduct or unprofessional conduct as specifically enumerated in the section, or are they intended to apply to any improper act, be it either professional or otherwise, and occurring before or after the enrolment of a person as a pleader or mukhtar? In the opinion of Mr. Justice GHOSE, the more limited interpretation is the correct one, the improper act must be one of professional misconduct, and the application of the section must, therefore, be confined to misconduct occurring after admission as a pleader or mukhtar has taken place. Mr. Justice RAMPINI is of the contrary opinion. With every deference I venture to think that Mr. Justice GHOSE has perhaps pressed the *ejusdem generis* doctrine somewhat too far. Each of the clauses of s. 13 which precedes cl. (f) seems to me to be generically distinct from the rest, and to be exhaustive of its own genus, and, where this is so, I think the principle of *ejusdem generis* can hardly apply. In my judgment cl. (f) was intended to cover misconduct other than professional misconduct and to embrace all causes other than those previously enumerated in the section which might reasonably be regarded as disqualifying a person for retaining the office of pleader or mukhtar, and, in this view, [1038] I am, I think, supported by the case of *In the matter of Gholab Khan*, (1871) 7 B. L. R., 179, a case decided under the corresponding provisions of the "Pleaders, Mukhtars and Revenue Agents Act, 1865" (Act XX of 1865).

With respect to the further question whether cl. (f) was intended to apply to improper conduct occurring before admission, I feel greater doubt. If the act of misconduct be viewed apart from what it implies, it would be difficult perhaps to say that cl. (f) could apply to it if it took place prior to admission, but I think that s. 13 was intended to provide for causes disqualifying a person for

retaining the office of pleader or mukhtar, and that a moral defect of character may be one of such causes. It is on the ground of moral defect of character that the High Court is empowered to act under s. 12 when a conviction of a criminal offence has been had. If a person is proved to be morally unfit to be a pleader, it would seem to be not unreasonable that he should be dismissed from the office, at whatever time the moral defect may have had its origin or first disclosed itself, and in this sense I think that an offence committed prior to admission may be made the foundation of proceedings under s. 13, provided it is of such a nature as to imply a permanent defect of character of a disqualifying kind. If it were otherwise, there would be no machinery provided by the Act for the dismissal of a practitioner, however heinous a criminal he might be, if only his crime had been committed previous to his admission—a conclusion I should feel reluctant to admit unless there were no escape from it.

On these questions, therefore, I venture to think the view taken by Mr. Justice RAMPINI was the correct one.

Turning, however, to the merits of the case, I confess I am unable to find on the materials before me, justification for the dismissal or suspension of Purna Chunder Pal. It is important to bear in mind what precisely were the charges preferred against him and which he was called upon to answer. The first was that he concealed from the Judge the fact of his dismissal from the Police, and the second, the fact that he had been dismissed from the Police, and as has already been observed, the Sub-Divisional Magistrate was [1039] directed to confine his inquiry strictly to these charges. A copy of the letter, moreover, containing the District Magistrate's direction to this effect was served on Purna Chunder Pal for the purpose of informing him of the charges which he had to meet.

With respect to both these charges, the Sub-Divisional Magistrate has found against Purna Chunder Pal. As to the first, however, there is not an *iota* of evidence upon the record nor does the Magistrate state his reasons for his finding. Somewhat curiously the question whether Purna Chunder Pal had concealed his antecedents from the pleader who certified to his character was the only one to which the Magistrate really seems to have devoted his attention. But that question was not before him. The second charge was proved by the evidence of a Police-officer and was indeed admitted by Purna Chunder Pal, who suggested an explanation of his dismissal, which may be a sufficient or insufficient explanation; but, at all events, the Sub-Divisional Magistrate has expressed no opinion as to its merits; so that it comes to this that the first charge has been found to be established in the absence of all evidence in support of it, and the second charge has been established by evidence as well as by Purna Chunder Pal's own admission.

With respect to the first charge, I feel myself unable under the circumstances to affirm the recommendation of the Sub-Divisional Magistrate, and this charge must, in my judgment, be put out of view altogether. There are no materials upon the record to enable one to pronounce an opinion as to its truth or falsehood, and it seems to me, therefore, unnecessary to express any opinion on the question whether, if it had been properly established, it would have afforded reasonable cause for either the dismissal or suspension of Purna Chunder Pal.

The question, however, remains whether he ought to be dismissed or suspended in consequence simply of his dismissal from the Police, and this question ought, I think, to be answered in the negative.

Regarding this charge in its strictness and as it has been dealt with by the Magistrate who held the inquiry, it would be sufficient, I think, to justify that answer if one were to say that [1040] the reasons which would warrant a dismissal from the police might well fall far short of or differ from those which would warrant dismissal from the profession of mukhtar; and perhaps, in strict fairness to Purna Chunder Pal, one ought not to go behind the precise charge which was formulated against him, for he was not called upon to say anything one way or the other as to the correctness of the facts and inferences arrived at by the Magistrate who dismissed him, and on the strength of which his dismissal took place. But if one is at liberty to go behind the charge and to treat the offences found by the District Magistrate in his order of dismissal as if they constituted the subject-matter of the present charge, can it be justly said that they have now been established, as the Act requires, by evidence? or are we to accept as evidence, for the purpose of a proceeding which, it is to be remembered, involves the possibility of depriving a person belonging to a respectable profession of the means of gaining a living, the opinions of the head of a department formed without taking evidence in the presence of the person affected and without hearing him, and formed, moreover, in the teeth of the opinion to the contrary of the highest judicial tribunal of the district? For my own part I have no hesitation in answering these questions in the negative. I do not for a moment mean to suggest that the District Magistrate may not have been "departmentally" correct, in his action. One has, however, but to glance at the reasons assigned by him for his conclusions in order to estimate the value of the evidence on which he proceeded, and, in the present matter at all events, we have, I think, to deal with legal proof and not with the "moral convictions" of the Magistrate.

On this branch of the case, then, I agree with Mr. Justice GHOSE in thinking that no case either for dismissal or suspension has been made out against Purna Chunder Pal. I would only refer further to the judgment of the late Chief Justice, Sir BARNES PEACOCK, in the case of *In the matter of the petition of Ahmeenooddeen Ahmed*, (1866) 6 W. R., Mis., 5, a case in many respects resembling the present, in which the learned Chief Justice clearly indicates the principles which ought to govern such a proceeding as this. His [1041] remarks, I think, fully bear me out in the view of the matter which I have taken.

I wish, however, to add that what I have now said proceeds on the assumption that this Court is properly seized of the case—a matter as to which I entertain considerable doubt. S. 13 of the Legal Practitioners' Act authorizes the High Court, after such inquiry as it thinks fit, to suspend or dismiss a pleader or mukhtar for any of the causes specified in the section, but the power of Subordinate Courts is much more restricted. S. 14 deals with that power and provides that, if a pleader or mukhtar practising in any Subordinate Court is charged in such Court with "taking instructions as aforesaid" or "with any such misconduct as aforesaid," the presiding officer shall send him a copy of the charge and also a notice that, on a day to be appointed therein, such charge will be taken into consideration; and then follow directions as to the procedure to be adopted in the matter. The taking of instructions, and misconduct here referred to, relate to cls. (a) and (b) respectively of s. 13 [see *In the matter of Southekal Krishna Rao*, (1887) 1. L. R., 15 Cal., 152; L. R., 14 I. A., 154] and it is only in such cases that a Subordinate Court is authorized to proceed under s. 14. The charges in the present case do not fall under either of these heads, and it seems to me therefore, that the proceedings are bad. The inquiry ought, I think, to have been held by the High Court.

In the result I think that Purna Chunder Pal ought to be acquitted and it is so ordered.

B. D. B.

NOTES.

[The words 'other reasonable cause' have been given a wider interpretation than the rule of *ejusdem generis* would suggest:—(1902) 29 Cal., 890 F.B.; 19 M. L. J., 504; 20 M. L. J., 500; 6 N. L. R., 129; 26 Mad., 448. As regards the power of Subordinate Courts to hold an inquiry, see also (1906) 10 C. W. N., 1059; 4 C. L. J., 229; (1906) 29 All., 61.]

[27 Cal. 1041]
FULL BENCH.

The 4th and 9th June, 1900

PRESENT :

SIR FRANCIS W. MACLEAN, K.C.I.E., CHIEF JUSTICE,
MR. JUSTICE PRINSEP, MR. JUSTICE GHOSE,
MR. JUSTICE RAMPINI, AND MR. JUSTICE HANDLEY.

Nemai Chatteraj
versus
Queen-Empress.*

*Kidnapping—Kidnapping from lawful guardianship—Completion of such offence—Whether a continuous offence—Constructive possession—
Penal Code Act (XLV of 1860), ss. 360, 361 and 363.*

[1042] *J*, a minor girl, was taken away from her husband's house to the house of *R* and there kept for two days. Then one *M* came and took her away to his own house and kept her there for twenty days, and subsequently clandestinely removed her to the house of the petitioner, and from that house the petitioner and *M* took her through different places to Calcutta. The petitioner was convicted under s. 363 of the Penal Code for kidnapping a girl under 16 years of age from the lawful guardianship of her husband. *Held*, (by the majority of the FULL BENCH) that the taking away out of the guardianship of the husband was complete before the petitioner joined the principal offenders in taking the girl to Calcutta, and that the petitioner, therefore, could not be convicted under s. 363 of the Penal Code.

Held, further, that the offence of kidnapping from lawful guardianship is complete when the minor is actually taken from lawful guardianship; it is not an offence continuing so long as she is kept out of such guardianship.

Per RAMPINI, J.—The offence of kidnapping under s. 363 is not necessarily or in all cases complete as soon as the minor is removed from the house of the guardian; when the act of kidnapping is complete is a question of fact to be determined according to the circumstances of each case.

ON the 20th July 1899 the complainant missed his wife named Johura, aged about 11 or 12 years, from his house. It appeared that the girl was taken from her husband's house to the house of a man called Rambandhu a mile away. Here she was kept for two days and then one Mohendro came and fetched her

*Full Bench Reference on Rule No. 123 of 1900, against the order of K. N. Roy, Esq., the Officiating Sessions Judge of Bankura, dated the 18th December 1899.

away to his house where she was kept for twenty days. One night she was removed from there and taken to the house of the petitioner, Nemaï Chatteraj, eight miles away from that of Mohendro. Nemaï and Mohendro then took her by stages to Calcutta. Here they met a man Surji who took them to the house of Lukshi, a prostitute, who let rooms. The girl was palmed off as a relative of both Mohendro and Nemaï, and her name was given as Shoshi. The girl was found crying by a lodger, Giribala, and she then stated that her real name was Johura, and that she had been brought down on the pretence of bathing in the sacred Ganges; that she had been kept confined by Mohendro; and that she was married, and was not related to the two men, who now wanted her to live with a Babu. Upon hearing this story Lukshi and the male lodgers of the house took steps to prevent Mohendro and Nemaï from having access to her. Mohendro then lodged a complaint at the Kumartoli Thana in Calcutta to the effect that a girl of his village, aged about 12, had come to Calcutta with him and Nemaï, in order to go to a relation of hers, and that [1043] Lukshi had detained her. The Police went to the house and the girl repeated her story to them. This led to the arrest of Mohendro and Nemaï. The two accused and the girl were taken before the Calcutta Magistrate, who directed the transfer of the case to Bankura. The accused were convicted on the 29th of September 1899 by the Deputy Magistrate of Bankura under s. 363 of the Penal Code of the offence of having kidnapped a minor girl from lawful guardianship, and sentenced each of them to two years' rigorous imprisonment.

The accused appealed to the Sessions Judge of Bankura, who affirmed the conviction, but reduced the sentence. A rule was granted by the High Court against the decision of the Sessions Judge. The rule came on for hearing before PRINSEP and STANLEY, JJ., on the 3rd of April 1900, who made the following REFERENCE TO THE FULL BENCH :—

"Nemaï Chatteraj has been convicted under s. 363, Penal Code, of kidnapping Johura, the wife of Gopal Singh, and aged 11 or 12 years of age, from the lawful guardianship of her husband. There is no evidence that he was a party to the taking away of this girl under false pretences that she was being taken to her mother; but there is evidence that while she was being taken to Calcutta for the purposes of making her lead the life of a prostitute Nemaï joined in promoting this purpose, and was one of those who took her to Calcutta. She was obviously a minor, which from her appearance must have been known to him, and there is evidence which we believe that he falsely represented that she was his sister. The question arises whether he can properly be convicted under s. 363, Penal Code, of kidnapping from lawful guardianship, or whether, that offence being completed when she left the house and guardianship of her husband, he cannot under any circumstances be convicted of that offence.

The reported cases on this subject are conflicting. In *Rakhal Nikari v. Queen-Empress*, (1897) 2 C. W. N., 81, the learned Judges seem to have held that the offence "was complete when the girl was actually kidnapped" (see *per* GHOSE, J., p. 82), and it would appear that they therefore considered only whether, on evidence that the [1044] prisoner as in this case merely promoted the object of the kidnapping, he could properly be convicted of abetment of that offence; and the learned Judges (GHOSE and TREVELYAN, JJ., RAMPINI, J., dissenting,) held that the prisoner could not properly be convicted of abetment, such abetment being after the commission of the offence. In *Reg. v. Samia Kaundan*, (1876) 1 L. R., 1 Mad., 173, where the prisoner had been convicted under somewhat similar circumstances of abetment of kidnapping, the convic-

tion was affirmed on the ground "so long as the process of taking the minor out of the keeping of his lawful guardian continued, the offence of kidnapping might be abetted." "This case, we may observe, was not before the learned Judges who decided *Rakhai Nikari v. Queen-Empress*, (1897) 2 C. W. N., 81. But it was disapproved in *Queen-Empress v. Ram Dei* (1896) I. L. R., 18 All., 350, no reasons being specifically given for this opinion, and it would seem that a similar opinion was held by the learned Judges in *Queen-Empress v. Ram Sundar*, (1896) I. L. R., 19 All., 109. We are inclined to agree with the view of s. 363 taken in *Reg. v. Samia Kaundan*, (1876) I. L. R., 1 Mad., 173, but in this conflict of opinion we feel bound to refer the matter to a Full Bench. On receipt of an answer to this reference we propose to deal with the case on its merits."

1900, JUNE 4. Babu Digamber Chatterji (with him Babu Khetter Mohan Sen) for the petitioner :—There is no evidence on the record of any conspiracy on the part of the petitioner which led to the kidnapping of the girl, nor did he have anything to do with the taking away of the girl from the house of her guardian, and it was not till she had been kept twenty-two days away from her guardian that she was brought to the house of the petitioner, who then accompanied the party to Calcutta. I would, therefore, submit that the petitioner cannot be convicted under s. 363 of the Penal Code. The case of *Reg. v. Samia Kaundan*, (1876) I. L. R., 1 Mad., 173, is distinguishable. Section 360 of the Penal Code deals with the offence of kidnapping out of British India, s. 361 with kidnapping from lawful guardianship, and s. 363 provides a punishment for both those offences. *Reg. v. Samia Kaundan*, (1876) I. L. R., 1 Mad., 173, was a case of abetting the kidnapping of a minor out of British India [1045] and the offence was not completed, but was continuous until the minor had left the shores of British India, so that there could be abetment; the kidnapping under s. 360 was not made out. That case, however, was not argued at the bar, and has not been followed in *Queen-Empress v. Ram Dei*, (1896) I. L. R., 18 All., 350, and *Queen-Empress v. Ram Sundar*, (1896) I. L. R., 19 All., 109. In *Rakhai Nikari v. Queen-Empress*, (1897) 2 C. W. N., 81, the judgments of all the three Judges are in the petitioner's favour, although the question raised here did not arise in that case. The girl, I submit, was out of the custody of her lawful guardian, her husband, either when she was taken to Rambandhu's house or else when she was taken to Mohondro's house. It is alleged that the girl was taken away for the purpose of selling her in marriage or for prostitution; there is however no reference in s. 361 to the destination of the minor; therefore I submit that the taking out of the keeping can be completed before the intention for which she was taken was carried out. If completion of intention was necessary the Legislature would have provided for it in s. 363.

Babu Srisht Chunder Chowdhry for the Crown.—The word "takes," in s. 361 of the Penal Code, is used in the sense of "removing" and that implies a continuous act. If the continuity is broken the Court must consider if the continuity is stopped by the breakage. Kidnapping is only limited by law to the violation of the guardian's right. So long as the girl had a mind to return to her husband he would, I submit, be in constructive possession of her. It is not necessary that the guardian should be in actual possession. *Reg. v. Mycock*, (1871) 12 Cox., 28; *Reg. v. Prince*, (1875) L.R., 2 Cr. Cas. Res., 154 (168); *Queen v. Oozeerun*, (1867) 7 W. R., Cr., 98. The taking or removal is a continuous act and if it culminates in an offence it is not completed until that offence is committed. The whole of the removal should be taken as one act, and therefore if any one joined at any time before the removal had been completed he would be guilty under s. 363. In this case [1046] until the

intention with which she was taken to Calcutta had been carried out the offence was continuous.

Cur. adv. vult.

1900, JUNE 9th. The following judgments were delivered by the Full Bench—

Maulean, C.J.—The question submitted to us by the learned Judges who referred this case is “whether the petitioner can be properly convicted under s. 363 of the Penal Code of kidnapping from lawful guardianship, or whether, that offence *being completed* when she left the house and guardianship of her husband, he cannot under any circumstances be convicted of that offence.”

The question perhaps is not very happily worded, for if the offence of kidnapping were *completed* when the girl left the house, which means I suppose when,—to follow the language of s. 361,—she was taken or enticed out of the keeping of her lawful guardian without his consent, and if, as is conceded, the accused had nothing to do with the actual taking or enticing out of the keeping of the lawful guardian, and did not appear upon the scene until some three weeks after the actual taking or enticing away, and that what he then did,—according to the finding in the reference,—was to join in taking her to Calcutta for the purpose of making her lead the life of a prostitute, I fail to see how the accused could be properly convicted under s. 363. But though the question has been so framed, the case has been argued before us upon the footing that the taking or enticing was not completed when the accused joined in taking the girl to Calcutta, and that the taking and enticing out of the keeping of the guardian was a continuous act, and that the accused took part in that continuous act, and therefore is liable to conviction under the section I have mentioned. I will deal with the case on this footing.

Now, what is the definition of kidnapping, for we are dealing only with the question of whether the accused can be properly convicted of that offence? Section 361 thus defines it, “Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such [1047] guardian, is said to kidnap such minor or person from lawful guardianship.”

The question, in each case, must be whether the accused did or did not actually take or entice the boy or girl, as the case may be, out of the keeping of the lawful guardian without his consent. The question is one of fact, and must in each case be decided upon the particular evidence of each particular case. The section says “taking” or “enticing;” it does not say a word about “detaining” out of the keeping of the guardian, and when the Legislature means “detaining” it says so, as in s. 498. Upon the facts found in the reference, I do not see how the accused can be said to have taken or enticed the girl out of the keeping of her guardian: the act of taking was completed when the girl was actually taken out of the keeping of her guardian, and in this apparently, the accused had no part. He had nothing to do with the matter until three weeks later. The act of taking is not, in the proper sense of the term, a continuous act: when once the boy or girl has been actually taken out of the keeping, the act is a completed one. If continuous, it would be difficult to say when the continuous taking ceased: it could only be when the boy or girl was actually restored to the keeping of the guardian. But this would constitute not the act of “taking” but an act of “detaining.”

If for instance, I have a watch which I keep in my pocket, and some light-fingered, but not too honest, personage takes that watch out of my pocket, the moment he has actually abstracted that watch he has taken it out of my keeping.

but it would be a strange thing to say that if one month afterwards, some light-fingered friend of his joins him in taking this watch to a pawnbroker, the latter personage can properly be said to have taken the watch out of my keeping. He had nothing to do with the taking. No doubt in the case I have put of a watch, the act, if dishonestly done, amounts to stealing: in the case of a minor taken from the keeping of a lawful guardian it is called kidnapping.

With regard to the suggestion that, when the accused joined in the journey to Calcutta, the girl was still in the constructive keeping of her husband, there is nothing in the English cases cited which go that length. I do not see how she can be properly said to be within his constructive keeping, when she was taken from his actual keeping some three weeks previously.

[1048] I propose to deal very shortly with the cases cited. The case of *Reg. v. Samia Kaundan*, (1876) 1 L. R., 1 Mad., 173, was a case of kidnapping out of British India, and as, when the accused intervened, the boy had not been actually taken out of British India, the process of "taking" was regarded as still going on, or continuing, and as the accused took part in it, it was held that his case was within the section. That case does not clash with the view I have expressed above, whilst the cases in the Allahabad High Court referred to in the reference tend to support it.

I do not regard the case of *Rakhali Nikari v. Queen-Empress*, (1897) 2 C. W. N., 81, as an authority one way or the other, for the point now under discussion was not then raised: though there is, of course, the dictum of Mr. Justice GHOSE which accords with my own view. In my opinion then, the question submitted to us ought to be answered in the negative.

I am disposed to agree with Mr. Justice RAMPINI in doubting whether any case for a Full Bench reference properly arose in this case: but, be that as it may, as the matter has been referred, I think we were bound to express our opinion upon it.

With this expression of opinion I would remit the case to the Bench taking the criminal cases, which I think we have every power to do under Rule 5 of Chapter 5 of the Appellate Rules and Orders.

Prinsep, J.—This case was referred to a Full Bench by the Bench dealing with the criminal business of the High Court, consisting of myself and STANLEY, J. The facts showing the point referred are clearly stated to be whether the appellant who did not join in the kidnapping but joined in promoting the purpose of the kidnapping from lawful guardianship can be convicted of that offence or whether that offence being completed when the woman left the house and guardianship of her husband, the appellant cannot, under any circumstances, be convicted of that offence.

The reason for the reference to the Full Bench is stated to be that the judgment of this Court in *Rakhali Nikari v. Queen-Empress*, (1897) 2 C. W. N., 81, is in this respect opposed to that of the Madras High Court in *Reg. v. Samia Kaundan*, (1876) 1 L. R., 1 Mad., 173, in which we were inclined to agree.*

[1049] It was with some surprise that I heard the pleader who pressed us to follow *Rakhali Nikari v. Queen-Empress*, (1897) 2 C. W. N., 81, contend before this Full Bench that that case was not in point, and that it did not decide the matter referred, for on that ground obviously this reference should not have been made. As some of my learned colleagues have also expressed that opinion, it becomes my duty to state why STANLEY, J., and I referred this case.

The point under consideration in that case was whether the appellant under findings of fact exactly similar to those in the present case could properly

be convicted of abetment; and it was held by TREVELYAN and GHOSE, JJ., RAMPINI, J., dissenting, that he could not. The case started on the assumption that the kidnapping "was complete" "when the girl was kidnapped." Those are the words of GHOSE, J., and it was because that opinion had been expressed without dissent on the part of the other Judges that we held that this view of the law was contrary to that expressed in *Reg. v. Samia Kaundar*, (1876) I. L. R., 1 Mad., 173. We noticed that that case had not been before those learned Judges, but still we considered, and I maintain justly considered, that the point now referred had been considered and determined. The learned Judges, TREVELYAN and GHOSE, JJ., who decided that case held that the prisoner was an accessory after the fact and not an abettor and that therefore he was not liable to punishment. If they had not held that the offence had been completed and that it was not continuing they could not have come to that conclusion. I therefore still venture to think that there were ample grounds for this conclusion on our part. If it is now otherwise held I can only say that we were misled by the terms of the judgment of GHOSE, J., by the result of that case, and by the arguments of the pleader who has now taken the very unusual course of expressing the contrary view of that judgment.

I am satisfied with the opinion expressed by my Lord the Chief Justice that the offence of kidnapping from lawful guardianship is complete when the woman is actually taken from lawful guardianship, and that it is not an offence continuing so long as she is kept out of such guardianship.

[1050] The result in this case will be that the appellant must be acquitted of that offence though he afterwards actively promoted the purpose of the kidnapping, and that unless he can properly be convicted under s. 368, Penal Code, he will be released. I venture to think that the law is defective in such a result.

The case will now be returned to the Criminal Bench for final determination whether on the evidence the appellant can be properly convicted of any other offence.

Ghose, J.—The petitioner, Nemai Chatteraj, has been convicted under s. 363 of the Indian Penal Code, *i.e.*, for kidnapping a girl under 16 years of age from the lawful guardianship of her husband.

It is stated by the learned Judges, who have referred this case to the Full Bench, in their referring order, that there is no evidence that the petitioner "was a party to the taking away of the girl under false pretences that she was being taken to her mother, but there is evidence that while she was being taken to Calcutta for the purpose of making her lead the life of a prostitute Nemai joined in promoting this purpose and was one of those who took her to Calcutta:" or in other words, as I understand it, that there is no evidence that he took any part, either directly or indirectly, in the taking or enticing away the girl, but that he afterwards helped the person or persons who had enticed her away, in removing her to Calcutta for the purpose of prostitution. Section 361 of the Indian Penal Code, which defines the offence of kidnapping, says: "Whoever takes or entices any minor under 14 years of age if a male or under 16 years of age if a female or any person of unsound mind out of the keeping of the lawful guardian of such minor or person of unsound mind without the consent of such guardian is said to kidnap such minor or person from lawful guardianship."

It will be observed that the essence of the offence consists in *taking or enticing away*, and *not* in *keeping* the minor after such taking or enticement; so that the offence would be committed when the minor is actually taken or enticed away from the keeping of the guardian. I do not mean here to say that

the offence is necessarily committed when the minor steps out of the threshold [1051] of the guardian; for her absence may be temporary, and may be capable of explanation. But so soon as she is fairly out of the control of her guardian, the offence, I take it, is committed, and I should think it is then complete.

The question, however, that has been put before the Full Bench is, whether in this case the petitioner "can properly be convicted under s. 363 of the Penal Code, of kidnapping from lawful guardianship, or whether, that offence being completed when she left the house and guardianship of her husband, he cannot under any circumstances be convicted of that offence." This question, as I understand it, presupposes that the girl did leave the guardianship of her husband before the petitioner had anything to do with her; and if that be so, the only matter for consideration is whether the act of the petitioner in joining the principal offender or offenders subsequent to the kidnapping of the girl in promoting the purpose of taking her to Calcutta, makes him guilty of the offence of kidnapping, as defined in s. 361.

The learned Judges in referring this case to the Full Bench have relied upon the decision of the Madras High Court in the case of *Reg. v. Samia Kaundan*, (1876) I. L. R., 1 Mad. 173, where that Court in the course of their judgment, observed: "So long as the process of taking the minor out of the keeping of the lawful guardian continued, the offence of kidnapping might be abetted."

This proposition taken by itself would seem to involve the question, when was the taking away out of the keeping of the lawful guardian complete. According to the view of facts in this case, as accepted by the learned Judges who have referred this case, the taking away out of the guardianship of the husband was complete before the petitioner joined the principal offenders in taking the girl to Calcutta; and in this view of the matter it follows that he could not have abetted the offence of kidnapping the girl.

Referring, however, to the judgment of the Magistrate which gives the facts upon which the question before the Full Bench arises—facts which have not been contested by the learned Vakil for the Crown—what occurred was this: one Rajani who appears [1052] to be son of the priest of the husband's family, promised the girl that he would take her to her mother; that one evening she was taken away not however to her mother's house, but to the house of Rajani's father Rambundhu, and here she was kept for two days and then one Mohendro came and took her away to his own house and kept her there for 20 days, and subsequently clandestinely removed her to the house of the petitioner, and from that house the petitioner and Mohendro took her through different places to Calcutta. And we have been informed by the learned Vakil for the petitioner that it appears on the record that Rambundhu's house is a mile distant from the house of the girl's husband, and Nemai's house is about 8 miles from Mohendro's.

Upon these facts, when was the taking away complete? It may be taken to have been complete either when she was taken to Rambundhu's house or to Mohendro's house. At any rate "the process of taking the minor out of the keeping" of the guardian was complete when she was taken from Rambundhu's to Mohendro's house, and there kept for 20 days together, without being allowed to go back to her husband's or to her mother's. If the taking away was then complete, I fail to see how, subsequent thereto, the petitioner could have committed the offence of kidnapping, when the girl was taken over to his house. What the petitioner did when she was taken by Mohendro to his house had evidently no connection with, or bearing upon the matter of taking or enticing

away from the guardianship of her husband. His acts and conduct might possibly bring him within the provisions of s. 368 of the Indian Penal Code, but he cannot be brought within s. 363, unless there is some evidence (and it is conceded there is none) showing that it was at his instigation that the girl was kidnapped.

The case of *Reg. v. Samia Kaundan*, (1876) I. L. R., 1 Mad., 173, was one where the offence was an attempt at kidnapping a boy out of British India as defined in s. 360. The accused knowing that the boy had left home without the consent of his parents, at the instigation of another person, undertook to carry him to Kandy in Ceylon, and had proceeded on the way as far as Trichinopoly where [1053] he was arrested. The learned Judges of the Madras High Court held that the offence committed by the accused was one which fell under s. 363, read with s. 116, of the Indian Penal Code. It will be observed that s. 363 refers to two distinct offences: (1) kidnapping a person from British India without that person's consent or of some person legally authorized to consent on his behalf as defined in s. 360, and (2) kidnapping out of lawful guardianship as defined in s. 361; and that being so, the conclusion arrived at by the Madras High Court would seem to me to be correct. The learned Judges, however, in the course of their judgment made certain observations to which I have already referred. If these observations are read by the light of the facts of the case and the conclusion arrived at by the Court, there is no ground to take exception thereto; for until the minor was taken out of British India, the attempt to commit the offence was being made. It was thus a continuous offence, and the offender was therefore liable to be punished for the first of the two offences mentioned in s. 363, read with s. 116, Indian Penal Code. But suppose the minor was actually taken out of British India, could it be said that any person, who joined the kidnapper in Ceylon and removed the boy from place to place or kept him in his possession, would be guilty of the offence of kidnapping out of British India, as defined in s. 360? I apprehend not; for the offence was complete when the minor was put out of British India. The whole question in a case like this is, when was the offence complete. If however the observation of the learned Judges in the Madras case be taken as applicable not only to a case of kidnapping out of British India, as defined in s. 360, but also to the case of kidnapping, as defined in s. 361, I am bound to say that I am unable to agree with them; and I observe that the case has been dissented from in two cases in Allahabad, *Queen-Empress v. Ram Dei*, (1896) I. L. R., 18 All., 350, and *Queen-Empress v. Ram Sundar*, (1896) I. L. R., 19 All., 109.

It has, however, been argued by the learned Vakil for the Crown, that the girl must be taken to have been in the constructive possession of her guardian even after she was removed from [1054] Mohendro's house to the petitioner's house, and that such constructive possession continued until the purpose which the principal offender had in view was completed, namely, until she was taken to Calcutta, and therefore the offence was a continuing one. I need hardly observe that the facts accepted by the learned Judges who referred this case to the Full Bench are contradictory to this argument; and I cannot understand how the girl could possibly be under the constructive keeping of her guardian, when she was put out of his control by the acts and conduct of the principal offender, Mohendro, or Rajani, whoever he may be. Another argument that has been advanced on behalf of the Crown is that the intention of the girl to return, or not to return, to her husband is an element in the consideration of the question whether she was not, notwithstanding her removal from her husband's house, in his constructive possession. I cannot find any warrant for this construction;

and I need hardly say that s. 361 of the Indian Penal Code does not contemplate such considerations.

If the offence, notwithstanding the removal of the girl from the keeping of the guardian, be regarded as continuous, how long is this to continue? It might, according to the contention on the other side, continue for years together, and any person who might have anything to do with the minor during this long interval of time in keeping her out of the way, or in his possession, would be punishable under s. 363; and this could not obviously be maintained.

Reference was also made, by way of analogy, to the offence of breach of trust; and it has been said that in the same way that such an offence is continuous, the offence of kidnapping should also be taken to be continuous. But it will be observed, referring to the definition of criminal breach of trust (s. 405), the offence is committed by the misappropriation, conversion, or disposal of the property by the person who has the custody thereof; and assuming that the retention of the property, after such conversion would make the offence continuous (which may be doubted) the argument could not apply to any third person, to whom the offender might make over the property after conversion unless he abetted the commission of the offence itself.

[1055] Before I conclude I have one word to say about the case of *Rakhal Nikari v. Queen-Empress*, (1897) 2 C. W. N., 81, referred to in the referring order. The question that was argued at the bar in that case was whether the acts and conduct of the petitioner, subsequent to the enticement of the girl out of the keeping of her lawful guardian, were such as would be sufficient to shew that he instigated the said enticement, and thereby committed the offence of abetment of kidnapping under s. 363. That was the question upon which RAMPINI, J., and I disagreed, and which was eventually settled by the judgment of TREVELYAN, J. In that case, the proposition, which I thought to be well understood, that the offence of kidnapping was complete when the girl was enticed away, was not questioned, and so both TREVELYAN, J., and myself in the course of our respective judgments remarked, and I had no doubt, that the offence was complete when the girl was actually kidnapped. And that is the view which we ought now to adopt.

For these reasons I agree with the learned Chief Justice in holding that the petitioner is not guilty of the offence of kidnapping under s. 363, Indian Penal Code.

Rampini, J.—This is a reference under Rule 5, Chapter V of the rules of this Court, in which the question propounded is whether an accused person who, after a minor had been removed from the house of her lawful guardian, joined in taking her to Calcutta for the purpose of making her there lead the life of a prostitute, "can be convicted under s. 363, Penal Code, of kidnapping from lawful guardianship, or whether, that offence being completed when she left the house and guardianship of her husband, he cannot under any circumstances be convicted of that offence."

The learned Judges who make this reference point out that in the case of *Reg. v. Samia Kaundan*, (1876) I. L. R., 1 Mad., 173, it has been said that "so long as the process of taking the minor out of keeping of his lawful guardian is continued, the offence of kidnapping may be abetted." On the other hand, the Allahabad High Court in *Queen-Empress v. Ram Dei*, (1896) I. L. R., 18 All., 350, has disapproved of this ruling, and in *Queen-Empress v. Ram Sundar*, (1896) I. L. R., 19 All., 109, has apparently been of a [1056] contrary opinion. Further, in the case of *Rakhal Nikari v. Queen-*

Empress, (1897) 2 C. W. N., 81, decided by this Court, it has been said by GHOSE, J., that the offence of kidnapping is complete when the minor is actually kidnapped.

I would say in the first place, that I feel doubts as to whether this reference has been regularly made. Rule 1 of Chapter V of the Rules of this Court prescribes that a Division Bench is at liberty to refer a case to a Full Bench whenever it differs upon a point of law from another Division Bench of this Court. But the remark of GHOSE, J., above cited, appears to me to be the opinion of an individual Judge. TREVELYAN, J., though he may have held this opinion, did not express it in so many words, and I, too, who was a party to the decision of that case, expressed no such opinion. Moreover, even if TREVELYAN, J., did join GHOSE, J., in expressing such an opinion, it was an *obiter dictum*; for the question when the offence of kidnapping is complete was never decided in that case. It could not be decided, for it was never raised or argued, at least before GHOSE, J., and myself. It therefore seems to me that there is no decision of any Bench of this Court from which the Judges who referred this case could differ. There are no doubt conflicting decisions of the Madras and Allahabad Courts on the subject, but these do not appear to me to justify a reference.

But if it be necessary for me to answer the question which forms the subject of this reference, then I would say that I do not think that the offence of kidnapping under s. 363 is necessarily or in all cases complete as soon as the minor is removed from the house of the guardian. It may or may not be complete at this time. When the act of kidnapping is complete it would appear to me to be a question of fact to be determined according to the circumstances of each case. In this case whether the conviction under s. 363, Penal Code, of the applicant for revision can be upheld, will depend upon whether, when he joined in promoting the purpose of the other accused, the minor was or was not completely beyond the control of her lawful guardian, which is a question of fact. If she was so beyond his control the conviction of the applicant is without doubt bad. But I cannot consider that she would necessarily be beyond his control, or that [1057] the offence of kidnapping her must be complete, as soon as she was removed from or left his house. In short, the words "taking or enticing a minor out of the keeping of the lawful guardian of such minor" in s. 361 should, I think, be interpreted in a somewhat elastic manner, very much in accordance with the English law on the subject as laid down in the cases of *Reg. v. Robb*, (1864) 4 F. & F., 59; *Reg. v. Robins*, (1844) 1 C. & K., 456, and *Reg. v. Mankletow*, (1853) Dears. C. C., 159. In the first of these cases, it has been held that it is not necessary for a conviction of kidnapping that the prisoner should be present, when the minor quits its house with the intention of abandoning it. In the second, the defendant was convicted under the statute, though all he had done was at the minor's request to place a ladder under a window by which she descended to him. In the third case, a girl left her house alone by a preconcerted arrangement with the prisoner and went to a place appointed, where she was met by him and they then went off together. The prisoner was nevertheless convicted of kidnapping. The provisions of s. 363, Penal Code, should, in my opinion, be similarly interpreted and a person may, I think, be properly convicted of kidnapping from lawful guardianship, though he may not take part in the actual removal of the minor from the guardian's house, though the minor may come to him of his or her own accord, and though the acts which render him amenable to the provisions of s. 363, Penal Code, are committed subsequently to that event, but before the minor is completely beyond the direct or constructive keeping of the guardian.

I say nothing with regard to the facts of the present case, or as to the sufficiency or otherwise of the evidence for the conviction of the applicant, for that evidence has not been laid before us; and I understand the case is to be remitted to the referring Judges for disposal.

Handley, J.—The question referred to the Full Bench is “whether Nemaï Chatteraj can be properly convicted under s. 363 of the Indian Penal Code of kidnapping one Johura, a minor, from the lawful guardianship of her husband Gopal Singh.”

[1058] The facts, as found by the Deputy Magistrate of Bankura who originally tried the case and admitted by the learned pleader, who appeared for the Crown, are, that Johura on or about the 20th July 1899 was taken by one Rajani to the house of his father, Rambandhu, a priest; she remained there for two days and then one Mohendro took her away to his house and kept her there for twenty days. At the end of that period, Mohendro, one night, removed her to the house of Nemaï Chatteraj. This is the first appearance of Nemaï Chatteraj on the scene, twenty-two days after the removal of Johura from her husband's house; there is no evidence whatever before us to connect Nemaï Chatteraj with Johura until twenty-two days after she had left or had been taken away from her husband's house. “Kidnapping from lawful guardianship” is defined in the Indian Penal Code as “taking or enticing away any minor out of the keeping of the lawful guardian of such minor without the consent of such guardian.” The words used are quite clear and explicit, “taking or enticing away.” There is no mention of “detaining.” Can it be said that a man takes or entices away a minor from the lawful guardianship of her husband when it is found on the evidence that his first connection with the minor is twenty-two days after she has left or has been taken away from her husband's house? It seems to me that the answer must be in the negative. My opinion on the question referred to us is that Nemaï Chatteraj cannot be convicted under s. 363 of the Indian Penal Code of kidnapping Johura from the lawful guardianship of her husband. I think it unnecessary for me to say more or to discuss the cases that have been cited before us as they have been fully dealt with in the judgments that have been already delivered.

D. S.

NOTES.

[Kidnapping is not a continuing offence, and there can be no abetment of it once the minor has been completely taken out of the keeping of the guardian :—(1900) 27 Cal., 1041; (1903) 26 All., 197; (1902) 26 Mad., 454; (1912) 18 I. C., 653 (Oudh); (1904) P. R., 13 Cr.; (1911) 9 I. C., 511 (Punjab).]

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Civil Procedure Code (Act XIV of 1882), ss. 2, 232, 244, cl. (c)—Civil Procedure Code Amendment Act (VII of 1888)—Application by transferee from legal representative of decree-holder—Question relating to execution, discharge, satisfaction or stay of execution of decree—Parties to suit—Legal Representative—Meaning of the terms "transferee" and "representative"—Decree—Administrator of estate. Any person who, at the time of the execution of a decree, is a transferee within the meaning of s. 232 of the Code of Civil Procedure is a representative of the decree-holder within the meaning of s. 244, cl. (c), of the Code; and the term *representatives* in that section includes subsequent transferees as well as those who purchased directly from the person who obtained the decree. An order of a Court executing a decree determining whether an alleged *transferee* from a decree-holder or from his legal representative is or is not the representative of the decree-holder within the meaning of s. 244, cl. (c) of the Code of Civil Procedure, is an order under that section and therefore a decree, and an appeal lies from such order. *Dwar Buxh Sircar v. Fatik Jali and Badri Narain v. Jai Kishen Das* followed.

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Order refusing to amend a clerical error in the form of probate—Probate and Administration Act (V of 1881), s. 86—Succession Act (X of 1865), s. 263—Exercise of power of High Court under s. 622 of the Civil Procedure Code, 1882, when there is no appeal. Where there was a clerical error in the form of probate granted, and the Judicial Commissioner refused to amend it on the ground that the probate

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was granted by his predecessor, it was held that though there was no appeal from such an order either under s. 86 of the Probate and Administration Act (V of 1881) or s. 263 of the Succession Act (X of 1865), yet the High Court might deal with the case under s. 522 of the Civil Procedure Code, and set aside the order. *Khetramoni Dasi v. Shyama Churn Kundu* followed.

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Misconduct of arbitrators—Application to have award set aside—Ground for setting aside award. On an application to have an award set aside by reason of misconduct on the part of the arbitrators, their action alleged was held not to amount to misconduct, and, therefore, the defendants were not entitled to have the award set aside.

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s. 19. *Possession of or control over arms or ammunition—Search, Legality of—Sanction to prosecute—Code of Criminal Procedure (Act V of 1898), ss. 55, 103 and 165—Arms Act (XI of 1878), ss. 20, 25, 29 and 30.* The license of the accused for the possession of firearms and ammunition was cancelled in August 1897. He was suspected of being in possession of arms after the cancellation of his license. On the 23rd of April 1899, the Assistant Magistrate of Purneah with a number of Police went to the house of the accused to search for arms. They surrounded it, arrested the accused, and then searched his house. The Police had no search warrants, nor was there anything to show upon what charge the accused was arrested. Two gun stocks, some ammunition and implements for reloading were discovered in the house. There was nothing to show that the sanction required by s. 29 of the Arms Act was given before proceedings were instituted against the accused. Accused was convicted and sentenced under ss. 19 and 20 of the Arms Act. Held, that the conviction under s. 20 was not sustainable, but that the accused must be taken to have had arms and ammunition as defined by the Arms Act within the meaning of sub-sec. (f) of s. 19 of that Act, and the conviction under that section must be confirmed. Held further that with respect to the question of whether or not any previous sanction had been given under s. 29 of the Arms Act, the Court was not unmindful of the suggestion that the charge in this case was, in the first instance, in respect of an alleged offence under s. 20 and not of one under s. 19; but that ss. 19 and 20 were so interwoven that it was difficult to see how an offence could be committed under the first paragraph of s. 20 unless an offence under one of the enumerated sub-sections in s. 19 had also been committed. It was not suggested that the charge here was an offence under the second paragraph of s. 20.

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Arrest—(continued.)

authority under which he is acting, but to hold that he is bound to do so before he can properly arrest and detain in custody such a person, so as to make the arrest and the detention lawful, would be to extend the law beyond what the Legislature has thought proper to declare it.

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Village chaukidar, whether a Police officer—Person unlawfully arrested by a private person and made over to village chaukidar—Rescue from custody of village chaukidar—Lawful custody—Penal Code (Act XLV of 1860), s. 225—Criminal Procedure Code (Act V of 1898), s. 59—Village Chaukidari Amendment Act (Bengal Act I of 1892), s. 13. S, who was alleged to have committed theft, was unlawfully arrested by a private person and made over to the custody of the village chaukidar. The theft was not committed in view of such private person. S was rescued from the custody of the village chaukidar by the accused. The accused were convicted under s. 225 of the Penal Code and sentenced each to two months' rigorous imprisonment. *Held*, that a village chaukidar cannot be properly regarded as a Police officer within the terms of s. 59 of the Code of Criminal Procedure, and that S, therefore was not in lawful custody at the time of his rescue. Conviction and sentence set aside.

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Warrant of arrest directed to Police officer—Endorsement of warrant by another Police officer to process-serving peons—Legality of such endorsement—Peons not Police officers—Arrest by peons—Rescue of persons arrested—Whether lawful arrest—Code of Criminal Procedure (Act V of 1898), ss. 68 and 79. A warrant of arrest was endorsed over to a Court Sub-Inspector for execution. The Court Sub-Inspector being away the Court Head Constable by an order in writing signed by himself endorsed this warrant over to two process-serving peons for execution. The peons arrested a number of men under the warrant, some of whom were forcibly rescued by the accused and other persons. The accused were convicted under various sections of the Penal Code of rescuing the persons arrested and obstructing the execution of the warrant of arrest. *Held*, that the endorsement of the warrant by the Court Head Constable to the peons did not make them competent to execute the warrant; and that even if the peons had been legally appointed, they could not have made the arrest, inasmuch as they were not Police officers within the terms of s. 79 of the Code of Criminal Procedure. The terms of s. 79 are express in this respect, and no other person except a Police officer is competent to execute a warrant of arrest under an endorsement from another Police officer.

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Assam Land and Revenue Regulation—

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ss. 65, 68, 70, sub-secs. (2), (3) and s. 71. *Act XI of 1859, s. 37—“Estate”—“Property”—Shikmi haziram rights.* A purchaser of a part of a permanently settled estate is entitled to the benefit of s. 71 of the Assam Land and Revenue Regulation, inasmuch as in s. 71 the words used are “property sold under s. 70,” and the property to which reference is made in s. 70 includes both an estate as well as a share in respect of which revenue has been separately apportioned. The object of s. 37, Act XI of 1859, is the same as that of s. 71, Regulation I of 1886. Those sections cannot be said to have different meanings, for if it were to be held that the incumbrance which could be set aside under s. 71 of the Regulation I of 1886 must be an incumbrance actively created by the previous holder, it would amount to this, that any acquiescence or laches, either wilful or arising from pure negligence on the part of the holder, by which the *taluk* or estate becomes incapable in the hands of the purchaser of yielding the Government revenue would be outside the scope of that section.

MAHOMED NASIM *v.* KASI NATH GHOSE

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Assessment of Tax—

See BENGAL MUNICIPAL ACT, s. 85.

Assets realized—

By sale “or otherwise” in execution. See EXECUTION OF DECREE.

Assignee of Decree—

See BENGAL TENANCY ACT, s. 148.

Assignee of Tenant—

Liability of. See LANDLORD AND TENANT.

Assignment—

Of part of impartible estate. See DECREE.

Of shares as partners. See PARTNERSHIP.

Association—

For purpose of habitually committing theft. See EVIDENCE IN CRIMINAL CASE.

Attachment—

See RECEIVER : SALE FOR ARREARS OF RENT. SMALL CAUSE COURTS (PRESIDENCY TOWNS) ACT.

Attachment before judgment, Effect of—Alienation during attachment—Civil Procedure Code (Act XIV of 1882), ss. 483, 484, 485, 486, 487, 488, 489, 490, 276. Any private alienation of a property attached before judgment, during the continuance of the attachment, is void as against all claims enforceable under the attachment. The effect of an attachment of a property under the Civil Procedure Code, whether made before or after decree, is the same, provided that in the former case a decree is made for the plaintiff at whose instance the attachment takes place. *Raj Chunder Roy v. Isser Chunder Roy* referred to.

GANU SINGH v. JANGI LAL XXVI 531

Before Judgment. See ATTACHMENT.

Subjects of attachment—Civil Procedure Code (XIV of 1882), s. 266—Meaning of the word "debt"—Attachment in execution of decree—Prohibitory order—Attachment of maintenance allowance. The word "debt" in s. 266 of the Civil Procedure Code means an actually existing debt, that is, a perfected and absolute debt, not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not happen. When, therefore, A is bound under a deed to pay to B a monthly maintenance allowance during the life-time of the latter, there cannot be a valid attachment of any portion of the allowance by a prohibitory order issued to A of a date anterior to the time when the same falls due to B.

HARIDAS ACHARJIA CHOWDHRY v. BARODA KISHORE ACHARJIA CHOWDHRY XXVII 36

Attempt to commit Offence—

Power of Appellate Court to alter charge or finding—Prejudice to the accused—Necessity for a retrial on the altered charge—Criminal Procedure Code (Act V of 1898), ss. 236, 237, 238 and 423. The accused gave his pleader a copy of a document which had been falsified by an interpolation being made in it for the purpose of its being used in the trial of his suit. *Held*, that he was guilty, not of an attempt to commit an offence under s. 471 of the Penal Code, but of the offence itself. If the prosecution establishes certain acts constituting an offence and the Court misapplies the law by charging and convicting an accused person for an offence other than that for which he should have been properly charged, and if, notwithstanding such error, the accused has by his defence endeavoured to meet the accusation of the commission of these acts, then the Appellate Court may alter the charge or finding and convict him for an offence which those acts properly constitute, provided the accused be not prejudiced by the alteration in the finding. Such an error is one of form rather than of substance, and the alteration by an Appellate Court of the charge or finding would not necessitate a retrial expressly on a charge of that offence.

LALA OJHA v. QUEEN-EMPRESS XXVI 863

Attestation—

See WILL.

Of bond. See TRANSFER OF PROPERTY ACT, s. 59.

Attorney—

Acting for both mortgagor and mortgagee. See MINOR.

Change of. See PRACTICE.

Right of, to taxed costs on change of attorney. See PRACTICE.

Attorney and Client—

Agreement as to costs between. See PRACTICE.

Attorney's Costs—

See PRACTICE.

Auction-purchaser—

See PARTIES: SECOND APPEAL.

Award—*Application to set aside.* See ARBITRATION.*Of arbitrators, Decree and settlement on.* See DECREE.*Of talukhdars.* See OUDH ESTATES ACT.*Order refusing to set aside.* See APPEAL.*Validity of.* See ARBITRATION.**Bad Character—***Evidence of.* See EVIDENCE.**Benami Transaction—**

See TITLE.

Benami purchase—Whether property was held benami for the claimant or was a gift to the holder—Evidence of ownership—Source of purchase-money. The claimant, having supplied the purchase money on the sale of a village in suit, took the transfer by sale deed in the name of the first defendant who remained in possession of it, receiving rents. The claim was for proprietary possession by the purchaser, on the ground that the property was held *benami* for him. The first Court decreed the claim. The Appellate Court reversed this decision. The first Court had attributed too much to the fact that the plaintiff had supplied the purchase-money— an important fact in most of the cases raising the question of *benami*, or not *benami* but not the only test of ownership. Here the source of that money was consistent with the claimant's having, as the defence alleged, intended to make a gift of the property to the holder of it, and the right inference from the fact was that it was not held *benami* for the claimant, but belonged to the defendant.

RAM NARAIN v. MUHAMMAD HADI ... XXVI

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Certified purchaser—Civil Procedure Code (Act XIV of 1882), s. 317—Sale in execution of a decree—Suit against heirs or mortgagee of the certified purchaser. Section 317 of the Civil Procedure Code is no bar to a suit against any person claiming through or under the certified purchaser, such as his heir or mortgagee. *Buhans Koonwar v. Lalla Buhoree Lal and Lokhee Narain Roy Chowdhry v. Kallypudho Bandopadhyay* referred to. *Raj Chunder Chuckerbutty v. Dina Nath Saha and Theyyavelan v. Kochan* followed.

DUKHADA SUNDARI DAS v. SRIMONTO JOARDAR ... XXVI

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Suit by real owner against benamidar—Colorable transaction in fraud of creditors—Fraudulent purpose given effect by claim successfully preferred by the benamidar. A suit does not lie for a declaration that a conveyance executed by the plaintiff is a *benami* and fictitious transaction, when the alleged transaction has been used to accomplish the fraudulent purpose for which it was intended. The fraudulent purpose is accomplished when the property conveyed being attached by a decree-holder, the *benamidar* is allowed to prefer a claim to it, and the claim is allowed by the Court.

BANKA BEHARY DASS v. RAJ KUMAR DASS ... XXVII

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Bengal Act—

VIII of 1865. See SALE FOR ARREARS OF RENT.

II of 1867. See GAMBLING ACT.

VII of 1868, ss. 2, 8; 8. See PUBLIC DEMANDS RECOVERY ACT.

VIII of 1869—

ss. 59, 64. See SALE FOR ARREARS OF RENT.

Effect of sale in execution under. See SALE FOR ARREARS OF RENT.

VII of 1876. See LAND REGISTRATION ACT.

VIII of 1876. See ESTATES PARTITION ACT.

I of 1879. See CHOTA NAGPORE LANDLORD AND TENANT PROCEDURE ACT.

IX of 1879. See COURT OF WARDS ACT.

VII of 1880. See PUBLIC DEMANDS RECOVERY ACT.

IX of 1880. See BENGAL CESS ACT.

III of 1884. See BENGAL MUNICIPAL ACT.

II of 1888. See CALCUTTA MUNICIPAL CONSOLIDATION ACT.

I of 1892. See VILLAGE CHAUKDARI AMENDMENT ACT.

IV of 1894. See BENGAL MUNICIPAL ACT, 1884.

Bengal Cess Act—

Bengal Act IX of 1880, s. 95. See EVIDENCE ACT, s. 32.

Bengal Municipal Act—

Bengal Act III of 1884—

ss. 85 cl. (a), 87, 114, 116. *Bengal Act IV of 1894 amending Bengal Act III of 1884—Municipal Taxation—Assessment—Appeal against assessment—Jurisdiction of Civil Court to set aside an assessment—“Circumstances and property within Municipality”—Capability and circumstances of the assessee—Specific Relief Act (I of 1877), ss. 42, 45.* An assessment of tax under s. 85 cl. (a) of the Bengal Municipal Act (III of 1884 as amended by Bengal Act IV of 1894) made in consideration of the assessee's “circumstances and property” (altogether or partly) outside the local limits of the Municipality is *ultra vires* and illegal; and the Civil Court has jurisdiction to set aside such an assessment. *Manessur Das v. The Collector and the Municipal Commissioners of Chupra* distinguished. *Navadip Chandra Pal v. Purnanand Saha* referred to.

KAMESHWAR PERSHAD *v.* THE CHAIRMAN OF THE BHABUA MUNICIPALITY XXVII

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ss. 155, 156. *Ferry, Meaning of—Boat plying for hire without license within prescribed limits of ferry—Right of ferryman to demand tolls.* The expression “a ferry” in the Bengal Municipal Act means the exclusive right to carry passengers across the stream from one bank to the other on payment of certain prescribed tolls. The object of s. 155 of that Act appears to be to prevent the crossing of passengers from one bank of the river to the opposite bank by a boat plying for hire without a license within the prescribed limits. *Semble*, therefore, that the mere crossing of the bar of a *khal* leading into the limits of a Municipal ferry would not constitute a breach of the Act. A ferryman has no authority to demand tolls from persons who are merely passengers in an unlicensed boat. The remedy against the person who keeps a ferry-boat without a license plying within the prescribed limits is provided by s. 156 of that Act.

GOVERNMENT OF BENGAL *v.* SENAYAT ALI XXVII

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ss. 224 ; 245, 246. See JURISDICTION OF CIVIL COURT.

Bengal N.-W.P. and Assam Civil Courts Act—

XII of 1887, s. 13. See JURISDICTION.

Bengal Tenancy Act—

VIII of 1885—

Ch. XIV. See SALE FOR ARREARS OF RENT.

s. 3, sub-sec. 5. See PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, CL. (8).

s. 5, sub-sec. 1. See LANDLORD AND TENANT.

s. 7. See ENHANCEMENT OF RENT.

s. 7, sub-sec. 3. See LANDLORD AND TENANT.

ss. 11, 12 and 13. *Sale of a tenure in execution of decree not for arrears of rent—Effect of non-payment of landlord's fee or the fee for service of notice of the sale on the landlord before the confirmation of sale.* Under s. 13 of the Bengal Tenancy Act, when a permanent tenure is sold in execution of a decree other than a decree for arrears of rent due in respect thereof, and the landlord's fee prescribed by s. 12 of the said Act is not paid before the confirmation of the sale, the sale is invalid.

BABAR ALI *v.* KRISHNAMANINI DASSI XXVI

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ss. 12 and 13. See BENGAL TENANCY ACT, s. 11.

ss. 15 and 16. *Arrears of rent, Suit for—Suit by a putnidar on the death of the last owner against the durputnidar, without complying with the provision of s. 15 of the Bengal Tenancy Act, whether maintainable—Holder of a tenure.* In a suit for arrears of rent for the years 1299 B.S. to Falgoun 1302 B.S. brought by putnidars on the death of the last owner on the 14th Aghran 1302 B.S., the defence of the *durputnidar* mainly was that the plaintiffs not having complied with the provisions of s. 15 of the Bengal Tenancy Act, the suit was not maintainable. *Held*, that as the plaintiffs did not claim the rent, which fell due during the lifetime of the last owner as the holder of the tenure, but claimed it either as the representatives of the holder of the tenure for the time being or as representatives of their father, the rent became an increment to the estate of the father, and therefore the suit was maintainable. *Nogendra Nath Bose v. Satadul Bashini Bose* referred to.

SHERIFF *v.* JOGEMAYA DASII XXVII

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ss. 15 and 16. *Whether the heir of an occupancy raiyat can claim recognition by the landlord on the death of his ancestor who was the recorded tenant.* An heir of

Bengal Tenancy Act—(continued.)**VIII of 1885—(continued.)**

- an occupancy raiyat can claim recognition by the landlord on the death of his ancestor who was the recorded tenant.
- ANANDA KUMAR NASKAR v. HARI DASS HALDAR ... XXVII 545
- s. 22. See CIVIL PROCEDURE CODE, SS. 244, 266 AND 318.
- s. 22. *Occupancy, non-transferable right of—Effect of purchase of non-transferable right of occupancy by a co-sharer landlord.* Section 22 of the Bengal Tenancy Act applies only to occupancy-holdings which are transferable. In the case of a non-transferable occupancy holding, the holding itself, as apart from the right of occupancy, cannot be sold so as to give the transferee a right to retain possession of it. *Jawadul Huq v. Ram Das Saha* explained and distinguished.
- GRISH CHANDRA CHOWDHRY v. KEDAR CHANDRA ROY ... XXVII 473
- s. 25. See LIMITATION ACT, ART. 32.
- s. 26. See SALE FOR ARREARS OF RENT.
- s. 29. *Enhancement of rent by registered contract—Increase in the amount of rent by reason of increase of area—Applicability of s. 29 in such cases.* Section 29 of the Bengal Tenancy Act applies only to an increase in the rate of rent, and not to an increase in the amount of rent by reason of an increase of the area.
- SATISH CHUNDRA GIRI v. KABIRADDIN MALICK ... XXVI 233
- s. 46, sub-secs. (6) and (9). *Non-occupancy raiyat—Enhancement of rent—Fair and equitable rent.* Sub-section (9) of s. 46 of the Bengal Tenancy Act is not exhaustive. It was not intended that if there was no land of a similar description and with like advantages in the same village as the land in suit, it should be impossible to enhance the rent of a non-occupancy raiyat upon any other ground.
- HOSAIN ALI KHAN v. HATI CHARAN SHAW ... XXVII 476
- s. 48, cl. (a). *Operation of s. 48 on suit instituted before Act came into force.* Section 48, cl. (a) of the Bengal Tenancy Act is retrospective. *Ram Kumar Juji v. Jafar Ali Patwari* approved of.
- GURU DASS SHUT v. NAND KISHORE PAL ... XXVI 199
- s. 50. See ENHANCEMENT OF RENT.
- s. 52. See LANDLORD AND TENANT.
- s. 52, cl. (6) and s. 198. *Abatement of rent—Suit for rent by several joint landlords against one of the joint tenants, whether in such a suit the tenant can claim abatement of rent—"Tenant" meaning of.* The expression "tenant" in s. 52 of the Bengal Tenancy Act does not include the case of a mere co-sharer tenant who has only a fractional share in the tenure; it means the tenant of the tenure and not one of many tenants. In a suit for rent, brought by some of several joint landlords against one of several joint tenants for recovery of the plaintiff's share of the rent payable on account of the defendant-tenants' share of the tenure under a previous arrangement, such tenant-defendant cannot claim abatement under the provisions of s. 52 of the Bengal Tenancy Act.
- BHOOPENDRA NARAIN DUTT v. ROMON KRISHNA DUTT ... XXVII 417
- s. 60. See LAND REGISTRATION ACT, SS. 78, 79.
- s. 65. See CIVIL PROCEDURE CODE, SS. 244, 266 AND 318. LANDLORD AND TENANT: SALE FOR ARREARS OF RENT.
- s. 66. *Suit for arrears of rent brought before expiry of Bengali year—Right to eject tenant.* Where a suit is brought before the expiry of the Bengali year in respect of the arrears of rent for that year, the landlord is not entitled to eject the tenant under s. 66 of the Bengal Tenancy Act.
- GURU DASS SHUT v. NAND KISHORE PAL ... XXVI 199
- s. 66, cls. (2) and (3). *Landlord and Tenant—Suit for arrears of rent—Execution of decree for ejectment for arrears of rent—Extension of time for payment.* Per PRINSEP and BANERJEE, JJ.—The extension of time authorized by s. 66, cl. 3, of the Bengal Tenancy Act can be granted by the Court after the decree, and not only when framing the decree under cl. 2 of that section. Per RAMPINI, J.—*contra.* Per PRINSEP and BANERJEE, JJ.—The decree for ejectment passed under s. 66, cl. 2, of the Bengal Tenancy Act need not incorporate the terms as to the ejectment being avoided by payment within fifteen days from the date of the decree. These terms are rather in the nature of a direction to the Court of execution. Per PRINSEP, J.—The application for such extension of time may therefore be made by the judgment-debtor on a mere petition, and not in the form of an application for review of judgment.
- BODH NARAIN v. MAHOMED MOOSA ... XXVI 639
- s. 67. See INTEREST.

Bengal Tenancy Act—(continued.)

VIII of 1885—(continued.)

ss. 67, 178. *Suit for arrears of rent and interest at an exorbitant rate—Rule relating to hard and unconscionable bargain—Liability of a purchaser of a tenure at a sale for arrears of rent to pay interest.* A stipulation for the payment of interest at an unusual and an exorbitant rate cannot be supposed to be an incident of a tenancy which would attach to it even after a sale for arrears of rent. In execution of a decree for rent against a tenant who held under a *kabuliyat*, dated March 1880, the plaintiff put up the tenure for sale and the defendant purchased it on the 20th November 1891. Subsequently a suit for rent with interest at 225 per cent. per annum, specified in the *kabuliyat* executed by the former tenant, was brought by the plaintiff against the defendant. The defence was that the plaintiff was not entitled to interest at such a high rate. *Held*, that the plaintiff was not entitled to recover interest at the rate claimed, it being an exorbitant one and not an ordinary incident of a tenancy. *Held* also, that in such a case the rule relating to hard and unconscionable bargains should apply, and the plaintiff would be entitled to interest at 12 per cent. per annum, being the ordinary rate of the interest for arrears of rent. *Per* RAMPINI, J.—By the sale of an ordinary *raiyyati* tenancy for arrears of rent, a new contract is created between the auction-purchaser and the landlord at the date of the sale; therefore in a case where the tenure was sold after the Bengal Tenancy Act came into operation, and a suit was brought by the landlord for rent with interest against the auction-purchaser, the provisions of s. 67, read with s. 178, sub-sec. 3, cl. (h) of the Bengal Tenancy Act, would apply.

KALI NATH SEN v. TRAILOKHYA NATH ROY ... XXVI 315

s. 73. See CIVIL PROCEDURE CODE, SS. 224, 266 AND 318.

ss. 74 and 179. *Stipulation for payment of abwab—Permanent tenure-holder.* The defendant, a *durputnidar*, stipulated in the *kabuliyat* for the annual payment of Rs. 4 in lieu of certain quantities of jack fruit, bamboos and fish. This stipulation was contained in a clause perfectly distinct from that containing the payment of rent which was payable quarterly. *Held* (i) such a stipulation is a stipulation for the payment of an *abwab*; (ii) A stipulation for the payment of an *abwab*, under a permanent *mukurari* lease is valid, and s. 74 of the Bengal Tenancy Act does not control s. 179 of the Act. *Assanulla Khan v. Tirtha Bashini and Atulya Churn Bose v. Tulsi Das Sarkar* referred to and followed. *Basanta Kumar Roy Chowdhry v. Promotha Nath Bhattacharjee* distinguished.

KRISHNA CHANDRA SEN v. SUSHILA SOONDURY DASSEE ... XXVI 611

s. 85. *Landlord and Tenant—Sub-lease of a raiyyati holding, by a registered instrument for a period of more than nine years, whether valid.* A sub-lease of a holding, by a *raiyyat* without the consent of the landlord, though created by a registered instrument, is altogether void under s. 85 of the Bengal Tenancy Act.

SRIKANT MONDUL v. SARODA KANT MONDUL ... XXVI 46

s. 88. *Transfer of a portion of occupancy holding—Custom—Ejectment—Possession.* The transfer of a portion of an occupancy holding is contrary to the spirit, if not the letter, of s. 88 of the Bengal Tenancy Act VIII of 1885, and the existence of a custom in a particular place by which such a holding is transferable is immaterial, and gives no right to the transferee as against the landlord.

KULDIP SINGH v. GILLANDERS ARBUTHNOT & CO. ... XXVI 615

ss. 101, 108. *Condition or incident of tenancy—Dispute as to right of way between two neighbouring tenants—Jurisdiction of Settlement Officer.* A Settlement Officer has no jurisdiction to decide civil disputes between tenant and tenant. A dispute as to a right of way between two neighbouring tenants is of a civil nature, and the existence of a right of way cannot be regarded as a condition or incident of a tenancy. *Pandit Sardar v. Meajan Mirdha* followed.

HARO MOHUN ROY CHURAMONI v. PRAN NATH MITTER ... XXVII 364

s. 104. See ENHANCEMENT OF RENT.

ss. 105, 106, 108. See SECOND APPEAL.

ss. 107, 108. See JURISDICTION OF CIVIL COURT.

ss. 113, 115. See ENHANCEMENT OF RENT.

s. 116. *“Zerai land—Raiyat brought on zerai land by lessee, Right of on expiry of lease—Trespasser—Right of occupancy—Liability to ejectment.* Section 116 of the Bengal Tenancy Act applies even in a case where a person is brought on the *malik's* *zerai* land as a *raiyyat* by a lessee for a term of years: therefore such a person cannot acquire any right of occupancy or non-occupancy on the said land, and, he, being a trespasser only, on the expiry of the lease of the lessee, is liable to

Bengal Tenancy Act—(concluded.)

VIII of 1885—(concluded.)

- ejectment. *Henderson v. Squire, Oomatara Debta v. Peena Bibee and Hurish Chunder Roy Chowdhury v. Sree Kales Mookerjee* referred to. *Binad Lal Pakrashhi v. Kalu Pramanik* distinguished. XXVI 546
- SHEO NANDAN ROY v. AJODH ROY XXVI 546
- s. 144. See SECOND APPEAL.
- s. 148, cl. (h). *Assignee of decree—Trustees applying for execution for benefit of assignor's heir.* The word "assignee," as used in s. 148, cl. (h) of the Bengal Tenancy Act, does not include trustees who execute decrees under an assignment which is not for their own benefit but for the benefit of the heir of the assignor. *CHHATRAPAT SINGH v. GOPI CHAND BOTHRA* XXVI 750
- s. 148, cl. (h). *Rent decree—Decree for arrears of rent—Application for execution by the assignee of such a decree—Code of Civil Procedure (Act XIV of 1882), s. 316.* An application for execution, by the assignee of a decree which was obtained by a landlord against a defaulting tenant, for arrears of rent which accrued due between the date of the sale of the tenure in execution of a previous decree for arrears of rent, and the date of the confirmation of such sale, is barred by clause (h) of s. 148 of the Bengal Tenancy Act, as being one for the execution of a decree for arrears of rent.
- KARUNA MOYI BANERJEE v. SURENDRA NATH MOOKERJEE ... XXVI 176
- s. 155. See LIMITATION ACT, ART. 32.
- s. 175. See BENGAL TENANCY ACT, S. 67 : INTEREST : RIGHT OF OCCUPANCY.
- s. 179. See BENGAL TENANCY ACT, S. 74 : INTEREST.
- s. 183. See RIGHT OF OCCUPANCY.
- s. 188. See CIVIL PROCEDURE CODE, SS. 244, 266 AND 318 : ENHANCEMENT OF RENT : SALE FOR ARREARS OF RENT.
- s. 188. *Joint landlords—Suit for apportionment of rent and for splitting a jama—Frame of suit—Parties—Arrears of rent.* Section 188 of the Bengal Tenancy Act does not prohibit joint landlords from ceasing to be joint or preclude them from suing for their shares of the rent separately, when they have ceased, or wish to cease, to be joint landlords ; provided that the suits are so framed as to free the tenant from all further liability to any one of them. When, therefore, the plaintiffs who are joint landlords, have in suits separately instituted by them against the defendant-tenant, asked for apportionment of rent and for recovery of rents due on such apportionment, and all the parties interested have been made parties to the suits, there is no reason why the plaintiffs should not have the rent apportioned ; and the apportionment may take place in respect both of the arrears alleged to be due and the future rent.
- RAJNARAIN MITTER v. EKADASI BAG XXVII 479
- s. 189. See LANDLORD AND TENANT.
- sch. III. See LANDLORD AND TENANT.
- sch. III, art. 3. See LIMITATION.
- Applicability of Act to lands outside the limits of the Town of Calcutta, but within its municipal boundaries—Calcutta Municipal Consolidation Act (Bengal Act II of 1888), s. 3—Town of Calcutta, Municipal boundaries of.* The Bengal Tenancy Act applies to lands situated outside the limits of the Town of Calcutta, but within its municipal boundaries, as defined by Bengal Act II of 1888.
- BIRAJ MOHINI DASSI v. GOPESWAR MULLICK XXVII 202

Bigamy—

Complaint by the husband—"Person aggrieved"—Criminal Procedure Code (Act V of 1898), s. 198—Penal Code (Act XLV of 1860), s. 494. The husband is a "person aggrieved," within the meaning of s. 198 of the Criminal Procedure Code upon whose complaint the Court should take cognizance of an offence under s. 494 of the Penal Code. *Queen-Empress v. Rukshmoni* and *In the matter of Ujjala Bewa* referred to.

THE DEPUTY LEGAL REMEMBRANCER v. SARNA KAHMI XXVI 336

Boat—

Plying for hire without license within limits of ferry. See BENGAL MUNICIPAL ACT, SS. 155, 156.

Boats—

Confiscation of. See FOREST ACT, S. 25.

Bond—

See STAMP ACT, s. 23.

Attestation of. See TRANSFER OF PROPERTY ACT, s. 59.

Form of. See LETTERS OF ADMINISTRATION.

Unregistered and unattested. See EVIDENCE ACT, s. 68.

Books—

Selling, with Counterfeit Property Mark. See PENAL CODE, s. 486.

Books of Account—

Admissibility of, in evidence. See EVIDENCE ACT, s. 34.

Breach of Contract—

See WORKMAN'S BREACH OF CONTRACT ACT.

Bribe—

Abetting offence of giving. See PENAL CODE, s. 218.

British Court—

Suit in, on Foreign Judgment. See FOREIGN COURT, JURISDICTION OF.

British Subject—

See FOREIGN COURT, JURISDICTION OF.

Burden of Proof—

See UNUS OF PROOF.

Calcutta—

Town of, Municipal boundaries of. See BENGAL TENANCY ACT.

Calcutta Municipal Consolidation Act—

Bengal Act II of 1888—

ss. 125, 132, and 135. "*Valuation.*" *Meaning of—Re-valuation made by the Municipality within six years from the date of the valuation made after hearing objection, Legality of—Provincial Small Cause Courts Act (IX of 1887), s. 25—Code of Civil Procedure (Act XIV of 1882), s. 622—Statute 24 and 25 Vic., c. 104, s. 15—Superintendence of High Court.* The word "*valuation*" in s. 135 of the Calcutta Municipal Consolidation Act (Bengal Act II of 1888) means, not "*the amount of the valuation*" only, but also the process or act of valuation. A valuation was made by the Calcutta Municipality of a holding, the rate-payer objected to the amount, and the Vice-Chairman of the Municipality, on hearing the objection, fixed the valuation at a certain amount. Within six years from this valuation fixed after objection, a re-valuation was made by the Municipality, and the rate-payer objected to the legality of such valuation on the ground that the Municipality had no power to make a re-valuation within six years from the date of the last valuation. The Vice-Chairman overruled the objection, and the rate-payer appealed under s. 157 of the Act to the Judge of the Court of Small Causes at Sealdah, who allowed the appeal. *Held that*, inasmuch as the objection raised by the rate-payer was an objection to the valuation within the meaning of s. 135 of the Act, the Judge of the Small Cause Court had jurisdiction to deal with it. That being so, it was not open to the High Court to interfere either under s. 25 of the Provincial Small Cause Courts Act, or under 622 of the Code of Civil Procedure, or under s. 15 of 24 and 25 Vic., c. 104.

CORPORATION OF CALCUTTA v. BHUPATI ROY CHOWDERY

... XXVI

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Carriage—

Explosion in, on Railway. See RAILWAY COMPANY.

Carriers' Act—

III of 1865—

ss. 6, 8 and 9. *Negligence—Accident, Loss by—Burden of proof in a suit for damages for non-delivery.* The plaintiffs sued a company, who were common carriers, for damages for the non-delivery of goods entrusted to them for carriage, destruction of the goods by fire having taken place on board the company's flat when moored off the place of destination. How the fire originated was not shown. The company did not prove absence of negligence on their part, nor was there placed before the Original Court a case inconsistent with their negligence. The Judicial Committee dismissed an appeal from the decree of the Appellate High Court, which proceeded on the 9th section of the Carriers' Act (III of 1865), that Court having taken the non-delivery as placing the burden of proving absence of negligence on

Carriers' Act—(continued.)**III of 1865—(continued.)**

the carriers. There were facts showing that no adequate means had been provided by the defendants for extinguishing a fire on board, and that the watch was inefficient. The defendants, accordingly, had failed to exonerate themselves.

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Charge—	
<i>Alteration of charge—Conviction of rioting with the common object of theft—Finding by Appellate Court of different common object—Legality of conviction on such finding—Penal Code (Act XLV of 1860), ss. 147 and 379—Code of Criminal Procedure (Act V of 1898), s. 428.</i> The accused were convicted by a Magistrate of theft of mangoes and also of rioting, the common object of the unlawful assembly being the forcibly taking away of mangoes belonging to the complainant. On appeal the Sessions Judge not only found that the common object was not the taking of the mangoes but that the dispute between the parties was as to certain land. He however dismissed the appeal and confirmed the conviction. <i>Held</i> that, as the accused were convicted on a different finding of fact from that to which they were called upon to plead and to defend themselves at the trial, they were entitled to an acquittal.	
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<i>Alteration of charge on appeal—Conviction for different offence from that charged—Want of notice to accused—Penal Code (Act XLV of 1860), ss. 143 and 379.</i> The accused were convicted of theft: that was the only charge which they were called upon to answer. In appeal the District Magistrate held that no theft had been committed, but he convicted the accused of being members of an unlawful assembly. <i>Held</i> , that on the trial the accused were called upon to answer only a charge of theft, they were never called upon to answer any other charge, and they	

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therefore could not fairly be convicted on their appeal of an offence of an entirely different character. It is on the proceedings taken before the Magistrate that the facts constituting an offence for which a trial is held are made known to the accused, and the law is applied by the Magistrate to the facts established, so as to constitute the charge which the accused is called upon to answer. It therefore cannot be said that sufficient notice was given to the accused because mention of s. 147 of the Penal Code (rioting) together with theft was made in the final report of the Police as the offences considered to have been established; and that the accused must have been made acquainted with such report.

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Framing new. See PENAL CODE, s. 477A.

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Joinder of. Offences of same kind not within year—Failure of justice—Code of Criminal Procedure (Act V of 1898), ss. 233, 234 and 537. Held, that s. 537 of the Code of Criminal Procedure can be applied to any case in which the trial has been held on charges joined together contrary to s. 234 of that Code. In the matter of Luchminarain, Queen-Empress v. Chandi Singh and Raj Chunder Mosumdar v. Gour Chunder Mosumdar overruled.

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Charter Act—

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Chota Nagpore Encumbered Estates' Act—

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ss. 2, 3 (c), 4-12. *Meaning of the words "holder" and "heir"—Capacity to mortgage.* The words "holder" and "his heir" are used throughout the Chota Nagpore Encumbered Estates' Act in the sense of the holder of the property at the time of the determination of the debts and liabilities under s. 8 of the Act and his heir. The word "heir" in the act always applies to the person who is the holder's heir at the time of such determination of the debts and liabilities and to no other heir, nor to the heir's heir. The estate of F came under management under the Chota Nagpore Encumbered Estates' Act in 1880. He had several sons, of whom B was the eldest and J the next in age. F died in 1884, and according to the custom of the family, B succeeded him to the estate, and on B dying in 1892 without leaving a male issue, J succeeded him. On the 8th June 1894, J mortgaged a village which had been granted to him by his father for his maintenance, and which never came under the management of the Encumbered Estates. Held, that there was nothing in s. 3, cl. (c), of the said Act to incapacitate J from mortgaging the property. The object of Act VI of 1876 explained.

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Chota Nagpore Landlord and Tenant Procedure Act—

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ss. 37, 38, 47, 49-56, 62-67, 76, 98, 113, 137, 144. See SECOND APPEAL.

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s. 2. See APPEAL: CIVIL PROCEDURE CODE, s. 244: SALE IN EXECUTION OF DECREE; SECOND APPEAL.

ss. 3, 4. See SECOND APPEAL.

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s. 108. *Ex parte decree—Setting aside ex parte decree on condition of finding surety.* An *ex parte* decree was set aside on condition that the defendants should find a surety, who would be responsible for any amount that might be found due from the defendant by any decree to be subsequently made in the suit. *Held*, that under s. 108 of the Code of Civil Procedure, a Court has jurisdiction to set aside an *ex parte* decree on these terms.

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ss. 109, 244. *Sale in execution of an ex parte decree and purchase by the decree-holder—Confirmation of the sale—Subsequent setting aside of the ex parte decree—Application by a subsequent purchaser in execution of another decree to set aside the sale on the ground that the ex parte decree had been set aside.* Certain immovable properties were sold in execution of an *ex parte* decree and were purchased by the decree-holder himself. After the confirmation of the sale, the decree was set aside under s. 108 of the Civil Procedure Code at the instance of some of the defendants in the original suit. On an application under s. 244 of the Civil Procedure Code having been made by a prior purchaser of the said properties in execution of another decree, to set aside the sale held in execution of the *ex parte* decree the defence was that the application could not come under s. 244 of the Civil Procedure Code, and that the sale could not be set aside, as it had been confirmed. *Held*, that the case was one under s. 244 of the Civil Procedure Code; and that the *ex parte* decree having been set aside the sale could not stand, inasmuch as the decree-holder himself was the purchaser. *Doyamoyi Dasi v. Sarat Chander Mozoomdar, Beni Persad Koeri v. Lakhi Rai, Durga Charan Mandal v. Kali Prasanna Sarkar, Nawab Zainal-ud-din Khan v. Mahammed Asghar Ali and Mina Kumari Bibee v. Jagat Sallani Bibee* referred to.

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s. 109. See **PARTIES.**s. 157. See **CIVIL PROCEDURE CODE, s. 370.**s. 209. See **CONTRACT ACT, s. 60.**s. 211. See **MESNE PROFITS.**

ss. 228, 232 and 578. *Jurisdiction of a Court where a decree has been transferred for execution to substitute the name of the transferee of the decree—Whether an order passed without jurisdiction can be cured by the provisions of s. 578 of the Civil Procedure Code.* An application by the transferee of a decree for execution after substitution of his name can be entertained only by the Court which passed the decree, and the Court to which the decree has been transferred has no jurisdiction to entertain it. *Shoo Narain Singh v. Hurbans Lall, Nakoda Ismail v. Kassam and Kadir Bakhsh v. Ilahi Bakhsh* referred to. In a case where a decree has been transferred to another Court for execution, and that Court orders the execution to proceed after substitution of the name of the transferee of the decree, the said order is one passed without jurisdiction, and can be set aside on appeal, notwithstanding the provisions of s. 578 of the Civil Procedure Code. *Sham Lal Pal v. Modhu Sudan Sircar* distinguished.

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s. 230. See **LIMITATION.**s. 232. See **APPEAL: CIVIL PROCEDURE CODE, ss. 228; 244.**s. 244. See **APPEAL: CIVIL PROCEDURE CODE, s. 108: RIGHT OF SUIT: SALE IN EXECUTION OF DECREE: SECOND APPEAL.**

s. 244. *Parties to suit—"Representative" of party—Purchaser of the decree from the decree-holder—Civil Procedure Code (Act XIV of 1882), ss. 2, 232—Decree-holder—Application by transferee of decree—Civil Procedure Code Amendment Act (VII of 1888)—Second Appeal.* The word "representative," as used in s. 244 of the

Civil Procedure Code—(continued.)

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Code of Civil Procedure, when used with reference to a decree-holder, includes the purchaser of the decree from the decree-holder by an assignment in writing *Ishan Chunder Sirkar v. Beni Madhub Sirkar and Badri Narain v. Jai Kishen Das* referred to. The Court executing a decree which has been so transferred can go into the disputed question of the transfer of the decree under the provisions of s. 244 of the Civil Procedure Code as amended by Act VII of 1888.

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- s. 244. *Party to suit—Question in execution of decree—Right of suit—Minor defendant objecting to sale in mortgage suit but withdrawing his defence.* In a suit brought upon a mortgage bond after the death of the executant, who was the widow of the last full owner of the properties mortgaged, the present plaintiff, who was a minor at that time, appeared, represented by the manager under the Court of Wards, and denied the widow's right to mortgage the properties in dispute. He subsequently withdrew his defence, but remained a party on the record, and a decree was made in his presence. At an execution proceeding taken against the minor son of the alleged adopted son of the last full owner without any notice to the present plaintiff, some of the mortgaged properties were sold. In a suit by him (the plaintiff) for recovery of possession of the said properties, the defence was that the suit was not maintainable by virtue of the provisions of s. 244 of the Civil Procedure Code. *Held*, that inasmuch as the plaintiff was a party to the suit in which the decree was passed, his remedy, if he could object to the sale, was by an application under s. 244 of the Civil Procedure Code, and not by a separate suit.

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- s. 244. *Question for Court executing decree—Execution of decree—Plea taken by defendant in separate suit—Civil Procedure Code (Act XIV of 1882), s. 13—Res judicata.* When an issue arising out of the execution of a decree has not been raised and determined under s. 244 of the Civil Procedure Code there is nothing in that section to prevent a defendant in a separate suit subsequently brought from raising that issue in that suit. *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha* followed.

NIL KAMAL MUKERJEE v. JAHNABI CHOWDHURANI XXVI 946

- s. 244. *Question for Court executing decree—Question between decree-holder and judgment-debtor as to saleability or otherwise of an occupancy holding.* Under s. 244 of the Civil Procedure Code the question as to the saleability or otherwise of an occupancy holding between the decree-holder and judgment-debtor can be determined in the execution proceedings. *Durga Charan Mandal v. Kali Prasanna Sarkar, and Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha* referred to.

GAHAR KHALIPA BIPARI v. KASI MUDDI JAMADAR XXVII 415

- s. 244. *Question for Court executing decree—Transferability of occupancy holding according to custom or usage—Saleability of occupancy holding in execution of decree.* When an application is made to execute a decree for money, by the attachment and sale of an occupancy holding, the judgment-debtor is entitled, under s. 244 of the Civil Procedure Code, to raise the question as to whether the holding is saleable according to custom or usage, and to have that question determined by the Court executing the decree.

MAJED HOSSEIN v. RAGHUBUR CHOWDHRY XXVII 187

- s. 244. *Question in execution of decree—Possession in execution of decree after sale—Question arising between the parties or their representatives—Separate suit—Appeal.* Proceedings for the delivery of possession to the auction-purchaser after sale in execution of a decree, are proceedings in execution of the decree; and when the application for possession is resisted by the legal representative of the judgment-debtor on the allegation that portions of the property belonged to him and not to the judgment-debtor, the question raised comes under s. 244 of the Civil Procedure Code and must be decided under that section and not by a separate suit.

MADHU SUDAN DAS v. GOBINDA PRIA CHOWDHURANI XXVII 34

- ss. 244, 266 and 318. *Questions for Court executing decree—Sale of an occupancy holding not transferable by custom in execution of a decree for arrears of rent obtained by a co-sharer landlord—Effect of such a sale—Bengal Tenancy Act (VIII of 1885), ss. 22, 65, 73 and 188.* A decree for rent obtained by some of certain co-sharer landlords and not by the whole body of them, is not a decree under the Bengal Tenancy Act. *Prem Chand Nuskur v. Mokshoda Debi and Jugobundhu*

Civil Procedure Code—(continued.)**Act XIV of 1882—(continued.)**

Pattuck v. Jadu Ghose Alkushi referred to. An occupancy holding which is not transferable by custom, as also the interest of the judgment-debtor in the said holding, are not saleable in execution of such a decree. *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha* referred to. A judgment-debtor, whose occupancy holding, which was not transferable by custom, had been sold in execution of a decree for rent obtained by some of the co-sharer landlords, objected to the application made by the auction-purchaser after the confirmation of the sale for delivery of possession of the said holding, on the ground that the sale was illegal. *Held*, that the confirmation of sale was no bar to the application that was made by the judgment-debtor to have it declared that in execution of such a decree the holding could not be sold, the question being one which related to the execution, discharge, and satisfaction of the decree. *Basti Ram v. Fattu* referred to.

DURGA CHARAN MANDAL *v.* KALI PRASANNA SARKAR ... XXVI 727

s. 253. See SURETY.

s. 266; 276. See ATTACHMENT.

ss. 278, 281, 283. See CLAIM TO ATTACHED PROPERTY.

ss. 278, 282; 293. See SMALL CAUSE COURTS (PRESIDENCY TOWNS) ACT.

s. 295. See EXECUTION OF DECREE: INSOLVENCY: PARTIES.

s. 310A. *Civil Procedure Code Amendment Act (V of 1894)—Power of a Court to set aside a sale if the deposit provided for in s. 310A be not paid within thirty days.* *Held* (by the FULL BENCH). Where the judgment-debtor has not within thirty days from the date of sale deposited in Court a sum equal to 5 per cent. of the purchase-money and the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder, but has deposited in Court within the prescribed period a sum calculated by some officer of the Court as the sum to be deposited in respect of such 5 per cent. and of the sum specified in such proclamation of sale, and there is nothing to show that there was any mistake of the Court by which the judgment-debtor was induced to deposit an insufficient amount, the sale ought not to be set aside. *Makbool Ahmed Chowdhry v. Bazle Sabhan Chowdhry* distinguished.

CHUNDI CHARAN MANDAL *v.* BANKE BEHARY LAL MANDAL ... XXVI 449

s. 311. See APPEAL: LANDLORD AND TENANT: SALE IN EXECUTION OF DECREE: SECOND APPEAL.

s. 313. See SALE IN EXECUTION OF DECREE.

s. 315. See PARTIES.

s. 316. See BENGAL TENANCY ACT, s. 148.

s. 317. See BENAMI TRANSACTION.

s. 370. *Insolvent Act (11 and 12 Vic., C. 21), s. 7—Whether s. 370 of the Civil Procedure Code applies to a case, where there has not been a completed bankruptcy or insolvency—Dismissal of the suit for non-appearance of plaintiff or of the Official Assignee—Civil Procedure Code, ss. 102, 103, 157, 371.* Section 370 of the Code of Civil Procedure does not apply to a case where there has been only an application to declare the plaintiff to a suit an insolvent and a vesting order made, but the proceedings are subsequently annulled, and the party is not declared either a bankrupt or an insolvent; therefore in such a case, where a suit has been dismissed for the non-appearance of the plaintiff or the Official Assignee on the date fixed for hearing, s. 103 of the Civil Procedure Code applies.

AMRITA LAL MUKERJEE *v.* RAKHALI DASSI DEBI ... XXVII 217

s. 373. See APPEAL.

ss. 377, 379; 389, 390. See PRACTICE.

ss. 392, 393. See MESNE PROFITS.

ss. 436, 437. See HINDU LAW, JOINT FAMILY.

s. 443. See PROBATE: SUMMONS. SERVICE OF.

s. 462. See OATHS ACT, s. 9.

ss. 483, 490. See ATTACHMENT.

s. 503. See RECEIVER.

s. 506. See ARBITRATION.

ss. 544. See CIVIL PROCEDURE CODE, s. 561.

ss. 556, 558. *Second appeal—Order refusing to re-admit appeal—Dismissal of appeal for default—Pleader asking for time to go on with a case.* The provisions of ss. 556 and 558 of the Civil Procedure Code do not apply when the pleader for the

Civil Procedure Code—(concluded.)

Act XIV of 1882—(concluded.)

appellant not merely informs the Court that he has no instructions, but makes an application for postponement, which is refused, and the appeal is thereupon dismissed. A second appeal does not, therefore, lie in such a case from an order of the first Appellate Court refusing to re-admit an appeal under the provisions of s. 558 of the Code of Civil Procedure.

WATSON & CO v. AMBICA DAS 529

s. 559. See CIVIL PROCEDURE CODE, s. 561 : PARTIES.

s. 561. *Cross objection*—Persons interested in the result of the appeal—Whether a respondent can prefer a cross-objection against another respondent—Added respondent—Civil Procedure Code (1882), ss. 544, 559. In a suit for possession of land the Court of First Instance decreed the plaintiffs' suit in part against the defendants. Some of the defendants appealed to the High Court without making the other defendants party-respondents. The plaintiffs preferred cross-objections under s. 561 of the Code of Civil Procedure. The non-appealing defendants were added as respondents by an order of the High Court to the effect that they might be made parties without prejudice to any objection that might be urged on their behalf at the hearing of the appeal. The non-appealing defendants at the hearing of the appeal contended that they were wrongly made parties, and that the plaintiffs could not urge their cross-objection as against them. *Held*, that the non-appealing defendants were persons who were interested in the result of the appeal, within the meaning of s. 559 of the Code of Civil Procedure, and that, therefore, they were rightly made parties. *Held*, also, that as a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellant, and it is only by way of exception to this general rule that one respondent may urge a cross-objection against another respondent, the exception holding good, among other cases, in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents; but as there was nothing exceptional in this case, the plaintiffs were not allowed to urge their cross-objections against the non-appealing defendants.

BISHUN CHURN ROY CHOWDHRY v. JOGENDRA NATH ROY 114

s. 575. See HINDU LAW, JOINT FAMILY.

s. 578. See ARBITRATION. CIVIL PROCEDURE CODE, s. 228.

s. 582. See APPEAL.

ss. 582 A. See PAUPER SUIT.

ss. 584; 584, 585; 586; 588. See SECOND APPEAL.

s. 588. See APPEAL: SALE IN EXECUTION OF DECREE.

s. 589. See APPEAL.

ss. 591-616 (Ch. XLV). See PRIVY COUNCIL, PRACTICE OF.

ss. 603 and 610. See APPEAL TO PRIVY COUNCIL.

s. 622. See APPEAL: CALCUTTA MUNICIPAL CONSOLIDATION ACT, s. 120.

s. 623. See REVIEW.

s. 626. See PRIVY COUNCIL, PRACTICE OF.

s. 640. See PRACTICE.

s. 647. See PROBATE: SECOND APPEAL.

Civil Procedure Code Amendment Act—

VII of 1888—

See APPEAL: CIVIL PROCEDURE CODE, s. 244.

V of 1894. See CIVIL PROCEDURE CODE, s. 310A.

Claim—

On behalf of minor by manager of estate without sanction of Court of Wards.
See LIMITATION ACT, ART. 11.

Claim to Attached Property—

By mortgagor in execution proceedings in Small Cause Court. See SMALL CAUSE COURTS (PRESIDENCY TOWNS) ACT.

Civil Procedure Code (Act XIV of 1882), ss. 278, 281 and 283—*Claim preferred by a defendant's predecessor in title—Claim disallowed but no suit brought within one year to set aside the order—Effect of such an adverse order as against the defendant in a suit, and how far binding—Limitation Act (XV of 1877), sch. II,*

Claim to Attached Property—(continued.)

arts. 11 and 15. In a suit brought by the plaintiff to recover possession of certain lands by virtue of a purchase by his father, at an execution sale held by a Civil Court, it was found by the Court below that the vendor of the defendant had purchased the said lands at a sale held by a Deputy Collector for arrears of road cess and had preferred a claim to the disputed property in the execution proceedings, which lead to the sale at which the plaintiff's father purchased, but which was disallowed, and no suit was brought by him (the defendant's vendor) within one year to set aside the order disallowing the claim. *Held*, that the vendor of the defendant not having brought a suit within one year to set aside the order disallowing the claim, the defendant was concluded by that order, even if she was not the plaintiff in the suit, to establish her right to the property in dispute. *Nemagauda v. Paresha* referred to.

SURNAMOYI DASI *v.* ASHUTOSH GOSWAMI XXVII 714

Co-contractors—

See PARTIES.

Code Napoleon—

Unauthorized translation of. See EVIDENCE ACT, s. 38.

Cognizable Offence—

See PENAL CODE, s. 218.

Collector—

Effect of partition by. See PARTITION.

Surveyor employed by. See PUBLIC SERVANT.

Under Land Acquisition Act. See FALSE EVIDENCE.

Commission—

Evidence taken on. See PRACTICE.

Right of pardanashin lady to be examined on. See PRACTICE.

Common Object—

Causing hurt in furtherance of. See RIOTING.

Finding of, different from that charged. See CHARGE.

Communication—

To clerk of pleader. See EVIDENCE ACT, s. 127.

Companies Act—

VI of 1882, s. 58. See APPEAL.

Compensation—

See CATTLE TRESPASS ACT, s. 22.

Application by purchaser to set aside sale or for. See SALE IN EXECUTION OF DECREE.

For use and occupation, Claim for. See JURISDICTION.

On rescission of contract. See MINOR.

Sanction to prosecute and award of compensation—Criminal Procedure Code (Act V of 1898), s. 250 and s. 476—Magistrate, Discretion of. It is an improper exercise of his discretion by a Magistrate to award compensation to the accused under s. 250 of the Criminal Procedure Code and also to direct or sanction the prosecution of the complainant under s. 211 of the Penal Code for bringing a false charge. *Shib Nath Chong v. Sarat Chunder Sarkar* followed. *Queen v. Rupan Rai* referred to.

BACHU LAL *v.* JAGDAM SATHI XXVI 181

Complaint—

See SANCTION FOR PROSECUTION.

Institution of complaint and necessary preliminaries—Charge of furnishing false information in Land Acquisition Proceedings—Omission to refer to particular false statement on which accusation made—Penal Code (Act XLV of 1860), s. 177—Land Acquisition Act (I of 1894), ss. 9 and 10. A Magistrate issued processes for the attendance of the accused on the complaint of the Land Acquisition Deputy Collector for having given false information within the terms of s. 177 of the Penal Code and s. 10 of the Land Acquisition Act in certain written statements that they had made to the Collector. The complaint was that the written statements were false. The documents, however, contained more than one statement of fact. Neither in the complaint made by the Deputy Collector nor in his examination by

Complaint—(continued.)

the Magistrate was any reference made to any particular statement made by either of the accused as being a false statement, nor had the Deputy Collector put in the written statements upon which he desired to proceed, either with his written complaint or at the time of his examination by the Magistrate. *Held*, that the complaint was bad and the case should not be allowed to proceed in its present form. The Magistrate was bound to require from the complainant the written statements on which the proceedings were founded, and also to ascertain from him the particular statement or statements on which the accusation was made.

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Presentation of. See MAGISTRATE, JURISDICTION OF.

Compromise—

Compromise of matters in suit and of matters outside scope of suit—Authority of Counsel to make such compromise—General authority—Special authority—Notice—Evidence—Statement of Counsel not made on oath. Counsel possesses a general authority, an apparent authority, which must be taken to continue until notice be given to the other side by the client that it has been determined to settle and compromise the suit in which he is actually retained as Counsel. Where the compromise, however, extends to collateral matters, to matters quite outside the scope of the particular case in which Counsel is engaged, in order to bind his client it must be shown, that he had from his client special authority to compromise upon the terms upon which the compromise was effected, and the other side cannot avail themselves of the position that they did not know that it had not been given; they are not entitled to assume, as in the case of an apparent authority, that it was given and was existing. Where Counsel under a misapprehension of his client's instructions and believing himself to have authority acts in fact without it, he cannot bind his client. Though it has been the practice in Courts in England to accept the statements of Counsel made from his place at the Bar, the Court entertained great doubt whether, if that course be objected to by the opposite side, the party putting forward such a statement could insist upon its being made without the sanctity of an oath.

NUNDO LAL BOSE v. NISTARINI DASSI ... XXVII 128

Of suit. Effect of compromise—Interest Act (XXXII of 1839)—Interest on certain amount payable on the happening of an event and at certain time—Sum agreed to be paid to defend a suit—Effect of compromise of suit on liability to pay. A brought a suit against B and C. B wrote a letter to C, proposing that counsel should be engaged to defend the suit, and that C should contribute Rs. 900 only for it. C agreed to the proposal and consented to pay the amount within ten days. Counsel was engaged, and Rs. 4,000 were paid to him. After several hearings the case was compromised. B then demanded from C the amount which he had promised to contribute, and also interest on it. C refused to pay and a suit was brought by B to recover the said amount with interest. C pleaded that he was not liable to pay the amount, inasmuch as the case was compromised, and also pleaded that he was not liable to pay interest on it, as the debt was neither certain in amount nor payable at a certain time. *Held*, that B was entitled to recover the amount, as there was a promise by C to pay it on the happening of a certain event which had happened. *Held*, also, that B was entitled to get interest on the amount inasmuch as the debt was not uncertain, the date of payment was defined, and C knew that the contingency upon which he became liable had occurred.

SURJA NARAIN MUKHOPADHYA v. PRATAP NARAIN MUKHOPADHYA... XXVI 955

To deprive attorney of his costs. See PRACTICE.

Conditional Sale—

Mortgage by. See MORTGAGE.

Conduct—

Evidence of. See EVIDENCE.

Of lessor. See LANDLORD AND TENANT.

Confession—

Confession to Police officer—Evidence Act (I of 1872), s. 25. The provisions of s. 25 of the Indian Evidence Act (I of 1872), which declare that no confession made to a Police officer shall be proved as against a person accused of any offence, applies to every Police officer and is not to be restricted to officers of the regular Police force.

QUEEN-EMPRESS v. SALEMUDDIN SHEIK ... XXVI 569

Withdrawal of. See EVIDENCE IN CRIMINAL CASE.

Confiscation of Property —*Effect of.* See OUDH ESTATES ACT. •**Consent Decree —***Effect of partition by.* See EASEMENT. •**Consideration —***Non-payment of.* See TRANSFER OF PROPERTY ACT, S. 54.*Unlawful, Meaning of.* See CONTRACT ACT, S. 23.**Contempt of Court —***Penal Code (Act XLV of 1860), s. 174—Non-attendance on service of summons—*

Appearance by mukhtear—Criminal Procedure Code (Act V of 1898), s. 205. In a summons case on the day fixed for trial an appearance was made on behalf of an accused person by his mukhtear who asked the Magistrate under s. 205 of the Code of Criminal Procedure to dispense with the personal attendance of the accused. The Magistrate, however, regarding the non-attendance of the accused as a contempt of Court called upon him to show cause why he should not be prosecuted under s. 174 of the Penal Code for non-attendance on service of summons. *Held*, that the accused did make an appearance though not a personal appearance on service of summons; but that he did not personally attend should not under the circumstances have been regarded as an offence under s. 174 of the Penal Code.

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Continuous Offence —

See KIDNAPPING.

Contract —*Breach of.* See WORKMAN'S BREACH OF CONTRACT ACT.*Construction of.* See LEASE.

Contract of sale—Want of assent—Broker's bought and sold notes. To contract through a broker, to sell a quantity of paddy at a price stated, the plaintiff firm signed the sold note. This was taken by the broker to the defendant firm, of which a member, before signing the bought note, wrote in Chinese characters, not understood by the vendor, a term as to quality. This was to the effect that the paddy was to be without yellow grains and not wet. A part delivery was made of paddy not answering this description. For this the defendant firm made a part payment at a reduced rate. Of the rest they refused to take delivery, when tendered, because it was not of the quality contracted for. *Held*, that the plaintiffs' suit for the balance of the price of the part delivered, and for damages for non-acceptance of delivery of the rest, failed. If the plaintiffs—neither they nor their broker understanding Chinese—did not assent to the term written by the defendant, then there was no contract entered into to buy. If, on the contrary, the plaintiffs had assented to that term, then the paddy was not of the quality required by the contract.

AH SHAIN SHOKE v. MOOTHIA CHETTY

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Relating to property of minor. See SPECIFIC PERFORMANCE.*Sale of goods—Offer of performance—Tender of railway receipts endorsed in blank**—Goods not available—Goods subject to demurrage or freight—Duty of seller.* P

agreed to sell and F to buy certain goods to be delivered to F in April--May 1897.

The contract of sale contained (*inter alia*) the following clauses: "(10) The

goods to be tendered fully 48 hours before the expiration of the present term of 72

hours granted by the railway company in order to enable buyers to weigh,

sample, and inspect the same; and the delivery not to be considered complete

until the samples have been refracted and examined, and any dispute about

quality, etc., settled. (11) If railway receipt be tendered, such to be handed to

buyers 48 hours before the goods are liable to demurrage under the present term

of 72 hours granted by the railway company." P, not having, before the 31st

May, goods of his own to meet the contract, arranged with H for certain goods of

H to be delivered under it and tendered to F. On that day, certain railway

receipts, which had been endorsed in blank by H, in respect of the said goods,

were tendered to F. F was ready to pay for the goods; but, before tendering

the price, he insisted upon an endorsement of the railway receipts by H to P and

by P to himself. P was unable to point out the goods to be delivered under the

contract, nor could he indicate the wagon-numbers. P refused to procure the

endorsement required by F, and thereupon F declined to take delivery as proposed,

though he tendered the price in exchange for the goods. *Held*, that, F not having

had an opportunity of inspecting the goods as provided by the contract, the tender

Contract—(continued.)

made as aforesaid by P was not such an offer of performance of the contract as F was bound to accept. *Held*, also, that F was not bound to accept a tender of railway receipt for goods subject (as some of these were) to demurrage, nor for goods on which freight had not been paid (as was the case with some of these goods), nor for goods that were not available on the 31st May, as in the present case. In order to establish a valid tender of the goods, it was for P to show that had F taken the railway receipts, the railway company would have been bound to deliver the goods upon production of the receipts; and F was under no duty to point out to P that the tender was defective. F's duty under the contract arose when a sufficient tender was made to him, and not till then. Failure to justify an alleged breach of contract upon one ground only which is found insufficient, does not disentitle the defendant to rely upon other grounds which his rights under the contract entitled him to rely upon. *Cowan v. Milburn and Mothoormohun Roy v. Bank of Bengal* referred to.

MOTICHAND v. FULCHAND XXVI 142

To pay interest at high rate. See INTEREST.

Contract Act—

IX of 1872—

ss. 11 and 64. See MINOR.

ss. 23 and 24. *Illegal contract—Compound interest—The Sonthal Pergannahs Settlement Regulation (III of 1872), s. 6—The Sonthal Pergannahs Justice Regulation (V of 1893), s. 24—“Unlawful” consideration, Meaning of.* There is no law or regulation laying down that an agreement between any two persons living in the Sonthal Pergannahs to pay compound interest upon the amount borrowed is “unlawful” within the meaning of s. 23 of the Contract Act. All that the law provides is that compound interest will not be decreed by any Court. Referring to the Sonthal Regulations, s. 6 of Regulation III of 1872 and s. 24 of Regulation V of 1893, it was held in respect of an agreement to pay interest on an amount composed partly of the principal and interest due on a former debt, that such agreement is not void under s. 24 of the Contract Act, and that the obligee may recover such sums of money as he is entitled in law to recover, notwithstanding that part of the consideration is compound interest.

SRAMA CHARAN MISSEER v. CHUNI LAL MARWARI XXVI 238

s. 60. *Creditor's appropriation of payments to one or other of debts—Transfer of Property Act (IV of 1882), ss. 86, 88—Enforcement of mortgage—Rate of interest from date of suit to date fixed for realization—Civil Procedure Code (Act XIV of 1882), s. 209.* One of two mortgages bore interest at 12 per cent. on the mortgage debt payable with costs; and the other carried simple interest. Payments made by the debtor had been appropriated by the creditor to payment of the interest on the bond bearing simple interest, while the compound interest, on the other hand, had been left to accumulate. In a suit, brought against the representative of the debtor after his decease, to enforce the mortgage bearing compound interest, the objection was taken to the appropriation by the creditor. *Held*, that the rule in s. 60 of the Indian Contract Act, 1872, follows the ordinary law in prescribing a rule as to the case in which the creditor may, at his discretion, apply, to one or other of the debts due to him, payments made by the debtor. A reluctance shown by the debtor to agree to pay compound interest, before he executed the mortgage bond at such interest, was not an indication, within that section, that he intended that application of his payments should be made first to that bond. The Transfer of Property Act, 1882, was in force when this suit was instituted, but not when the relation of debtor and creditor between the parties commenced. Assuming that a discretionary power to a Court remained under s. 209, Civil Procedure Code, to decree interest to run, at less than the contract rate, in a suit commenced before Act IV of 1882 became law, still the best guide to discretion, in this case, was to be found in s. 86 of that Act, which required the Courts to decree mortgage debts with interest at the rate provided by the mortgage (if to that rate no valid legal objection could be taken), down to the date fixed for realization.

RAMESWAR KOER v. MAHOMED MEDHI HOSSEIN KHAN XXVI 39

s. 69. See VOLUNTARY PAYMENT.

s. 74. See INTEREST.

ss. 201 and 218. See JURISDICTION.

s. 253. See ONUS OF PROOF.

Contribution—

Suit for. See LIMITATION ACT, ART. 120.

Suit for. Partnership business—Money borrowed by agreement by one partner and paid into partnership business—Decree against one partner—Suit for contribution by him against other partners—Adjustment of account whether necessary. In a partnership business entered into between the plaintiff and the defendants, it was agreed that each member, together with the *gomastas* of the business, should be at liberty to borrow money upon his individual credit and to pay into the firm the money so borrowed to carry on the business. The plaintiff conjointly with defendants 4 and 6, in accordance with that agreement, borrowed several sums of money upon promissory notes, and paid the amounts so borrowed into the business. After the loan the partnership business came to an end, but no account was settled. Afterwards decrees were obtained upon those promissory notes, and the plaintiff was obliged to pay up the decretal amounts. To a suit for contribution by the plaintiff, for money so paid, against the members of the firm, the defence, *inter alia*, was that the suit was not maintainable, in the absence of adjustment of the accounts relating to the firm. *Held*, that the suit was maintainable, inasmuch as the money secured by the promissory notes did not become an item of the partnership account.

DURGA PROSONNO BOSE v. RAGHU NATH DASS ... XXVI 254

Suit for. Partnership business—Whether a suit for contribution by a partner against a co-partner would lie and in what cases—Adjustment of account whether necessary. A suit for contribution by a partner against some of his co-partners, on account of money paid by him for the satisfaction of a debt contracted by him jointly with the said co-partners, is maintainable in cases where the liability satisfied by the plaintiff is not a joint liability of the entire partnership, or where the said partners were some only of several persons comprising the partnership, and the bond was executed not in the usual course of business of the partnership; it is also maintainable in a case where the co-partners expressly promised to contribute their share of debt after a decree had been passed upon the bond.

GUDA KULITA v. JOYRAM DAS ... XXVI 262 *note*.

Conviction of Offence not charged—

See CHARGE.

Corroboration—

See EVIDENCE ACT, S. 34 : EVIDENCE IN CRIMINAL CASE.

Co-sharer—

Incumbrance created by. See PARTITION.

Landlords, Decree obtained only by some of several. See CIVIL PROCEDURE CODE, SS. 244, 266 AND 318.

Co-sharers—

Joint possession, Suit for—Effect of purchase of a right of occupancy, not transferable by custom, by a co-sharer landlord without the consent of the other co-sharers—Abandonment—Right to partition. In a suit to recover joint possession of an occupancy holding in respect of his share by a co-sharer landlord, on the ground that the defendant acquired no title by the purchase of the said holding, as it was not transferable by custom, and that there was an abandonment of the holding by the former tenant, the defence (*inter alia*) was that the plaintiff was not entitled to joint possession, and that he could not get any relief except by bringing a suit for partition, inasmuch as they (the plaintiff and the defendants) were joint proprietors. *Held*, that the plaintiff was entitled to the relief claimed, and that the claim for joint possession without partition was maintainable. *Watsor & Co. v. Ramchund Dutt, and Luchmeswar Singh v. Manowar Hossein* distinguished.

DILBAR SARDAR v. HOSEIN ALI BEPARI ... XXVI 553

Costs—

See GUARDIANS AND WARDS ACT, S. 14 : RAILWAY COMPANY : SALVAGE.

Agreement as to, between attorney and client. See PRACTICE.

Dismissal of appeal—Time occupied in hearing of preliminary objection to appeal.

An appeal was dismissed with costs notwithstanding that almost the whole time occupied in the hearing of the case on appeal was taken up by the argument on a preliminary objection that no appeal lay which was taken by the respondents and was unsuccessful.

TOOLSEE MONEY DASSEE v. SUDEVI DASSEE ... XXVI 361

Costs of Attorney—

See PRACTICE.

Counsel—

Power of. See COMPROMISE.

Court—

See FALSE EVIDENCE.

Court Fee—

Payment of, after period of limitation. See PAUPER SUIT.

Court Fees Act—

VII of 1870—

ss. 3 and 19 H. See LETTERS OF ADMINISTRATION.

sch. 1, art. 11. See LETTERS OF ADMINISTRATION.

Court Fees Amendment Act —

XI of 1899. See LETTERS OF ADMINISTRATION.

Court of Wards—

Want of sanction of. See LIMITATION ACT, ART. 11.

Court of Wards Act—

Bengal Act IX of 1879—

s. 55. See LIMITATION ACT, ART. 11.

Covenant as to Payment of Interest—

See MORTGAGE.

Covenant in Ekrarnama for Money paid —

See LIMITATION ACT, ART. 120.

Cow—

Slaughter of. See POLICE ACT, S. 34.

Creditors—

Transaction in fraud of. See BENAMI TRANSACTION.

Criminal Breach of Trust—

By public servant. See PENAL CODE, S. 477A.

Criminal Force—

Use of. See CRIMINAL PROCEDURE CODE, S. 522.

Criminal Procedure Code—

Act V of 1898—

s. 4, cl. (f). See PENAL CODE, S. 218.

s. 55. See ARMS ACT, 1878.

ss. 56 ; 59 , 68 , 79 ; 80. See ARREST.

s. 80. See WARRANT OF ARREST.

s. 103. See ARMS ACT, 1878.

s. 106. See RECOGNIZANCE TO KEEP PEACE.

ss. 110 ; 112 ; 117 , 118 ; 123. See SECURITY FOR GOOD BEHAVIOUR.

s. 138. See NUISANCE.

s. 138. See JURY.

s. 144. *Dispute in respect of colliery—Order under s. 144—Prohibition to both parties from exercising right of possession—Proceedings under s. 145 of the Code of Criminal Procedure—Date of possession—Code of Criminal Procedure (Act V of 1898), ss. 145, 146. On the 10th of November 1899, the Magistrate passed an ex parte order under s. 144 of the Code of Criminal Procedure by which both parties to a dispute were prohibited from exercising any right of possession in respect of a colliery. Subsequently proceedings under s. 145 of the Code were instituted in respect of the same colliery and between the same parties. On the 29th of January 1900, the Magistrate, having found that the second party had been in possession on the 10th of November 1899, passed an order declaring them to be in possession. Held, that the proper way of dealing with this case in interpreting the Magistrate's order was to hold that, whereas by reason of the operation of his order under s. 144 of the Code of the 10th of November 1899, no evidence could be offered to show the possession of either party from that date up to the 29th of December, he was consequently obliged to ascertain the possession immediately*

Criminal Procedure Code—(continued.)

Act V of 1898—(continued.)

before this order and to regard his intervention as an attachment suspending the previous possession whatever it might be, but that, at the same time, the former possession continued, and although the lawful exercise of its rights had been forbidden for a time, the possession had never ceased to exist. That the order of the Magistrate was correct.

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- s. 144. *Dispute regarding right to property—Power of Magistrate to determine rights and shares of parties—Civil Court—Code of Criminal Procedure (Act V of 1898), ss. 144 and 145—Magistrate, Jurisdiction of.* It is not because private parties or members of the same family dispute regarding their respective rights to land or crops, that a Magistrate is called upon to interfere. A Magistrate cannot take upon himself to decide questions of fact and Mahomedan law, so as to satisfy himself as to what are the actual rights of the parties to the lands in dispute. If he has good reasons to believe that such a dispute is likely to cause a breach of the peace, the law enables him to ascertain and maintain actual possession, or, if it is shown that the members of the family are inclined to break the peace, he can bind them all over to keep the peace. Where there was a dispute between the parties, who were related to one another, as to the amount of their shares to certain property which was claimed on the one hand to be joint in certain shares, and on the other hand to exclusively belong to the other party, and no proceedings had been taken under s. 145 of the Code of Criminal Procedure, nor was there anything to show that there was any probability of a breach of the peace, the Magistrate passed the following order: "The applicants must not plough more than 12 annas of the land." *Held*, that such an order could not properly fall within s. 144 of the Code of Criminal Procedure, as an order under that section could only be passed on some emergency and would have effect for only two months. The present order in its operation would have effect and was intended to have effect, until the parties went to a Civil Court to settle their disputes, and no emergency was even suggested. The order, therefore, was entirely without any authority of law and must be set aside.

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- s. 115. See SUPERINTENDENCE OF HIGH COURT.

- s. 145. *Dispute regarding right to collect rents—Jurisdiction of Magistrate—Appointment of Receiver of a joint estate—Joint owners governed by Mitakshara Law.* There is no want of jurisdiction in a Magistrate to proceed under s. 145 of the Criminal Procedure Code, because the dispute is one regarding the right to the collection of rents between joint owners governed by the Mitakshara School of Hindu Law. Nor can the appointment of a Receiver of the joint estate, subsequent to the passing of the order by the Magistrate, affect the question of the jurisdiction of the Magistrate at the time when he passed the order.

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- s. 145. *Disputes as to ownership of land—Collection of rents—Zamindars and tenants versus rural zamindars and tenants—Necessary parties to proceedings under s. 145 of the Code of Criminal Procedure—"Parties concerned," meaning of—Omission to add necessary parties—Addition of parties during proceedings—Revision and alteration of character of such proceedings by succeeding Magistrate—Jurisdiction of Magistrate—Revision, Power of High Court to interfere—Code of Criminal Procedure, s. 149—Charter Act (24 and 25 Vic., c. 104), cl. 15.* The words in s. 145 of the Code of Criminal Procedure, "parties concerned" in a dispute do not necessarily mean only the parties who are disputing, but include also persons who are interested in or claiming a right to the property in dispute. It is the duty of the Magistrate on the materials before him to ascertain, so far as he can, who are the persons interested in or claiming a right to the property in dispute, and to give notice to them all, so that the whole matter so far as his Court is concerned, may be disposed of in one proceeding. *Ram Chandra Das v. Monohur Roy and Protap Narain Singh v. Rajendra Narain Singh* followed. Where there was a dispute as to the ownership of lands between certain zamindars and their tenants on the one side and other zamindars and their tenants on the other, and the real matter for determination was not merely which of the two parties of zamindars were entitled to collect the rents of the lands, but also which set of rival tenants was entitled to hold actual possession of the lands, and in a proceeding under s. 145 of the Code of Criminal Procedure the zamindars only were made parties and not the tenants. *Held* (AMBER ALL and STANLEY, JJ.) that the tenants were necessary parties to the proceeding and the omission to make them

Criminal Procedure Code—(continued.)**Act V of 1898—(continued).**

parties went to the root of the case and was an illegality affecting jurisdiction which would justify the High Court in setting aside the order. PRINSEP, J.—The omission to join the tenants could not vitiate an order as between the zamindars on an objection that it was without jurisdiction and that no question of jurisdiction arose in the matter. The High Court's powers are under the Charter Act, and these could be exercised only in respect of jurisdiction. Where a Magistrate recorded proceedings under s. 145 of the Code of Criminal Procedure and his successor on the same materials revised those proceedings altering their entire character, converting the dispute, which was originally stated to be a dispute regarding the actual possession of the land into a dispute regarding the collection of rent between the persons named therein. *Held* (AMEER ALI and STANLEY, JJ.), that it was an abuse of jurisdiction on the part of the Magistrate so to alter the proceedings, and an abuse which would justify the intervention of the High Court under the powers conferred by the Charter. AMEER ALI, J.—The High Court has the power to interfere both under its revisional jurisdiction as also under s. 15 of the Charter Act. *Hurbullubh Narain Singh v. Luchmeswar Prosad Singh* referred to.

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- s. 145. *Order instituting proceedings under s. 145 of the Code of Criminal Procedure (Act V of 1898)—Contents of such order—Irregularity in order, making proceedings without jurisdiction.* Unless a Magistrate complies strictly with the terms of s. 145 of the Code of Criminal Procedure by stating in his written order all the particulars necessary to enable him to act under that section, his proceedings are without jurisdiction. It is not sufficient that the Magistrate should have before him a Police report and that he should have given orders thereon that a written order be drawn up within the terms of s. 145. It is his duty to draw up, or have drawn up, an order which in all respects satisfies the requirements of the law. It is absolutely necessary that the written order should be correct and complete in its terms.

MOHESH SOWAR v. NARAIN BAG XXVII 981

- s. 145. *Possession, Order of Criminal Court as to—Jurisdiction of Magistrate—Order made by a Civil Court—Power of revision by the High Court.* It is the duty of the Magistrate when the right to possession has been declared within a time not remote from his taking proceedings under s. 145 of the Criminal Procedure Code to maintain any order which has been passed by any competent Court; and therefore to take proceedings which necessarily must have the effect of modifying or even cancelling such orders, is to assume a jurisdiction which the law does not contemplate. The power of revision to be exercised by the High Court is limited to matters of jurisdiction, that is to say, to cases in which it is found that the Magistrate by taking proceedings under s. 145 has acted without jurisdiction.

DOULAT KOER v. RAMESWARI KOERI XXVI 625

- s. 145. *Right of ferry—Dispute concerning ferry including land, and water over which it plies—Possession, Order of Criminal Court as to.* The right to a ferry, i.e., the right to carry passengers to and fro, cannot be treated apart from the possession of the lands used on either side of the stream for the purpose of landing them. It is a proper case to be dealt with under s. 145 of the Criminal Procedure Code (Act V of 1898) where the subject-matter of dispute is a ferry including the land and water upon which the right of ferry is exercised.

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ss. 145, 146. See CRIMINAL PROCEDURE CODE, s. 144.

ss. 161 and 164. See EVIDENCE IN CRIMINAL CASE.

s. 165. See ARMS ACT, 1878.

s. 190. See SANCTION FOR PROSECUTION.

s. 190, cl. (c). See FALSE EVIDENCE.

ss. 190 and 191. See MAGISTRATE, JURISDICTION OF.

s. 192. See MAGISTRATE, JURISDICTION OF.

ss. 195; 197. See SANCTION FOR PROSECUTION.

s. 198. See BIGAMY.

s. 202. See FALSE CHARGE: MAGISTRATE, JURISDICTION OF.

s. 203. See CRIMINAL PROCEDURE CODE, s. 437: FALSE CHARGE: MAGISTRATE, JURISDICTION OF.

s. 204. See CRIMINAL PROCEDURE CODE, s. 437: MAGISTRATE, JURISDICTION OF.

Criminal Procedure Code—(concluded.)

Act V of 1898—(concluded.)

s. 205. See CONTEMPT OF COURT.

ss. 222 (2) and 234. See PENAL CODE, s. 477A.

ss. 233, 234. See CHARGES, JOINDER OF.

ss. 236, 237, 238. See ATTEMPT TO COMMIT OFFENCE.

s. 250. See COMPENSATION.

ss. 254, 256, 257. See WITNESS.

s. 288. See EVIDENCE IN CRIMINAL CASE.

s. 307. See REFERENCE TO HIGH COURT.

ss. 337 ; 339. See PARDON.

s. 340. See SECURITY FOR GOOD BEHAVIOUR.

s. 341. *Accused person deaf and dumb and unable to understand proceedings in Court—Commitment—Report by Magistrate of such proceedings to High Court—Power of High Court to pass final orders on such report—Discretion of High Court to order Sessions trial to be held or not—Code of Criminal Procedure (Act V of 1898), s. 471.* An accused person who had been for some time confined in a lunatic asylum was tried and committed to the Sessions by a Deputy Magistrate on a charge of murder. The accused was deaf and dumb, and could not be made to understand the proceedings which had been taken. On the proceedings being forwarded to the High Court under s. 341 of the Code of Criminal Procedure it was held that the law does not contemplate that the Sessions trial should necessarily take place; that it is discretionary with the High Court on a commitment made to order the Sessions trial to be held and the High Court must consider whether any benefit would be likely to result especially to the accused by such trial. The High Court in this case having come to the conclusion that no benefit would be likely to result to the accused by his being tried by the Court of Session, found that the accused was guilty of the alleged murder, but that he was by reason of unsoundness of mind not responsible for his action, and directed him to be kept in the District Jail to await the orders of Government.

QUEEN-EMPERESS v. SOMIR BOWRA... XXVII 368

s. 342. See EVIDENCE.

s. 370. See PRESIDENCY MAGISTRATE, JUDGMENT OF: WORKMAN'S BREACH OF CONTRACT ACT.

s. 423. See ATTEMPT TO COMMIT OFFENCE: CHARGE: REVISION: SESSIONS JUDGE, JURISDICTION OF.

s. 428. See APPEAL IN CRIMINAL CASE.

s. 429. See SUMMARY TRIAL.

s. 435. See REVISION: SUPERINTENDENCE OF HIGH COURT.

s. 437. See SECURITY FOR GOOD BEHAVIOUR.

s. 437. *Further inquiry—Offence not charged—Other persons not before Magistrate—Code of Criminal Procedure (Act V of 1898), ss. 203, 204—Penal Code, ss. 144 and 426.* On a complaint made to the Deputy Magistrate he convicted one of the accused H, of mischief. On application made to the Sessions Judge he directed a further inquiry to be made by the Magistrate into another offence, under s. 144 of the Penal Code, in respect of H, no charge of any such offence having been made at any time against him. The Sessions Judge also directed a further inquiry against other persons, who apparently were mentioned in the complaint, but who had not been summoned to appear before the Magistrate. *Held*, that the order of the Sessions Judge was without jurisdiction, not being within the powers described by s. 437 of the Code of Criminal Procedure.

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s. 439. See REVISION: SANCTION FOR PROSECUTION: SUMMARY TRIAL.

s. 476. See COMPENSATION: FALSE CHARGE: FALSE EVIDENCE.

s. 480. See SANCTION FOR PROSECUTION.

s. 522. *Restoration of possession of property—Use of criminal force—Penal Code (Act XLV of 1860), s. 350.* In order to support an order under s. 522 of the Criminal Procedure Code (V of 1898) there must be a finding that the dispossession was by the use of criminal force as defined in s. 350 of the Penal Code. *Ram Chandra Boral v. Jityandria* approved of.

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s. 526. See FALSE EVIDENCE.

s. 537. See CHARGES, JOINDER OF: SECURITY FOR GOOD BEHAVIOUR.

Withdrawal of operation of. See REVISION.

Crops—

Increase of rent for rise in price of. See ENHANCEMENT OF RENT.

Cross-objection—

See CIVIL PROCEDURE CODE, s. 561.

Custom—

See BENGAL TENANCY ACT, s. 88.

Evidence of. See RIGHT OF OCCUPANCY.

Or usage as to transferability of occupancy right, Question of. See CIVIL PROCEDURE CODE, s. 244.

Damages—

See MALICIOUS PROSECUTION.

For insult, Loss of reputation, and mental pain. See SLANDER.

For use and occupation. See RENT, SUIT FOR.

Measure of. See RAILWAY COMPANY.

Suit for. See LANDLORD AND TENANT.

Suit for, for non-delivery. See CARRIERS' ACT.

Darputnidar—

Dispossession of. See LIMITATION ACT, ART. 144.

Deaf and Dumb Person—

See CRIMINAL PROCEDURE CODE, s. 341.

Death of Party—

To execution proceeding. See SUCCESSION CERTIFICATE ACT, s. 4.

Debt—

Acknowledgment of. See JURISDICTION: LIMITATION ACT, s. 19.

Acknowledgment of, by guardian. See LIMITATION ACT, s. 19.

Contracted by one only of several partners. See CONTRIBUTION, SUIT FOR.

Meaning of. See ATTACHMENT: SUCCESSION CERTIFICATE ACT, s. 4, CL. 2.

Debtor and Creditor—

See INSOLVENT ACT, s. 51.

Declaratory Decree—

Suit for. See GRANT: TITLE.

Suit for. Suit for declaration of title—Land not properly described—Land Registration Act (Bengal Act VII of 1876), ss. 59, 62—Specific Relief Act (I of 1877), s. 42—Subsequent suit for possession—Practice—Amendment of plaint. A person is not debarred from bringing a suit for declaration of title on the ground that the land in question is not properly described; but if an order under s. 59 of the Land Registration Act is made against him, he is precluded by s. 42 of the Specific Relief Act from bringing a suit merely for declaration of his title without seeking to recover possession, although he may be in physical possession, the effect of such an order being to "settle the actual possession." The Appellate Court will not grant in a case of this nature an opportunity to amend the plaint if the plaintiffs had already such an opportunity and did not avail themselves of it. *Kazem Sheikh v. Danesh Sheikh, Dwarakanath Roy v. Jannabee Chowdhraim, Darbaree Sayal v. Patu Dhalee, Mahomed Ismail v. Lalla Dhundur Kishore Narain, Ajoodhia Lall v. Gumani Lall and Limba bin Krishna v. Rama bin Pimpala* distinguished. *Ram Mundar v. Janaki Pershad, Omrumissa Bibee v. Dilawar Ally Khan and Krishnabhupati Devi v. Ramamurti Pantulu* referred to and followed.

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Decree—

See APPEAL: SECOND APPEAL.

Against one of, several partners. See CONTRIBUTION, SUIT FOR.

Application for execution of, by transferee. See CIVIL PROCEDURE CODE, s. 244.

Assignee of. See BENGAL TENANCY ACT, s. 148.

Assignment of. See BENGAL TENANCY ACT, s. 148.

Construction of decree—Assignment of villages, part of an impartible estate—Maintenance of a member of a junior branch of a joint Hindu family—Agreement—Arbitration award, decree and settlement thereon—Revenue, by whom payable. A talukhdar owning an impartible inheritance was the head of a joint Hindu family

Decree—(continued.)

of which the defendant, his first cousin, was a member in a junior branch. In 1864 they came to terms as to the latter's claims upon the ancestral estate. A decree in that year founded upon the award of arbitrators between them declared the talukhdar's ownership, and the assignment by him of eleven villages to the junior member, free of liability in respect of the revenue. These terms were entered in an administration paper, or *wajib-ul-arz*, of the talukh before the settlement of 1867, in the record whereof they were also entered. And they were referred to in a sanad granted to the talukhdar. When the settlement of 1889 was in progress the profits of the eleven villages and the Government demand thereon had greatly increased; and for this jama the talukhdar was liable without any proportionate increase of profit from the eleven villages. In 1881 the talukhdar sued for a declaration that the defendant's right in the villages consisted only in a certain amount of allowance for maintenance derivable from them. He also claimed that the defendant should repay to him a sum which he had paid for local cesses. The defence was that the defendant's right in the eleven villages had been conclusively settled in the above proceedings. *Held*, that by the true construction of the decree of 1864, which was the foundation of the title of either party, the profits of the eleven villages belonged to the defendant, and that the revenue was to be paid, as between the two, by the plaintiff with the enhancements without benefit to him from the increase in the yield of the land. The principle of the judgments below was that the question to be decided was of the kind where the head of a family and a junior member dispute the amount of maintenance that should be paid. But the property assigned in this case was not of the variable character which belonged to an ordinary allowance for maintenance, and there was nothing to show that the Courts had authority to disturb settled arrangements on the ground of their being originally based on claims to maintenance. The talukha was vested in the plaintiff subject to the right of the defendant to hold the eleven villages, and as between them, the former was liable for the jama and the latter for the local rates and cesses.

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Ex parte. See CIVIL PROCEDURE CODE, s. 108.

Ex parte, Application to set aside. See PARTIES.

Ex parte, Effect on sale of reversal of. See SALE IN EXECUTION OF DECREE.

Ex parte, Sale in execution of. See RIGHT OF SUIT.

For arrears of rent against registered tenant alone. See SALE FOR ARREARS OF RENT.

Form of. See MORTGAGE.

Form of decree—Decree for maintenance—Receiver, Appointment of, in case of default—Transfer of Property Act (IV of 1882), ss. 67, 99, 100. To avoid any difficulty in executing a decree for maintenance out of property charged with payment of the allowance and make a fresh suit unnecessary in case of default in payment of the instalments, a Receiver should be appointed under the decree itself with directions, in case of default in payment of the maintenance, to take possession of the estate and sell the same, and out of the sale proceeds to pay the allowance for maintenance.

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Form of decree—Mortgage decree—Transfer of Property Act (IV of 1882), decree regarded as mortgage decree under—Sale of mortgaged property in execution of decree. In a suit for recovery of mortgage money by sale, brought after the Transfer of Property Act (IV of 1882) had come into force, the decree of the Court was: "that a decree be passed in favour of the plaintiffs in respect of Rs. 5,387-10-13, together with costs and interest at the rate of 6 per cent. per annum up to the date of realization, and that the mortgaged properties be made liable (*pas band kea jae*) for realization of the decretal money." *Held*, that the decree was to be regarded as a mortgage decree governed by the Transfer of Property Act, though not made in the form prescribed by that Act; and it followed that it was not open to the decree-holder to proceed against properties other than the mortgaged properties before exhausting the latter, and without obtaining an order under s. 90 of the said Act. *Jogemaya Dassi v. Thackomoni Dassi and Fasi Howladar v. Krishna Bandhoo Roy* referred to. *Chundra Nath Dey v. Burroda Shoondury Ghose* distinguished.

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For sale of mortgaged property making defendant personally liable in case of insufficiency. See LIMITATION.

For winding up, and for an account. See PARTNERSHIP.

Decree—(concluded.)

Obtained by fraud. Power of Court to treat it as nullity. See FRAUD.
Of Foreign Court as evidence in Court in British India. See FOREIGN COURT,
 JURISDICTION OF.
Purchaser of. See CIVIL PROCEDURE CODE, s. 244.

Decree-holder—

See CIVIL PROCEDURE CODE, s. 244.

Deed—

Acknowledgment of, by Registrar. See MORTGAGE.
Attestation of. See MORTGAGE.
Construction of. See MORTGAGE.

Deed of Sale—

Registration of. See TRANSFER OF PROPERTY ACT, s. 54.

Defamation—

Statements made by persons in the course of their evidence as witnesses in Court of Justice—Relevancy of statements to issue in case—Penal Code (Act XLV of 1860), s. 500. Where certain statements alleged to be defamatory were made by certain persons in the course of their evidence as witnesses in a Court of Justice and were relevant to the issue in the case under enquiry: *Held*, that such persons could not be prosecuted for defamation in respect of those statements.

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Defendant—

Payment into Court by. See PRACTICE.

Delivery of Deed of Sale—

See TRANSFER OF PROPERTY ACT, s. 54.

Demurrage or Freight—

Goods liable to. See CONTRACT.

Denial of Means by Respondent—

See PRACTICE.

Departmental Inquiry—

See LEGAL PRACTITIONERS' ACT, s. 13.

Deposit—

By defendant of money in Court in satisfaction of claim. See PRACTICE.
By judgment debtor. See CIVIL PROCEDURE CODE, s. 310A.

Deterring Public Servant—

From discharge of his duty. See PENAL CODE, s. 353.

Discharge—

Except as to debts due to a particular creditor. See INSOLVENT ACT, s. 51.

Discretion of Court—

See JURY: MESNE PROFITS: PRACTICE: RECEIVER: REVISION.

Dismissal of Suit—

For default. See REVIEW.
For non-appearance.. See CIVIL PROCEDURE CODE, s. 370.

Dispossession—

See POSSESSION, SUIT FOR.
Of putnidar and darputnidar. See LIMITATION ACT, ART. 144.

Dispute—

Regarding right to collect rents. See CRIMINAL PROCEDURE CODE, s. 145.

Distribution of Proceeds of Execution—

See EXECUTION OF DECREE.

District Court—

Report by, to High Court. See GUARDIANS AND WARDS ACT, s. 14.

Divorce Act—

IV of 1869, s. 36. See PRACTICE.

Document—

Signed by several persons, some of whom only are dead. See EVIDENCE ACT, s. 32.
Unregistered. See EVIDENCE.

Domicile—

See FOREIGN COURT, JURISDICTION OF.

Easement—

See RIGHT OF WAY.

Implied grant—Easement upon the severance of a heritage by its owner into two or more parts—Continuous and apparent easement—Right of way—Limitation Act (XV of 1877), s. 26. Implication of a grant of easement upon the severance of a tenement may extend to a "way" but that is so only where there has been some permanence in the adaptation of the tenement from which continuity could be inferred. *Charu Surnohar v. Dokouri Chunder Thakoor* distinguished.

RAM NARAIN SHAHA v. KAMALA KANTA SHAHA ... XXVI 311

Light and air—Partition of a joint-family house—Effect of partition by a consent decree where the decree does not reserve any right to the use of light and air—Implied grant of easement upon severance of tenement. On partition of a family dwelling house by a consent decree, the plaintiff claimed a right to the passage of light and air necessary for the enjoyment of his share of the building in the way in which it was enjoyed at the time of the partition, though no such right was expressly reserved in the decree. The defence was that the principle of an implied grant of easement upon severance of the tenement should not be applied to the case, but that the rights of the parties should be determined solely with reference to the decree made in the partition suit. *Held*, that the principles of justice, equity and good conscience should be applied to the case, and that the plaintiff was entitled to the right claimed, even in the absence of any express provision in the decree reserving such right. *Quære*: Whether the principle of an implied grant of easement in severance of tenements would apply in a case where the partition was effected by a decree of the Court in a contested suit and not by a consent of parties.

KADAMBINI DEBI v. KALI KUMAR HALDAR ... XXVI 516

Ejectment—

See LANDLORD AND TENANT.

Execution of decree for, for arrears of rent. See BENGAL TENANCY ACT, s. 66.

Liability to. See BENGAL TENANCY ACT, ss. 88; 116.

Right of. See BENGAL TENANCY ACT, s. 66.

Ekrarnama—

Liability created by. See LIMITATION ACT, ART. 120.

Registration of. See SPECIFIC RELIEF ACT, s. 27.

Enhancement of Rent—

See BENGAL TENANCY ACT, s. 29.

Bengal Tenancy Act (VIII of 1885), ss. 50 (sub-sec. 2), 115, 104 (sub-secs. 2 and 3) 113—Record of rights—Presumption as to fixity of rent—Settlement of fair and equitable rent—Enhancement for excess land—Enhancement for rise in price of crops. The provision contained in s. 115 of the Bengal Tenancy Act against the presumption as to fixed rent under s. 50 (2) of the Act arising in certain cases, has no application in a suit brought by a tenant for the purpose of contesting the correctness of the decision of a Revenue Officer in regard to the entry as to the status of a *raiya* in a record-of-rights prepared under ch. X of the Act. In such a suit the tenant is entitled to the benefit of the presumption. Given the circumstance of an increase or decrease in the area of the land for which a tenant is paying rent, it is competent to the Revenue Officer under s. 104 (2) of the Bengal Tenancy Act to settle a fair and equitable rent in respect of the whole of the land of the tenant, including the excess area, and the Revenue Officer can in such a case enhance the rent under the provisions of the Tenancy Act, *e.g.*, on the ground of the rise in the prices of the food crops, and so forth.

THE SECRETARY OF STATE FOR INDIA v. KAJIMUDDI ... XXVI 617

Partition of estates—Bengal Tenancy Act (VIII of 1885), ss. 7 and 188—Customary rate of rent—Fair and equitable rent—Joint-landlords—Onus of proof. In a suit for enhancement of rent of a tenure under s. 7 of the Bengal Tenancy Act, it is for the plaintiff to start his case by proving that the existing rate was below the customary rate payable by persons holding similar tenures in the vicinity, or that it was not fair and equitable, before the onus can be shifted to the defendant to prove that the existing rent was fair and equitable. A tenure was held under a

Enhancement of Rent—(continued.)

zamindari, which originally formed one entire estate. The estate was subsequently partitioned by the revenue authorities into four several estates. The rent of the tenure was thereupon allotted proportionately to each of the four estates thus formed, although the land forming the tenure remained undivided. In a suit for enhancement of the rent of the tenure brought by the proprietor of some of the estates, *held*, that the effect of the partition of the parent estate was to create separate and distinct tenures out of the original single tenure under the proprietors of each of the estates; that the proprietors of the several estates were not *joint* landlords of the tenure within the meaning of s. 188 of the Bengal Tenancy Act, and that, therefore, a suit for enhancement of rent would lie by a proprietor of one of the estates in respect of the rent allotted to his estate. *Surut Soonduree Debia v. Sumeeroodeen Talookdar*, and *Sarat Soondary Dabee v. Anund Mohun Surma Ghuttack* followed.

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Enhancement of Sentence—

See SENTENCE.

Enjoyment—

As of right, Continuance of. See RIGHT OF WAY.

"Entire Estate"—

Meaning of. See SALE FOR ARREARS OF REVENUE.

Entries in Account-books—

Admissibility of, in evidence. See EVIDENCE ACT, s. 34.

Equitable Execution—

See EXECUTION OF DECREE.

Equitable Relief—

See INTEREST.

Escape from Custody—

See ARREST.

"Estate"—

Meaning of. See ASSAM LAND AND REVENUE REGULATION.

Estates Partition Act—

Bengal Act VIII of 1876, ss. 112, 128. See PARTITION.

Estoppel—

See MINOR.

Evidence—

See PROBATE: SETTLEMENT.

After report of Amin, Discretion of Court to take. See MESNE PROFITS.

As to jurisdiction at hearing. See JURISDICTION.

Evidence in Criminal Case—Criminal Procedure Code (Act X of 1882), s. 342—

Statement of accused under that section—Misdirection. A gap in the evidence for the prosecution cannot be filled up by any statement made by the accused in his examination under s. 342 of the Criminal Procedure Code. It is a misdirection to ask the jury to consider a document, purporting to be proved by such a statement, as evidence against the accused.

BASANTA KUMAR GHATTAK v. QUEEN-EMPRESS ...

... XXVI 49

In Criminal Case. Criminal Procedure Code (Act V of 1898), ss. 161, 164, 288 and 307—Impropropriety of taking down statements of persons immediately before their arrest—Impropropriety of recording statements of witnesses with a view to fix them to those statements—Confession retracted—Evidence of witnesses retracted—Corroboration—Deposition before Committing Magistrate read under s. 288, Criminal Procedure Code. Where there is evidence in the hands of a Police officer upon which he is bound to arrest a person, it is improper for him to obtain a statement from that person, professedly under s. 161 of the Criminal Procedure Code, and reduce it to writing; and by virtue of s. 25 of the Evidence Act such statement is inadmissible in evidence. It is also improper for a Police officer to send a person practically under custody, who is in the position of a witness, to have his statement recorded by a Magistrate under s. 164 of the Criminal Procedure Code, with the view of fixing him

Evidence—(continued.)

to that statement at the time when judicial proceedings are subsequently taken. The voluntary character of such a statement cannot but be doubted and when retracted in the Court of Sessions, the Judge should not bring the statement on to the record under s. 288 of the Criminal Procedure Code without making proper inquiry. It is not safe to convict an accused person on his retracted confession standing by itself uncorroborated, or on the statements of witnesses brought in under s. 288 of the Criminal Procedure Code without independent corroborating testimony; nor can these two be joined together and held as mutually corroborating each other so as to justify a conviction based on them. *Queen v. Amanulla, Queen-Empress v. Rangi and Queen-Empress v. Bharmappa* referred to and approved of.

QUEEN-EMPRESS *v.* JADUB DAS XXVII 295

In Criminal Case. Evidence of bad character—Belonging to a gang of persons associated for the purpose of habitually committing theft—Penal Code (Act XLV of 1860), s. 401—Evidence Act (I of 1872), s. 14 and s. 54 as amended by Act III of 1891. The character of the accused not being a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft, punishable under s. 401 of the Indian Penal Code, evidence of bad character or reputation of the accused is inadmissible for the purpose of proving the commission of that offence. Where it was proved that certain persons were found together at some distance from their houses, that they were all intimately connected with one another and were in the habit of visiting *melas* together, that one of them was arrested in the act of picking a pocket and that when they were arrested many of them gave false names and false addresses. *Held*, they could not be convicted under s. 401 of the Indian Penal Code, there being no proof that they belonged to a gang of persons associated for the purpose of habitually committing theft.

MANKURA PASTI *v.* QUEEN-EMPRESS XXVII 139

Of title. See TITLE.

Parol evidence—Evidence Act (I of 1872), s. 92—Evidence of conduct—Return of a lease—Intention of parties. Evidence of conduct, as for instance return of a lease is admissible in evidence under s. 92 of the Evidence Act to prove that such return was due to an intention to make the lease inoperative. *Preonath Shaha v. Madhu Sudan Bhuiya* followed.

SHYAMA CHARAN MANDAL *v.* HERAS MOLLAH XXVI 160

Power of Judge in dealing with. See REFERENCE TO HIGH COURT.

Production and admissibility in evidence of income-tax papers—Income Tax Act (II of 1886) s. 38—Rule 16 of rules made by Local Government under Income Tax Act. Rule 16 of the rules made by the Local Government under s. 38 of the Income Tax Act (II of 1886) does not apply to the production of income-tax papers in a Court of Law in a suit between two partners. *Lee v. Birrell* and Mayne's Commentary on the Criminal Law, pp. 86, 87 cited.

JADOBRAM DEY *v.* BULLORAM DEY XXVI 281

Registration Act (III of 1877), s. 49—Collateral purpose—Mortgage, unregistered—Limitation Act (XV of 1877). An unregistered document, the registration of which is compulsory, may be admissible in evidence for a collateral purpose, *i.e.*, to prove admission of liability on part of the executant sufficient to prevent a claim from being barred by the Limitation Act.

MUGNIRAM *v.* GURMUKH ROY XXVI 234

Secondary evidence—Evidence Act (I of 1872), ss. 65, 66. (Per BANERJEE and RAMPINI, JJ.)—Where oral evidence was given to prove the contents of a letter, which was neither produced nor called for, but no objection was raised to the giving of the evidence, held, that this was secondary evidence of the contents of a document, and could not be given without satisfying the conditions of s. 65 of the Evidence Act. Section 66 rendered it legally inadmissible, although no objection was raised to the giving of it.

KAMESHWAR PERSHAD *v.* AMANUTULLA XXVI 53

Taken on commission. See PRACTICE.

Evidence Act—

I of 1872—

s. 14. See EVIDENCE IN CRIMINAL CASE.

s. 25. See CONFESION.

s. 32. *Statements made by deceased tenants—Road-cess returns—Bengal Cess Act (Bengal Act IX of 1880), s. 95. Semble; The statements made by deceased*

Evidence Act—(continued.)**I of 1872—(continued.)**

- tenants in road-cases returns filed by them regarding assets of the tenancy are not admissible in evidence under s. 32 of the Evidence Act.
- HEM CHANDRA CHOWDHRY v. KALI PRASANNA BHADURI ... XXVI 882
- s. 32, cl. (5). *Statement relating to the existence of any relationship contained in a document signed by several persons, some only of whom are dead.* A statement relating to the existence of any relationship contained in a document signed by several persons, some only of whom are dead, is admissible in evidence under cl. 5 of s. 32 of the Evidence Act.
- CHANDRA NATH ROY v. NILMADHAB BHUTTACHARJEE ... XXVI 286
- s. 34. *Admissibility of books of account containing entries after transaction—Corroborative evidence.* By s. 34 of the Indian Evidence Act, 1872, the admissibility of books of account regularly kept in the course of business is not restricted to books in which entries have been made from day to day, or from hour to hour, as transactions have taken place. The time of making the entries may affect the value of them but should not, if they have been made regularly in the course of business afterwards make them irrelevant. The course of business in keeping the accounts in the office of a talukhdari estate was that monthly accounts were submitted by karindas at the head office where they were abstracted and entered in an account book, under the date of entry, that being in some cases many days after the transaction of payment or receipt; but the entries were made in their proper order, on the authority of the officer whose duty it was to receive or pay the money. *Held*, that the entry in the account book was admissible as corroborative evidence of oral testimony to the facts of a payment for what it was worth, objection being only to be made to its weight, not to its relevance under s. 34. The opinion expressed in the judgment in *Munchershaw Neeraji v. The New Dhurumsey Spinning and Weaving Co.*, against the reception of an account book containing an entry not made at the time of the transaction was not approved.
- DEPUTY COMMISSIONER OF BARA BANKI v. RAM PARSHAD ... XXVII 118
- s. 38. *Statement as to French Law—Unauthorized Translation of Code Napoleon.* A statement contained in an unauthorised translation of the Code Napoleon as to what the French law is on a particular matter, is not relevant under s. 38 of the Evidence Act.
- CHRISTIE v. DELANNEY ... XXVI 931
- ss. 40 and 44. See FRAUD.
- s. 48. See RIGHT OF OCCUPANCY.
- s. 54. See EVIDENCE IN CRIMINAL CASE.
- ss. 65, 66. See EVIDENCE.
- ss. 65, 66, 74, 79, 86. *Foreign State, judicial proceedings in—Record not certified as specified in s. 86—Secondary evidence—Public document, contents of.* The record of proceedings in a Court of Justice is presumed to be genuine and accurate, if it is certified as directed by s. 86 of the Evidence Act. But the proceedings may be proved by an official of the Court speaking to what takes place in his presence and also to an uncertified record thereof. The latter thereby becomes secondary evidence under ss. 65 and 66 of the certified record (being a public document under s. 74) admissible without notice to the adverse party when the person in possession thereof is out of the jurisdiction.
- HARANUND CHETLANGIA v. RAM GOPAL CHETLANGIA ... XXVII 639
- s. 68. *Surety bond purporting to hypothecate immoveable property—Bond not properly attested—Transfer of Property Act (IV of 1882), s. 59.* Where a surety bond purported to hypothecate immoveable property, though it was not registered and attested by two witnesses, a personal decree could be passed on it against the surety inasmuch as the document was evidence of a money debt. *Madras Deposit and Benefit Society v. Oonnamalai Ammal* dissented from.
- SONATUN SHAHA v. DINONATH SHAHA ... XXVI 222
- s. 70. See TRANSFER OF PROPERTY ACT, s. 59.
- s. 92. See EVIDENCE.
- s. 115. See MINOR.
- s. 127. *Privileged communication—Communication to clerk of pleader.* (*Per BANERJEE, J.*)—Section 127 of the Evidence Act (I of 1872) extends to a communication made to the pleader's clerk the same confidential character that attaches to a communication to the pleader direct, under s. 126.
- KAMESHWAR PERSHAD v. AMANUTULLA ... XXVI 58

Evidence Act Amendment Act—

III of 1891. See EVIDENCE IN CRIMINAL CASE.

Excess Land—

Rent of. See ENHANCEMENT OF RENT.

Execution of Decree —

See APPEAL: ATTACHMENT: DECREE: JURISDICTION: MESNE PROFITS: RECEIVER: SALE FOR ARREARS OF RENT: SURETY.

Against female heir. See SALE FOR ARREARS OF RENT.

Application for. See LIMITATION ACT, SCH. II, ART. 179.

Application for, by assignee. See BENGAL TENANCY ACT, s. 148: CIVIL PROCEDURE CODE, s. 244.

Application for, by trustees under assignment. See BENGAL TENANCY ACT, s. 148.

Distribution of proceeds of execution—Assets realized by sale or otherwise in execution—Moneys realized by Receiver appointed by decree-holder—Equitable execution—Code of Civil Procedure (Act XIV of 1882), s. 295. Rents of property under attachment which have been realized by a receiver appointed at the instance of one decree-holder are "assets realized by sale or otherwise in execution of a decree" within the meaning of s. 295 of the Code of Civil Procedure. The appointment of a Receiver by the Court at the instance of a judgment-creditor is a "process of execution."

FINK v. MAHARAJ BAHADOOR SING XXVI 772

For ejectment for arrears of rent. See BENGAL TENANCY ACT, s. 66.

Question for Court in. See CIVIL PROCEDURE CODE, s. 244.

Question in. See CIVIL PROCEDURE CODE, SS. 244; 244, 266 AND 318.

Question relating to. See APPEAL: SECOND APPEAL.

Execution of Deed—

Admission of. See TRANSFER OF PROPERTY ACT, s. 59.

Ex parte Decree—

Application to set aside. See PARTIES.

Set aside on terms. See CIVIL PROCEDURE CODE, s. 108.

Extortion—

See ACCOMPLICE.

False Charge—

Necessity of examination of complainant—Dismissal of complaint—Order for judicial inquiry or report without examining complainant, Legality of—Penal Code (Act XLV of 1860), s. 211—Code of Criminal Procedure (Act V of 1898), ss. 202, 203 and 476.

Where a Magistrate after having examined the complainant and without hearing his witnesses or dismissing the complaint ordered the complainant to be prosecuted under s. 211 of the Penal Code: *Held*, that the Magistrate's order was without jurisdiction. Where a complainant, whose complaint had been reported false by the Police, complained to the Magistrate and asked him to try the complaint, and the Magistrate did not examine the complainant himself, but made over the case to a Subordinate Magistrate for judicial inquiry or report: *Held* that the Magistrate had no authority for this procedure. A complainant must be examined by the Magistrate, who receives the complaint, or by some Magistrate to whom he has transferred the case. When a complainant has been examined he is entitled to have the person accused brought before the Magistrate, and it is only when the Magistrate has reason not to believe the truth of the complaint from his examination that this can properly be refused and an investigation held.

MAHADEO SINGH v. QUEEN-EMPRESS XXVII 921

False Evidence—

Court—Collector under Land Acquisition Act—Power of such Collector to administer oath or require verification—Deputy Collector under Land Acquisition Act—Judicial officer—Revenue Court—Overestimate of value of land—False statement—Criminal Procedure Code (Act V of 1898), ss. 476 and 526—Penal Code (Act XLV of 1860), ss. 193, 196, 199, 467, 468, and 471—Land Acquisition Act (I of 1894), s. 53. The expression "the Court" in the Land Acquisition Act does not include a Collector, nor is there any authority given to the Collector to administer an oath or to require a verification. It is a false statement made under a verification that constitutes an offence under s. 193 of the Penal Code, not a verification on oath or solemn affirmation. The Deputy Collector acting under the Land Acquisition Act is not a Judicial Officer; he cannot properly be regarded as a Revenue Court

False Evidence—(continued.)

within the terms of s. 476 of the Code of Criminal Procedure, his proceedings under the former Act are not regulated by the Code of Civil Procedure, nor is he right in requiring a petition put in before him to be verified in accordance with that Code, so as to make any false statement punishable as perjury. The Deputy Collector is not in a position to pass any final order in the matter of value of the land or the right to claim the price fixed: a party dissatisfied can claim a reference to the Civil Court whose duty it is to settle the matter in dispute judicially; therefore, to subject parties, who claimed the right to such a reference, to a criminal prosecution, when the matters on which the Deputy Collector had formed an opinion as a Revenue Officer under the Land Acquisition Act must be submitted to the determination of a Court is obviously premature and improper, and is almost certain to operate very prejudicially towards them in the trial before the Civil Court of the same matter. In proceedings under the Land Acquisition Act what may be found to be an exaggeration or over-estimate of the value of land cannot properly constitute a false statement, which would demand a prosecution for perjury, and the fact that, some years before, the land was offered for sale at a much lower price is no sufficient ground for imputing such an offence

DURGA DAS RUKHIT v. QUEEN-EMPRESS XXVII 820

Examination on oath of person by Magistrate for purpose of obtaining information in order to take proceedings—Whether such person a witness—Contradictory statement made by such person at trial as witness—Code of Criminal Procedure (Act V of 1898), s. 190, cl. (c)—Indian Oaths Act (X of 1873), s. 5—Penal Code (Act XLV of 1860), ss. 191 and 193. Held, that where an accused person was examined by a Magistrate for the sake of obtaining information on which proceedings could be taken, the Magistrate although he might examine him to obtain information, could not legally examine him on oath, nor could the accused be said at that stage of the proceedings to be a witness even though he were examined on oath. There was no authority that being so examined the accused was bound by any express provision of law to state the truth. Consequently any charge for giving false evidence founded on this statement was bad, and it therefore followed that a conviction and sentence founded on this statement, as being contrary to another statement made by the accused when examined as a witness at the trial, without any proof or finding that the second statement was false, could not be maintained.

HARI CHARAN SINGH v. QUEEN-EMPRESS XXVII 455

Instigating person to give. See SANCTION FOR PROSECUTION.

Prosecution for giving. See PARDON.

False Information—

Charge of furnishing. See COMPLAINT.

Falsification of Accounts—

See PENAL CODE, s. 477A.

Farrukshyari Property—

See INCOME TAX ACT.

Father's Brother's Daughter's Son --

See HINDU LAW, INHERITANCE.

Fees—

To landlord and for service of notice of sale, Effect of non-payment of. See BENGAL TENANCY ACT, s. 11.

Ferry—

Meaning of. See BENGAL MUNICIPAL ACT, ss. 155, 156.

Right of. See CRIMINAL PROCEDURE CODE, s. 145.

Ferry Tolls—

See RENT, SUIT FOR.

Fine—

See CATTLE TRESPASS ACT, s. 22.

Daily payment of fine, Order for—Illegality of such order. An order for payment of a daily fine is illegal inasmuch as it is an adjudication in respect of an offence which has not been committed when such order is passed. *In the matter of Sagar Dutt, In re Love, and Kristodhone Dutt v. Chairman of the Municipal Commissioners of the Suburbs of Calcutta* referred to.

RAM KRISHNA BISWAS v. MOHENDRA NATH MOZUMDAR .. XXVII 565

Fireworks—

Carriage of. See RAILWAY COMPANY.

Firm—

Liability of members of. See STAMP ACT, s. 58.

Foreclosure and Possession—

Suit for. See MORTGAGE.

Foreign Court—

Jurisdiction of. Private International Law—Suit in British Court on foreign judgment—Territorial jurisdiction—British subject—Domicile—Nationality—Decree of foreign Court as evidence in Court in British India—Civil Procedure Code (XIV of 1882), s. 13. A foreign Court has no jurisdiction over a person who is a British subject domiciled and residing in British India, who was not within the territorial jurisdiction of that Court either at the time when a suit was brought against him or previously, and who never subjected himself by any act of his, such as by appearing and defending the suit, to the jurisdiction of that Court. A decree passed by a foreign Court against such a person cannot be given effect to in a Court in British India. Even if there be in such a case any special territorial legislation giving jurisdiction to the foreign Court, such legislation cannot be recognized by a Court in British India. Nationality is determined by birth on the soil and not by citizenship by descent. There is a distinction between a case in which a defendant puts forward a foreign judgment as a bar to a suit under s. 13 of the Code of Civil Procedure, and a case in which a plaintiff seeks to enforce a foreign judgment. In the former, it may fairly be supposed that the parties submitted to the jurisdiction of the foreign Court. *Gurdayal Singh v. Raja of Faridkot* followed.

CHRISTIE v. DELANNEY XXVI 93

Forest Act—

VII of 1878—

ss. 25, 54. *Conviction for offence under—Subsequent order for confiscation of boats—When such order should be made.* Certain accused persons were tried summarily and convicted under s. 25 of the Indian Forest Act, and sentenced to pay fines. By a subsequent order under s. 54 of the same Act their boats were confiscated. *Held*, that under the terms of s. 54 an order of confiscation cannot be regarded as an order incidental on the conviction. The confiscation is by the terms of that section declared to be a punishment, for it is in addition to any other punishment prescribed for the offence. Being a punishment, the order should have been passed simultaneously with the other punishment for the offence of which the accused have been convicted. *Empress v. Nathu Khan* referred to.

AIUNDDI SHEIKH v. QUEEN-EMPRESS XXVII 450

Fornication—

See MAHOMEDAN LAW.

Fraud—

See RIGHT OF SUIT: SALE IN EXECUTION OF DECREE.

Application to set aside sale on ground of. See SECOND APPEAL.

Pleading fraud—Evidence Act (I of 1872), ss. 40 and 44—Existence of a previous judgment inter partes—Relevant fact—Competency of any party against whom such judgment obtained to prove in a suit between the same parties, that it was obtained by fraud. In a suit brought by A against B for *khas* possession of a tank, the plaintiff put in a decree based on a compromise in a previous suit between him and the defendant, to prove his right to *khas* possession. The defence (*inter alia*) was that the decree was a fraudulent one. *Held*, that under s. 44 of the Evidence Act (I of 1872), the defendant could show that the decree was obtained by fraud.

RAJIB PANDA v. LAKHAN SENGH MAHAPATRA XXVII 11

Pleading fraud—Power of Court at instance of innocent party to treat decree of another Court obtained by fraud as a nullity. An innocent party may be allowed to prove in one Court that a decree obtained against him in a different proceeding in another Court of concurrent jurisdiction was obtained by fraud, and if the Court be of opinion that such decree so obtained in the other Court cannot stand it has jurisdiction to treat that decree as a nullity and render its effect nugatory.

NISTARINI DASSI v. NUNDO LALL BOSE XXVI 391

Successfully effected. See BENAMI TRANSACTION.

French Law—

Statement as to. See EVIDENCE ACT, s. 38.

Full Bench—

Power in criminal case to send back case to referring Bench for final disposal—Rules of High Court, Appellate side, Ch. V, Rule 5. The Full Bench has power in a criminal case, after deciding the question referred, to send back the case to the referring Bench for final disposal under Rule 5, Ch. V, of the rules of the High Court, Appellate side.

IN THE MATTER OF ABDUR RAHMAN ... XXVII 839

Further Inquiry—

Order for. See REVISION.

Gambling Act—

Bengal Act II of 1867—

Offence under. See PENAL CODE, s. 218.

Gang of Persons—

Habitually committing theft. See EVIDENCE IN CRIMINAL CASE.

Gift—

See BENAMI TRANSACTION.

To widow as "Malikatiwa." See HINDU LAW, WILL.

Validity of. Gift of immoveable property without possession—Mutation of names without objection of donor. A gift of immoveable property, followed shortly afterwards (pursuant to the terms of the gift) by mutation of names without any objection being made by the donor, was not invalid for the mere reason that the donor did not deliver actual possession. *Kalidas Mullick v. Kanhaya Lal Pundit and Dharmodas Das v. Nistarini Dasi* referred to.

RAM CHANDRA MUKERJEE v. RANJIT SINGH ... XXVII 242

Goods—

See PENAL CODE, s. 486.

Sold, not available for delivery. See CONTRACT.

Government—

Power of. See SETTLEMENT.

Rights of. See OUDH ESTATES ACT.

Government Officers—

Acts of, how far binding on Government. See SETTLEMENT.

Grant—

Construction of grant—Grant by zamindar of estate for maintenance—Pottah "dawami" made to a lessee by the grantee in excess of his estate to what extent effectual, from circumstances—Suit for possession—Limitation Act (XV of 1877), sch. II, art. 91—Suit for declaratory decree—Specific Relief Act (I of 1877), s. 39—Adverse possession. A grant of a village for maintenance was made by a zamindar to his nephew, operating only for life. The grantee survived the grantor, and by *ikrarnama* acknowledged the succeeding zamindar to be entitled to the village. The grantee had, however, already executed a pottah, described therein as permanent, to a lessee. The latter obtained possession, and from him after the death of the original grantee for life the zamindars who succeeded the grantor accepted rent at the rate stipulated in the pottah, and did not disturb his possession. This suit after the death of the lessee claimed the village as part of the inherited zamindari, the defence being that the lease was perpetual. *Heid*, (1) that the original grant not having extended to more than the life of the grantee, the pottah was void as against the successor in title of the grantor, and not merely voidable after the grantee's death. The acceptance of rent at the rate in the pottah could not have the effect of confirming it in its entirety, which, according to the construction of the High Court, would have been for a permanent estate. The duration of the pottah could not exceed that of the original grant; nor could an admission, taken by the High Court to have been that the acceptance of rent had confirmed the permanency of the lease, preclude the claim for legal right, even supposing that admission to have been made. The matter in contest was as to the circumstances under which the lessee was allowed to remain in possession, and their legal effect. And, on the evidence, the lessee had been allowed to remain as a *mokurrari* tenant for his life. (2) The suit for possession was not

Grant—(continued.)

barred under art. 91 of the Limitation Act (XV of 1877) on the ground that a decree declaratory of title to have the pottah cancelled might have been sued for in the lessee's life time under s. 39 of the Specific Relief Act, 1877. (3) The possession of a tenant for life is not rendered adverse within the meaning of Act XV of 1887 by a notice from the tenant that he claims to be holding on a perpetual or hereditary tenure.

BENI PERSHAD KOERI v. BUDHNATH ROY ... XXVII 158

Implied. See EASEMENT.

Grievous Hurt—

Conviction of. See RIOTING.

Ground for setting aside Award—

See ARBITRATION.

Grounds of Appeal—

See SECOND APPEAL.

Guardian—

Acknowledgment of debt by. See LIMITATION ACT, s. 19.

Appointment of. See GUARDIANS AND WARDS ACT, s. 14.

Power of, to bind minor in a suit. See OATHS ACT, s. 9.

Powers of. See LIMITATION ACT, s. 19.

Guardians and Wards Act—

VIII of 1890—

s. 14. *Proceedings for appointment of a guardian in more Courts than one—Report by District Court to High Court—Direction by Chief Justice—Powers of High Court—Letters Patent, High Court, 1865, cl. 17—Jurisdiction—Costs.* Section 14 of the Guardians and Wards Act (VIII of 1890) does not apply to the High Court in the exercise of its Original Civil jurisdiction; and the term "report" in cl. (2) of that section refers, not to a judicial reference, but to a ministerial act. Proceedings had been taken for the appointment of a guardian of a minor, under that section, in the High Court, and afterwards in a Mofussil Court. The latter reported the case to the High Court; and the Chief Justice thereupon directed that the proceedings in the Mofussil Court should be stayed, and that a Judge of the Original Side of the High Court should hear and determine the matter. *Held*, that such direction was in order, and that the Judge who determined the matter had jurisdiction to do so. *Held*, also, that although a petitioner had failed in his application on all points except the removal of the guardian, he was entitled to his costs up to and including the order removing the guardian, as he must be taken to have acted, so far, for the benefit of the minor.

IN THE MATTER OF FAKARUDDIN MAHOMED CHOWDHRY ... XXVI 133

ss. 27, 29. See LIMITATION ACT, s. 19.

Heir of Certified Purchaser—

Suit against. See BENAMI TRANSACTION.

Hereditary Right—

To officiate as priest. See RIGHT OF SUIT.

High Court—

Interference by, in pending case. See MAGISTRATE, JURISDICTION OF.

Jurisdiction of. See REVISION.

Jurisdiction of. Chittagong Hill Tracts—conviction of offences committed within Chittagong Hill Tracts—Appeal from sentence in such a case—Chittagong Act (XXII of 1860), s. 1—Penal Code (Act XLV of 1860), ss. 379 and 457. There is no jurisdiction in the High Court to hear appeals in respect of sentences passed on conviction of offences committed within the districts known as the Chittagong Hill Tracts.

QUEEN-EMPRESS v. SONAI MUGH ... XXVII 654

Land situate outside limits of. See JURISDICTION.

Power of. See APPEAL: GUARDIANS AND WARDS ACT, s. 14: REVISION:

SANCTION FOR PROSECUTION: SUPERINTENDENCE OF HIGH COURT.

Sanction of, for prosecution. See PARDON.

High Courts' Charter Act—

24 and 25 Vic., c. 104, s. 15. See CRIMINAL PROCEDURE CODE, s. 145 : REVISION : SUPERINTENDENCE OF HIGH COURT.

Hindu Female Heir—

Rent accrued due against, after death of last full owner. See SALE FOR ARREARS OF RENT.

Suit for possession by reversioner on death of. See LIMITATION ACT, ART. 144.

Hindu Law—

Adoption. Construction of will—Invalidity of authority purporting to be given to a widow jointly with others to adopt. That no one except the widow, authorized for the purpose by her husband, can adopt a son to him after his decease is a principle in the Hindu law of adoption. The power is exercisable by the widow alone, though restriction may be placed upon her choice of a boy by the husband's having made it a condition that persons named by him should concur in the choice. A husband had by his will purported to authorize his widow, whom he made his executrix jointly with two other persons whom he appointed his executors, to adopt a son to him. *Held*, that by this no valid authority to adopt was given to the widow. The conjecture that the testator really meant to give authority to the widow to adopt, restricting her power merely to the extent that there should be others, his executors, who were to consent to the choice of a boy to be adopted by her, could not be accepted as a legitimate construction of the will. The authority was expressed in clear terms to be to the three. It would also be beyond the range of judicial interpretation to construe the will as meaning that the testator only intended to provide for the appointment of a male successor to him in the property.

AMRITO LAL DUTT v. SURNOMOYE DASI ... XXVII 996

Alienation. Alienation by widow—Mortgage taken from Hindu widow—Unpaid interest claimed on her deceased husband's mortgage—Will, Construction of. A *purdanashin* widow executed a mortgage of part of the family estate to secure payment of the balance of interest alleged to be due on three previous mortgages, which had been executed by her husband in his lifetime. Justifying necessity for her to encumber was not shown, nor enquiry by the mortgagee as to her authority. Even if the transaction had been properly explained to her, as a Hindu widow, she would have exceeded her powers. By his will her husband had declared that his widow should have full powers, but that, during the life of his minor son she would not have power to transfer without legal necessity; and that she should have power to mortgage to pay revenue and other debts, *held*, that the will conferred on her no greater power of alienating the family estate than she had under the Hindu law; and that, under the circumstances, the mortgage executed by her was invalid. Notes promising to pay interest, additional to that contracted for in the mortgages, had been signed by the husband, which it was held could not affect the right to redeem, being unregistered.

TIKA RAM v. THE DEPUTY COMMISSIONER OF BARA BANKI ... XXVI 707

Custom. Jains—Power of sonless widow to adopt a son without permission of husband—Saraogi—Right of a sonless Jain widow—Limitation (Act IX of 1877), Art. 129—Minority. Judicial decisions recognising the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of the same custom amongst the Jains of another place, unless it is shown that the customs are different; and oral evidence of the same kind is equally admissible. There is nothing to limit the scope of the inquiry to the particular locality in which the persons setting up the custom reside. Upon the evidence in the case, consisting partly of judicial decisions and partly of oral testimony, it was *held* that the custom that a sonless Jain widow was competent to adopt a son to her husband without his permission or the consent of his kinsmen, was sufficiently established, and that in this respect there was no material difference in the custom of the Agarwalla, Choreewal, Khandwal and Oswal sects of the Jains; and that there was nothing to differentiate the Jains at Arrah from the Jains elsewhere. *Held*, also, that the terms *Jain* and *Saraogi* are synonymous. A childless Jain widow acquires an absolute right in her husband's separate property. An adoption was made by M, a Hindu widow to her husband J in 1854, when the plaintiff's father, the then nearest reversionary heir to J, was alive; and the adopted son B got actual possession of the property left by J, on the 14th April 1877, under a deed of gift executed by M. M died on the 6th February 1883; and B was succeeded by his son, the present defendant. The plaintiff's father died on the 15th October 1875, and the plaintiff attained his majority on the 28th July 1894, having been

Hindu Law—(continued.)

born on the 29th July 1873. The plaintiff brought the present suit against the defendant, on the 28th January 1895, for the recovery of the properties left by J as being his nearest reversionary heir. *Held*, that the suit was barred under art. 129 of the Limitation Act IX of 1871, as it involved the setting aside of an adoption made in 1851, having been brought after 12 years from the date of the adoption, and the period of limitation having commenced to run during the lifetime on the plaintiff's father.

HARNABH PERSHAD v. MANDIL DASS ... XXVII 379

Inheritance. Bengal School—Father's brother's daughter's son whether preferential heir to mother's brother's son. Under the Bengal School of Hindu Law, the father's brother's daughter's son as heir is preferential to the mother's brother's son.

BRAJA LAL SEN v. JIBAN KRISHNA ROY ... XXVI 285

Joint family. Joint family estate—Succession—Title of member by survivorship—Partition not established by award and record at settlement of widow's estate for life—Central Provinces Land Revenue Act (XVIII of 1881), s. 87. Where a Hindu and his widow had successively held the estate in a suit as joint-family estate in coparcenary with the appellant or his predecessor: *Held*, that the appellant succeeded at the widow's death. Though the widow was recorded under an award by the Collector in the settlement records as owner of an 8-anna share of the estate for her life-time, that did not operate as a separation in title or alter its devolution. Section 87 of the Land Revenue Act, Central Provinces (XVIII of 1881), did not affect the appellant's claim, for the award related solely to the widow's interest.

REWA PRASAD SUKAL v. DEO DUTT RAM SUKAL ... XXVII 515

Joint family. Partition—Right to an account—Suit for partition referred to arbitration but property not wholly partitioned—Infant's right to an account of his share of the property partitioned and unpartitioned. A, a member of a Hindu joint family, died leaving a widow and no issue. By his will he appointed B, C, and D, members of the joint family, his executors, and gave his widow power to adopt. In pursuance of that power the widow adopted E. The executors instituted a suit for partition of the joint estates, and the suit was referred to the arbitration of Z. He died without having partitioned the whole of the property, and an application was then made to the Court to determine the partition. The Court granted the application and the suit came on for trial. The infant E asked for an account to be taken of the dealings of the joint property, and of the rents and profits on behalf of the estate of his late father, from the death of his father up to the appointment of a Receiver. *Held*, that in respect of the properties remaining unpartitioned the infant was entitled to an account of the dealings of the joint property, and of the rents and profits from the death of his father up to the time a Receiver was appointed, but as to the properties already partitioned, he was not so entitled.

SARAT CHUNDER SINGH v. NITVE SUNDER SINGH ... XXVII 1015

Joint family. Partnership—Infant sons—Mitakshara law—Promissory note, Suit on—Non-joinder of parties—Plea in bar of suit. In a suit on a promissory note executed by the defendant in favour of a firm whose original partners were two brothers, one of whom had previously died, leaving an infant son surviving, while the other, who also had infant sons, was, at the date of the execution of the note, sole surviving partner of the firm: *Held*, that a Hindu infant, who by birth or inheritance becomes entitled to an interest in a joint family business, does not necessarily become a member of the trading partnership carrying on the business. There must be some consentient act to that effect on the part of the infant and his partners. Even, therefore, where parties are governed by the Mitakshara law, an infant need not be joined as a co-plaintiff in a suit by the father to recover a trade debt. Decrees obtained in such suits by or against the managers of the business are presumed to have been obtained by or against them in their representative capacity and will be binding on the whole joint family. *Bisessur Lall Sahoo v. Luchmessur Singh, Petum Doss v. Ramdhene Doss, and Ramsebuk v. Ramlall Koondoo* referred to.

LUTCHMANEN CHETTY v. SIVA PROKASA MODELAR ... XXVI 349

Maintenance. Widow's right to a share in lieu of maintenance on a partition—Right of a purchaser from one of the sons. A Hindu mother is entitled under the law to be maintained out of the joint family property, and if anything is done affecting that right, as for instance by the sale of any particular share by any of her sons, her right comes into existence. A purchaser from one of the sons has the same rights and takes it subject to the same liabilities as those of the person from whom he purchased. *Jogendra Chunder Ghose v. Fulkumari Dassi* followed.

AMRITA LAL MITTER v. MANICK LAL MULLICK ... XXVII 561

Hindu Law—(continued.)

Maintenance. Widow's right to a share in lieu of maintenance, on a partition suit having been instituted—Transfer of Property Act (IV of 1882), s. 52—Lis Pendens.

After the institution of a partition suit by a member of a joint Hindu family consisting of six brothers and a mother, but before the summonses were served, one of the sons (defendant No. 1) transferred his share of the property, alleging it to be one-sixth, to a third party, who was subsequently added as a party defendant to the suit. At the time of the transfer both the transferor and the transferee had notice of the said suit. On a question having been raised as to what share of the property the transferee was entitled to: *Held*, that inasmuch as the suit for partition was instituted by one of the sons, the mother had an inchoate or quasi-contingent right, which ripened into an absolute right on a partition having taken place (which happened in this case), and therefore she having been entitled to a share, the transferee could not get more than what the transferor was entitled to at the time of the transfer, *i.e.*, one-seventh share of the property. *Held*, also, that inasmuch as both the transferee and the transferor had notice of the partition suit at the time of the transfer, and as there was a dispute about the shares, s. 52 of the Transfer of Property Act applied to the case.

JOGENDRA CHUNDER GHOSE v. FULKUMARI DASSI ... XXVII 77

Manager. Sale by a de facto manager of minor's property for legal necessity and for his benefit whether valid. A de facto manager of an infant's estate has, in case of necessity or for the benefit of the minor, power to sell his property.

MOHANUND MONDUL v. NAFUR MONDUL ... XXVI 820

Marriage. Evidence of marriage—Inference and probabilities weighed against direct testimony. Upon a widow's claim for maintenance the question was whether the relation between her and a person, deceased many years before her suit, whom she alleged to have been her husband, had been the relation of marriage or of concubinage. The decision of this question, one way or the other, rested on considerations whether the substantial testimony of witnesses, who gave their testimony to the fact of the marriage in their presence, was, or was not, outweighed and negatived in judicial estimation by the antecedent and inherent improbability that such a marriage, under the circumstances of the parties alleged to have entered into it, would have taken place. The oral evidence was, however, corroborated by inferences drawn from several facts well established. The present suit was defeated by the successor in estate of the deceased, and it was common ground between this defendant and the plaintiff that there had been co-habitation between the deceased and the latter. This narrowed the effect of the condition and circumstances of the deceased at the time of the alleged marriage upon the question whether it was a fact. The ordinary criteria afforded by conduct contributed but little aid to remove doubt. In the result, the conclusion of the Judicial Committee was that the direct oral testimony had not been overborne, but should prevail against the improbability presented by the case that such a marriage should have taken place. The affirmative of it was maintained, and the widow's claim allowed.

LUCHMI KOER v. ROGHU NATH DAS ... XXVII 971

Mitakshara family. Alienation of ancestral property by father—Inability of sons for father's debts—Mortgage—Suit by mortgagee against son for sale of ancestral property—Antecedent debt—Legal necessity—Illegal or immoral purpose—Money-decree—Limitation Act (XV of 1877) sch. II, art. 116. In the case of a joint Mitakshara family where the father raised money on a mortgage hypothecating certain ancestral family property, and it was not proved that the money was required for payment of any antecedent debt or that the money was raised or expended for illegal or immoral purposes, or that any inquiry was made on behalf of the mortgagee as to the purpose for which the debt was incurred. *Held*, that the mortgage security could not be enforced against the son (the father having died), unless it could be shown that the debts for which the mortgage was created were antecedent to the transaction in question. Under the above circumstances the mortgage is not binding on the son, but the debt not being proved to have been incurred for immoral or illegal purposes, the mortgagee would be entitled to a money-decree against the defendants, not upon the mortgage security, but upon the simple obligation created by the bond; and a suit for such a relief must, under the Limitation Act, be instituted within six years from the due date of the mortgage bond. *Lachman Dass v. Giridhar Choudhary and Khalilul Rahman v. Gobind Pershad* relied upon.

SURJA PRASAD v. GOLAB CHAND ... XXVII 762

Hindu Law—(concluded.)

Mitakshara family. Liability of son to pay father's debt incurred during son's minority—Representative capacity of father—Antecedent debt—Mortgage—Suit for sale on mortgage by father without joining sons—Non-joinder of parties—Transfer of Property Act (IV of 1882) s. 85—Notice of interest in mortgaged property—Multiplicity of suits—Civil Procedure Code (Act XIV of 1882), ss. 28, 42, 436-487, 575. In the case of a joint Mitakshara family consisting of a father and a minor son, where the father executed a mortgage bond hypothecating ancestral family property during the minority of his son, and the mortgagee with the notice of the interest of the son in the mortgaged property brought a suit against the father alone to enforce the mortgage without making the son a party to the suit and obtained a decree declaring that the mortgaged property was liable to be sold in execution thereof, and where the debt was not proved to have been incurred for illegal or immoral purposes: *Held, per GHOSE, J.*—That the share of the son in the ancestral property was liable for the satisfaction of such decree notwithstanding the provisions of s. 85 of the Transfer of Property Act (IV of 1882), the father having incurred the debt in his representative capacity and as managing member of the family, and the son having been substantially a party to the suit in which the said decree was passed through the representation of his father. Section 85 of the Transfer of Property Act lays down only a rule of procedure; and the words "all persons" in the section could have hardly been intended to include a Mitakshara son—much less a minor son—in a suit where the father is sued in his representative capacity. *Suraj Buns Koer v. Sheo Persad Singh, Bissessur Lal Sahoo v. Maharajah Luchmessur Singh, Nanomi Babuasin v. Modun Mohun, Daulat Ram v. Mehr Chand, Pursid Narain Singh v. Honooman Sahai, Bhagbut Pershad v. Girja Koer, Mohabir Prasad v. Maheshwar Nath Sahai, Jagabhai Lalubhai v. Vijbhukan Das* relied on; *Bhawani Prasad v. Kallu* dissented from; *Syud Esmam Montauzuddin Mahomed v. Raj Coomar Dass, Ramasamayyan v Virasami Ayyar, and Palani Goundan v. Rangayya Goundan* referred to. *Semble—* (a). In the case of a joint Mitakshara family consisting of a father and minor sons, the father is "necessarily" the manager of the joint family, and as such, for all purposes, is the representative of the family: (b). And where the father, the managing member, mortgages family property for an antecedent debt, and a suit is brought and decree obtained against the father, such suit and decree should be regarded as instituted and pronounced against him in his representative capacity: (c). And that if a son, after a decree being obtained against the father upon a mortgage executed by the latter, sues to have it declared that his share is not liable to satisfy the said decree, or after a sale in execution thereof sues to recover possession of his share, he cannot succeed unless he proves that the debt was contracted for an immoral or illegal purpose, or that it was of an illusory character. *Per HALLINGTON, J.*—Having regard to the provisions of s. 85 of the Transfer of Property Act and those of ss. 28 and 42 of the Civil Procedure Code, the mortgagee was bound to make the plaintiff (the son) a party to the mortgage suit; and that, not having done so, he was not entitled to obtain a decree affecting the plaintiff's interest in the mortgaged property. *Bhawani Prasad v. Kallu* followed; *Rothschild v. Commissioners of Inland Revenue, Ramasamayyan v. Virasami Ayyar, and Palani Goundan v. Rangayya Goundan* referred to.

LALIA SURJA PRASAD v. GOLAB CHAND ... XXVII 724

Will. Construction of Will—Dyablagha family—Disposition to widow as "malikātwa." K, a Hindu, died without issue, leaving him surviving a widow B, and having made and published his will wherein he stated, "I appoint my wife B to the 'malikātwa' after my demise as exercised by myself in respect of the family dwelling house . . . wearing apparel, utensils, etc., whatever there is in respect of all the property aforesaid." B upon the death of K took possession of his properties. Upon B's death the plaintiffs, who claimed to be K's nearest of kin, brought this suit contending that the words of the will only conveyed a life estate to his widow B, and that after her death they were entitled to K's properties. The defendant, who claimed to be B's nearest of kin, contended that the words of the will gave B an absolute estate in K's properties, and that he was entitled to the whole estate. *Held*, that the intention of the testator was to give his widow B an absolute heritable and alienable estate in his properties.

RAJNARAIN BHADURY v. ASHUTOSH CHUCKERHUTTY ... XXVII 44

Upheld on appeal, RAJNARAIN BHADOORY v. KATYAYANI DABEE ... XXVII 649

Hindu Widow—

See ONUS OF PROOF.

Mortgage by. See HINDU LAW, ALIENATION.

Transfer of immoveable property by. See PROBATE AND ADMINISTRATION ACT, s. 40.

Holding over—

Effect of. See LANDLORD AND TENANT.

Husband—

Complaint by. See BIGAMY.

Illegal Contract—

See CONTRACT ACT, s. 23.

Illegal Gratification—

Offence of giving. See PENAL CODE, s. 218.

Immoveable Property—

Decree declaring charge on, for maintenance. See TRANSFER OF PROPERTY ACT, s. 39.

Gift of, without possession. See GIFT, VALIDITY OF.

Outside jurisdiction, Acts of mal-administration regarding. See JURISDICTION.

Suit for, on declaration of invalidity of adoption. See LIMITATION ACT, ART. 118.

Transfer of, by Hindu widow. See PROBATE AND ADMINISTRATION ACT, s. 40.

Impartible Estate—

Assignment of part of. See DECREE.

Improvements—

Expenditure on. See MORTGAGE.

Income Tax Act—

II of 1886—

ss. 3, 4, 5. *Religious endowment—Sajjadanashin—Khankah—Liability of the Sasseram Sajjadanashin to pay Income-tax—Assessment of Income-tax—Exemption from assessment—"Salary"—Remuneration—Maintenance—Position of Sajjadanashin as distinguished from that of Mutwalli—Wakf Farruichsyari property.* The Sajjadanashin of the Sasseram Khankah is not liable to be assessed with income tax under the provisions of Act II of 1886, in respect of such moneys as he draws from the Khankah properties for the purpose of his own maintenance and that of his family. The position of the Sajjadanashin discussed, and distinguished from that of a Mutwalli. *Semble*—The maintenance of the Sajjadanashin of the Sasseram Khankah is a part of the purpose for which the Khankah was established. *Mohiuddin v. Sayiduddin, and Piran v. Abdool Karim* referred to.

SECRETARY OF STATE FOR INDIA *v.* MOHIUDDIN AHMAD

... XXVII 674

s. 38. See EVIDENCE.

Income Tax Papers—

Production and admissibility in evidence of. See EVIDENCE.

Incumbrance—

Created by co-sharer. See PARTITION.

Infant Sons—

See HINDU LAW, JOINT FAMILY.

Infant's Right to an Account—

See HINDU LAW, JOINT FAMILY.

Inference and Probabilities—

Against direct testimony. See HINDU LAW, MARRIAGE.

Inheritance—

See HINDU LAW, INHERITANCE.

Insolvency—

Incomplete. See CIVIL PROCEDURE CODE, s. 370.

Vesting order—Civil Procedure Code (Act XIV of 1882), s. 295—Rights created by s. 295 not affected by insolvency—Insolvent Act (11 & 12 Vict., Ch. 21), s. 49. An order under s. 295 of the Civil Procedure Code affects only interests existing at the time. The insolvency of the debtor introduces a new state of things from the date of the insolvency, but as regards sums accrued due prior to the date of the insolvency the order under s. 295 creates rights, which are not affected by the insolvency. *Soobul Chunder Law v. Russick Lall Mitter* cited.

HOWATSON *v.* DURBANT...

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Insolvent Act—

11 and 12 Vic., c. 21—

s. 7. See CIVIL PROCEDURE CODE, s. 370.

s. 49. See INSOLVENCY.

s. 51. *Application for personal discharge—Discharge except as to debts due to a particular creditor—Prospective order under s. 51.* Application by insolvent for personal discharge. One creditor opposed. It appeared that that creditor lent money to the insolvent on a mortgage on false representations made by the insolvent to him. No decree had been obtained by the creditor on his mortgage. The opposing creditor applied that the insolvent be dealt with under s. 51 of the Insolvent Act. The insolvent contended that an order under s. 51 could only be made when the creditor had obtained a decree, and was in a position to apply at once for the arrest of the insolvent, which was not the case here. *Held*, the insolvent was entitled to his personal discharge, as regards all creditors except the opposing creditor; that the Court had no power under s. 51 to order immediate commitment of the insolvent, inasmuch as the opposing creditor had not placed himself in a position to issue execution against the insolvent, but that the Court could make a prospective order that with regard to the debt due to the opposing creditor the insolvent should be entitled to his personal discharge as soon as he should have been in custody at the suit of that creditor for the period of six months. *Quere*.—If the debt be satisfied out of the proceeds of sale of the mortgaged properties or otherwise, whether the effect of such payment would be to relieve the insolvent from the penalty prescribed by s. 51.

IN THE MATTER OF SARAT KUMAR SEN ... XXVI 973

Instigating Person—

To give false evidence. See SANCTION FOR PROSECUTION.

Insurance—

Life Assurance—Truth of answers to queries of Life Insurance Company—Warranty—Declaration by Assured to Medical Examiner of Company—Admissibility of evidence to show declarations not made by assured—Verbal representation to Medical Examiner, Effect of. G applied to the defendant-company in Calcutta to insure his life for the sum of Rs. 10,500 to be secured by five different policies. The policies were duly executed by the Company and delivered to the plaintiff, the wife of G, on his behalf. The Company's printed form of application for insurance and the printed form of declarations to the Medical Examiner of the Company were signed by G. The agreement of G with the Company was that the statements and representations contained in his application, together with those made to the Medical Examiner by him, should be the basis of the contract between him and the Company. He warranted them to be full, complete, and true, whether written by his own hand or not, and that the warranty was to be a condition precedent to, and a consideration for, the policy, which might be issued thereon; and he further agreed that no statements, representations or information made or given by or to any person soliciting or taking the application for the policy, or by or to any other person, should be binding on the Company, or in any way affect its rights, unless such statements, representations or information be reduced to writing, and presented to the officers of the said Company at their Home Office in the city of New York on the application. On G's death the plaintiff sued the Company for the amounts due under the policies. The plaintiff admitted that certain statements and representations made by G, both in his applications and declaration to the Medical Examiner, were untrue, but urged that it was open to her to show (1) that G signed the declaration to the Medical Examiner before it was filled up, and in consequence was not responsible for the contents of that declaration; (2) that G showed to the Medical Examiner a certain statement drawn up by G of an illness he had suffered from for three years, and that the knowledge thus acquired by the Medical Examiner must be imputed to the Company. *Held*, reversing the decision of the Court below, that the plaintiff was bound by the terms of the contract between G and the Company; that it was not open to the plaintiff to show that G did not state what, under his own signature he declared to be true, and yet to hold the Company liable on the policy, brushing aside and treating as of no import whatever the statements and representations which formed the basis of the contract; and that the misstatements and misrepresentations made by G were amply sufficient to warrant the Company in avoiding the policy.

NEW YORK LIFE INSURANCE COMPANY v. GAMBLE ... XXVII 593

Intention of Parties—

See EVIDENCE.

Interest—

See MESNE PROFITS: MORTGAGE: STAMP ACT, s. 23.

Exorbitant rate. See BENGAL TENANCY ACT, s. 67.

Compound. See CONTRACT ACT, s. 23.

Covenants as to payment of. See MORTGAGE.

Interest on arrears of rent—Bengal Tenancy Act (VIII of 1885), ss. 67, 178, sub-sec. 3, cl. (h) and 179—Contract to pay interest at higher rate than allowed by s. 67 of the Act. A contract by a tenant holding under a permanent *mokarari* lease to pay interest on the arrears of rent at a higher rate than 12 per cent. per annum is not enforceable in law.

BASANT KUMAR ROY CHOWDHRY v. PROMOTHA NATH BHUTTACHAR
JEE ... XXVI 180

Interest on arrears of rent—Waiver—Omission to claim rent for some years at the stipulated rate, whether it amounts to a waiver. The mere omission to claim interest for some years from a tenant at the rate stipulated in the lease does not amount to a waiver of the landlord's right to claim interest at such rate. *Johary Lall v. Bullab Lall* followed.

SHYAMA CHARAN MANDAL v. HERAS MOLLAH ... XXVI 160

Liability of purchaser at sale for arrears of rent to pay. See BENGAL TENANCY ACT, s. 67.

Mortgage Bond—Failure to pay on due date—Stipulation for the payment of enhanced interest from date of default till date of realization—Whether such stipulation is a penalty where a sum is mentioned in the contract as the amount to be paid in case of a breach of the contract—Contract Act (IX of 1872), s. 74. In a mortgage bond where the parties were adults, the provision as to interest was to the following effect: "On account of interest of the said sum of money, you shall take the profits of the said lands, and I will pay Rs. 20 per annum as the balance of interest from year to year by getting the said amount endorsed on the back of this document, and if I fail to do so, then at the end of the year the said amount of interest shall be added to the principal; and for the total amount whatever it will be I will pay up to the date of repayment at the rate of $\frac{1}{2}$ anna per rupee per mensem." *Held*, that inasmuch as what was specified in the contract was only the enhanced rate of interest, but no definite amount was specified as being payable in the event of a breach, nor could it be said that the amount, though not expressly stated in definite terms, was an ascertainable and definite amount which could become payable at the date of the breach, the stipulation for the payment of enhanced interest did not come within the scope of s. 74 of the Contract Act. *Mackintosh v. Crow*, and *Wallis v. Smith* referred to.

DENO NATH SANTH v. NIBARAN CHANDRA CHUCKERBUTTY ... XXVII 421

On arrears of rent. See OUDH LAND REVENUE ACT, ss. 121, 123.

On certain amount payable on happening of certain event and at certain time. See COMPROMISE OF SUIT.

On mortgage. See HINDU LAW, ALIENATION.

On purchase money. See SALE FOR ARREARS OF RENT.

Penalty—Enhanced rate of interest—Interest Act (XXVIII of 1855), s. 2—Contract Act (IX of 1872), s. 74—Equitable relief. In a mortgage bond the interest payable was 2 per cent. per mensem, and there was a stipulation that on default of payment on the due date, interest should run "from the date of default of promise" at 6 per cent. per mensem. In a suit upon the bond interest was claimed, at the higher rate from date of default to the date of realization. *Held*, that it is open to the Court to decide, notwithstanding the provisions of s. 2, Act XXVIII of 1855 whether the stipulation as to the enhanced interest was agreed upon as interest properly so called, or as a penalty, and whether in the circumstances of the case the debtor was entitled to equitable relief. *Ramendra Roy Chowdhry v. Serajuddin Ahmed Chowdhry* and *Umar Khan v. Sale Khan* referred to. *Per GHOSE, J.*—The cases of *Mackintosh v. Crow* and *Kala Chand Kyal v. Shib Chunder Roy* do not lay down any rule of law precluding the Court from affording relief to a debtor, independently of s. 74 of the Contract Act (IX of 1872), even when the bond provides for increased rate of interest prospectively and not retrospectively, where a proper ground for such equitable relief is made out. *Per RAMPINI, J.*—The stipulation for increased rate of interest may be a penalty, but is not necessarily so merely because the increased rate is an exorbitant one; whether it is a penalty or not is rather a question of fact than one of law, and the Court must consider

Interest—(continued.)

whether in the circumstances of the case the defendants had made out their claim to equitable relief. *Ramendra Roy Chowdhry v. Serajuddin Ahmed Chowdhry* distinguished. *Pava Nagaji v. Gobind Ramji*, *Umar Khan v. Sale Khan*, *Bichook Nath Panday v. Ram Lochun Singh*, *Magniram Marwari v. Rajpati Koeri* and *Surya Narain Sing v. Jogendra Narain Roy Chowdhury* explained.

PARDHAN BHUKHAN LAL v. NARSING DYAL XXVI 800

Rate of. See CONTRACT ACT, s. 60.

Interest Act—

XXXII of 1839. COMPROMISE OF SUIT: LIMITATION.

XXVII of 1855, s. 2. See INTEREST.

Irregularity—

In order. See CRIMINAL PROCEDURE CODE, s. 145.

Not affecting merits of case. See ARBITRATION.

Jains—

See HINDU LAW, CUSTOM.

Joint Authority to adopt—

See HINDU LAW, ADOPTION.

Joint Family—

See HINDU LAW, JOINT FAMILY.

Maintenance of member of junior branch of. See DECREE.

Joint Family House—

Partition of. See EASEMENT.

Joint Judgment-debtors—

Application for execution of decree against. See LIMITATION ACT, ART. 179.

Joint Landlords—

See ENHANCEMENT OF RENT.

Sale by one of several. See SALE FOR ARREARS OF RENT.

Joint Owners—

Governed by mitakshara law. See CRIMINAL PROCEDURE CODE, s. 145.

Joint Possession—

Suit for. See CO-SHARERS.

Joint Trial—

See SECURITY FOR GOOD BEHAVIOUR.

Judge—

Sanction to prosecute. See SANCTION FOR PROSECUTION.

Judgment-debtor—

Deposit by. See CIVIL PROCEDURE CODE, s. 310A.

Not party to execution proceeding. See LIMITATION ACT, ART. 179.

Want of saleable interest in. See SALE FOR ARREARS OF RENT.

Judgment inter partes—

See FRAUD.

Judicature Act, 1875—

Order XVI, Rules 11, 48. See PARTIES.

Judicial Officer—

See FALSE EVIDENCE.

Jurisdiction—

See CRIMINAL PROCEDURE CODE, s. 144: GUARDIANS AND WARDS ACT, s. 14: HIGH COURT, JURISDICTION OF.

Bengal, N.-W.P., and Assam Civil Courts Act (XII of 1887), s. 13, cl. 2—Transfer of Property Act (IV of 1882), ss. 98, 90—Sale in execution of mortgage decree—Execution of decree. When Subordinate Judges are appointed by the Local Government with jurisdiction over the whole of a district, the District Judge is not competent, under s. 13 (2) of the Bengal, N.-W. P., and Assam Civil Courts

Jurisdiction—(continued.)

Act, to assign to them different areas so as to limit or define their respective jurisdictions. The Court of such a Subordinate Judge which passed mortgage decree is therefore the only Court competent to entertain an application for the execution of the decree and to make an order in furtherance thereof, even when the execution is sought by the sale of property other than the mortgaged property, lying within the district, but outside the area assigned to it by the District Judge.

BACHU KOER v. GOLAB CHAND XXVII 272

Cause of action—Suit for maintenance—Letters Patent, 1865, cl. 12—Right of maintenance of a sonless widowed daughter in indigent circumstances out of properties inherited by the father's heirs. The plaintiff's father left various properties partly within and partly outside Calcutta. The plaintiff instituted this suit, as an indigent sonless widowed daughter; against the defendants for the recovery of her maintenance out of the estate inherited by them from her father, and prayed that her maintenance might be declared a charge upon the property situated within the limits of Calcutta. Some of the defendants lived within and some outside Calcutta. Leave was obtained under cl. 12 of the Letters Patent. It was held that under the abovementioned circumstances the High Court had jurisdiction to try the action. A sonless widowed daughter in indigent circumstances is not entitled to separate maintenance out of the estate of her father in the hands of his heirs. The right would depend upon the fact, whether the widowed sonless daughter was at the time of her father's death maintained by him as a dependent member of his family with others whom he was legally or morally bound to maintain. The position of a sonless widowed daughter is not the same as that of a disqualified owner or disqualified heir. *Bai Mangal v. Bai Rukhini* referred to.

MOKHODA DASSEE v. NUNDO LALL HALDAR XXVII 555

Evidence as to jurisdiction at hearing—Letters Patent, High Court, cl. 12—Agreement to pay as per account—Acknowledgment of debt—Limitation Act (XV of 1877), s. 19—Agency, Termination of—Accounting agents—Limitation Act (XV of 1877), sch II, art. 89—Contract Act (IX of 1872), ss. 201 and 218. The plaintiff as Receiver to the estate of S instituted a suit on the 11th July 1898 against the defendants to recover the sum of Rs. 2,808-13-2, a portion of the said sum being the rent of a house occupied by the defendants at Mandalay since January 1894 till the 11th July 1898, the remaining portion being the price of goods sold by the defendants as agents of S. The plaintiff at the institution of the suit obtained leave under cl. 12 of the Charter. The defendant contended that the Court had no jurisdiction, inasmuch as the plaint on its face did not show that the cause of action or any part of it arose in Calcutta; that the cause title alone represented the defendants as carrying on business in Calcutta, and that portion of the plaint was not verified; nor could the plaintiff give evidence to prove that his cause of action arose in Calcutta, as it would be varying the cause of action, and that fresh leave would have to be granted, which could not be done in this suit. *Held*, that the Court had jurisdiction, and the plaintiff was entitled to give evidence at the hearing to show that his cause of action arose in Calcutta. To admit evidence of that fact, and if necessary amend the plaint by adding a statement that part of the cause of action did arise in Calcutta, does not cause a variance in the original cause of action. It is sufficient to show that the cause of action or part of it arises in Calcutta when the suit comes on for hearing. It was also contended by the defendants that the plaintiff's claim to rent prior to July 1894 was barred, and that as the sale of the piece-goods was completed by the defendants in June 1894, that claim was also barred. The plaintiff submitted that the letters written by the defendants to the plaintiff within three years of the institution of the suit agreeing to pay as per account enclosed by them to the plaintiff was a sufficient acknowledgment to save the claim for rent from being barred. Further, that although the sale of the goods was completed in June 1894, the defendants did not cease to be the plaintiff's agents until they had accounted to him for the price of the goods which had not yet been done. *Held*, that the plaintiff's claim for the portion of rent claimed beyond three years was not barred; the defendant's letters were a sufficient acknowledgment to save limitation; there being an admission that there was an open account between the parties and that there was a right to have it taken, implied a promise to pay. *Prance v. Sympton and Banner v. Berridge* referred to. *Held*, also, that the defendants were liable to the plaintiff as agents until they had accounted to him, and therefore his claim as to the piece goods was not barred. *Babu Ram v. Ram Dayal* followed.

FINK v. BULDEO DASS XXVI 715

Irregularity not affecting. See **ARBITRATION.**

Jurisdiction—(concluded.)

Person not residing within. See SECURITY FOR GOOD BEHAVIOUR.

Suit for land—Administration suit—Acts of mal-administration regarding immoveable property outside jurisdiction—Power of Court to set aside leases of immoveable property outside its jurisdiction—Letters Patent, High Court, cl. 12—Leave to sue—Civil Procedure Code (Act XIV of 1882), s. 44, Rule A. In an administration action the fact that amongst other things leases of immoveable property granted by the executors to themselves are sought to be set aside on the ground that such leases are acts of mal-administration does not make the action one for the recovery of immoveable property, and leave under s. 44 of the Civil Procedure Code, Rule A, is not necessary. If the High Court has jurisdiction to entertain such an administration action the fact that the property comprised in the leases complained of is wholly outside the limits of its ordinary original civil jurisdiction does not preclude it from setting aside such leases, and leave for that purpose under cl. 12 of the Charter is not necessary. The Court assumes jurisdiction in regard to immoveable properties situate outside the jurisdiction in cases where it can act *in personam*, either to compel the owner to give effect to legal obligations into which he has entered or to a trust reposed in him.

NISTARINI DASSI v. NUNDO LALL BOSE ... XXVI 891

Suit for land—Suit for rent of land, with alternative claim for compensation for use and occupation—Land situated outside jurisdiction of High Court. A suit by landlord against a tenant for rent at a rate agreed upon for one period, and for rent on the basis of use and occupation for a subsequent period is not a suit for land; and therefore the High Court may have jurisdiction to try such a suit even when the land is situate outside the local limits of its jurisdiction.

RUNGO LALL LOHEA v. WILSON ... XXVI 204

Jurisdiction of Civil Court—

Bengal Municipal Act (Bengal Act III of 1884), ss. 224, 245 and 246—Acts done in accordance with ss. 245 and 246, whether subject to the jurisdiction of a Civil Court—Notice under s. 246 whether sufficient for the purpose of the removal of huts in a basti as well as a pucca privy. Where a Municipality, having proceeded in accordance with ss. 245 and 246 of the Bengal Municipal Act, decided that certain works are necessary, that conclusion in the absence of *mala fides* or fraud or considerations of that nature, cannot be questioned in a Civil Court. The action of the Municipality, so far as a privy was concerned, was held not to be *ultra vires*, although in the notice issued in accordance with s. 246 of the Bengal Municipal Act, they directed the plaintiff to remove not only certain huts but also a pucca privy, inasmuch as the Municipality had a right to require him to remove the privy under s. 224 of the Act.

DUKE v. RAMESWAR MALIA ... XXVI 811

Bengal Tenancy Act (VIII of 1885), ss. 107 and 108—Landlord and tenant—Record of rights—Decision of a Revenue Officer. An order made by a Revenue Officer under s. 107 of the Bengal Tenancy Act, determining the rent payable for a holding, has the force of a decree; and when not set aside by appeal or otherwise, cannot be questioned in a Civil Court.

RAM AUTAR SINGH v. SANOMAN SINGH ... XXVII 167

Jury—

Verdict on inspection of locality without taking evidence—Criminal Procedure Code (Act V of 1898), s. 138—Use of discretion in nomination of jurors by Magistrate. A jury cannot decide a matter referred to them merely on inspection of the locality without taking any evidence. In nominating the foreman and one half of the remaining members of the jury as required by s. 138 of the Criminal Procedure Code the Magistrate must exercise his own independent discretion and not appoint the nominees of the parties.

KAILASH CHUNDER SEN v. RAM LALL MITTRA ... XXVI 869

Kabuliyat—

Effect of. See SETTLEMENT.

Kidnapping—

Kidnapping from lawful guardianship—Completion of such offence—Whether a continuous offence—Constructive possession—Penal Code (Act XLV of 1860), ss. 360, 361 and 363. J, a minor girl, was taken away from her husband's house to the house of R, and there kept for two days. Then one M came and took her away to his own house and kept her there for twenty days, and subsequently clandestinely

Kidnapping—(continued.)

removed her to the house of the petitioner, and from that house the petitioner and M took her through different places to Calcutta. The petitioner was convicted under s. 363 of the Penal Code for kidnapping a girl under 16 years of age from the lawful guardianship of her husband. *Held* (by the majority of the FULL BENCH) that the taking away out of the guardianship of the husband was complete before the petitioner joined the principal offenders in taking the girl to Calcutta, and that the petitioner, therefore, could not be convicted under s. 363 of the Penal Code. *Held*, further that the offence of kidnapping from lawful guardianship is complete when the minor is actually taken from lawful guardianship; it is not an offence continuing so long as she is kept out of such guardianship. *Per* RAMPINI, J.—The offence of kidnapping under s. 363 is not necessarily or in all cases complete as soon as the minor is removed from the house of the guardian; when the act of kidnapping is complete is a question of fact to be determined according to the circumstances of each case.

NEMAI CHATTORAJ v. QUEEN-EMPRESS XXVII 1041

Korfa Raiyats—

In Manbhum. See LANDLORD AND TENANT.

Land—

Character and mode of enjoyment of. See LIMITATION.

Deficiency in area of. See SALE IN EXECUTION OF DECREE.

Not properly described. See DECLARATORY DECREE, SUIT FOR.

Not proved to be let for agricultural or horticultural purposes. See LANDLORD AND TENANT.

Outside limits of Town of Calcutta, but within its Municipal Boundaries. See BENGAL TENANCY ACT.

Suit for. See JURISDICTION.

Land Acquisition Act—

I of 1894—

ss. 9, 10. See COMPLAINT.

s. 53. See FALSE EVIDENCE.

Proceedings under. See COMPLAINT.

Land Registration Act—

Bengal Act VII of 1876—

ss. 59, 62. See DECLARATORY DECREE, SUIT FOR.

s. 78. *Suit for rent—Legal representative of registered proprietor—Landlord and tenant.* A suit for rent was instituted by the registered proprietor of an estate, who died during the pendency of the suit. His widow, the present plaintiff, was then substituted on the record in his place, but her name was not registered under the provisions of the Land Registration Act before the disposal of the suit in the first Court. *Held*, that as the present plaintiff was claiming rent due to the deceased plaintiff in a representative character, s. 78 of the Land Registration Act did not bar her claim, and she was entitled to a decree. *Belchambers v. Hussan Ali Mirsa* followed.

PRAMADA SUNDARI DEBI v. KANAI LAL SHAHA XXVII 178

s. 78. *Suit for rent, without registration of name whether maintainable by the legal representatives.* A suit for rent, accruing due partly during the lifetime of a registered proprietor, and partly after his death, was brought by his representatives; the defence was that the suit was not maintainable, inasmuch as the plaintiffs were not registered proprietors, and had no certificate under the Succession Certificate Act. *Held*, that s. 78 of the Land Registration Act is not a bar to the realization of rent accruing due during the lifetime of the registered proprietor, but a suit for rent accruing due after the death of the registered proprietor is not maintainable by his representatives, without having their names registered under the Land Registration Act.

NAGENDRA NATH BASU v. SATADAL BASINI BASU XXVI 536

ss. 75, 79. *Bengal Tenancy Act (VIII of 1885), s. 60—Right of suit—Suit for rent—Unregistered proprietor.* There is nothing in s. 60 of the Bengal Tenancy Act to render a suit for rent by an unregistered proprietor unmaintainable, it being sufficient, if during the pendency of the suit and prior to decree his name is registered. *Dhoronidhar Sen v. Wajidunnessa Khatoon* dissented from. *Alimuddin Khan v. Hira Lall Sen* explained and followed. *Belchambers v. Hussan Ali Mirsa Bahadur* followed.

ABUL KHAIR v. MEHER ALI XXVI 719

Landlord—

Acceptance of kabuliyat by. See SETTLEMENT.

Landlord and Tenant—

See BENGAL TENANCY ACT, SS. 66; 85: JURISDICTION OF CIVIL COURT: LAND REGISTRATION ACT, S. 78: LEASE: SALE FOR ARREARS OF RENT: SECOND APPEAL.

Accretion to parent estate, Assessment of rent in respect of—Regulation XI of 1825, s. 4, cl. (1)—Act XI of 1855, s. 1—Regulation VII of 1822—Act IX of 1847—Act XXXI of 1858—Bengal Tenancy Act (VIII of 1885), s. 52. In a suit brought by the *talukdar* of a certain *mousah* against the *durtalukdar* for a declaration that he was entitled to get rent at a certain rate annually, also for arrears of rent at that rate, and in the alternative for compensation for use and occupation of the disputed land which was an accretion to the said *mousah*, and in respect of which a settlement was made with him by Government treating it as a separate estate, the defence (*inter alia*) was that the suit was not maintainable unless a rental was assessed in the first instance, and that no arrears of rent could be claimed as there was no relationship of landlord and tenant between the parties. *Held*, the landlord could not treat it as a separate tenure altogether; that the increment was to be regarded as part of the parent estate, and treating it as part and parcel of the parent estate he was entitled to get assessment of rent on the disputed land; but he was not entitled in the suit to back rent or compensation for use and occupation.

ASSANULLAH BAHADUR v. MOHINI MOHAN DAS

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Assignment by tenant of goodwill, stock-in-trade, fixtures, furniture and chattels—Notice by landlord to lessee and to assignee to deliver up possession on expiration of lease or to pay rent—Holding over—Use and occupation—Liability of assignee for compensation for use and occupation. L assigned to D the stock-in-trade, goodwill, fixtures, chattels and premises in connection with a certain business carried on by him at the said premises which he held on lease from the plaintiff. The deed of assignment contained (*inter alia*) a provision empowering the assignee, in the event of any breach by L of the covenants contained in the said deed, to let the premises for any term or terms of years for such rent and under such covenants and conditions as D might think fit; and there was a further provision that L should not remove any of the stock-in-trade, chattels, etc., without the permission of D. Shortly before the expiration of the lease, the plaintiff served a notice on L to deliver up possession of the premises on the expiry of the lease or to pay an enhanced rent therefor, and a notice on D requiring D to deliver up possession and stating that in default he would hold D jointly liable with L for the enhanced rent. D had durwans and a clerk on the premises to see that nothing was removed therefrom without his permission. L and D continued to keep the stock-in-trade on the premises after the determination of the lease and the business was carried on as before. The plaintiff subsequently brought an action against D and L for compensation for use and occupation of the premises for four months. *Held* (reversing the decision of AMEER ALI, J.) that the lease did not pass under the terms of the assignment to D, and that D was not liable to the plaintiff for compensation for the use and occupation of the premises.

MADHUPMONEY DASSEE v. NUNDO LALL GUPTA

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Ejectment—Notice to quit by post—Bengal Tenancy Act (VIII of 1885), s. 189—Mode of service of the notice under the Act—Bengal Government Rule 3, chap. I, under s. 189 of the Bengal Tenancy Act. The plaintiffs served a notice by post upon the defendant to quit certain *khud kasht* lands that were alleged to be in his wrongful possession, and subsequently instituted a suit to eject him from those lands: *Held*, that the notice was bad in law, and the suit for ejectment based upon such a notice must fail. *Tara Das Maldkar v. Ram Doyal Malakar* referred to.

LALA MAKHAN LAL v. LALA KULDIP NARAIN

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XXVII

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Korfa raiyats in Manbhumi—Ejectment—Sufficiency of notice to quit—Act X of 1859. There is no authority for the proposition that notice to quit to a *korfa raiyat* in Manbhumi must be a six months' notice. Such a *raiya* is only entitled to a "reasonable notice." What is a reasonable notice is a question of fact, which must be decided in each case according to the particular circumstances and local customs as to reaping crops and letting land. *Kishori Mohun Roy Chowdhry v. Nund Kumar Ghosal* distinguished. *Jagut Chunder Roy v. Rup Chand Chango, Radha Gobind Koer v. Rakhal Das Mukherji, Bidhumukhi Dabee Chowdhraim v. Keffutullah and Kali Kishen Tagore v. Golam Ali* referred to and followed.

DIGAMBAR MAHTO v. JHARI MAHTO

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Landlord and Tenant—(continued.)

Lease—Suit for account—Principal and Agent, relationship of—Set off—Rent set off against advances—Suit for rent—Limitation Act (XV of 1877), arts. 85, 89, sch. II. The plaintiffs executed a lease for nine years in favour of the defendant No. 1 at a fixed annual rent payable by instalments. The defendant under instructions from the plaintiffs paid from time to time Government revenue, cesses, expenses of litigation, etc., on their behalf, and used to set off those sums against the rent due to them under the lease; no sum of money by way of advance or otherwise from the plaintiffs ever came into the hands of the defendant. After the expiry of the lease the plaintiffs instituted this suit against the defendant for an account: *Held*, that the suit for an account was not maintainable; the relationship between the parties as created by the lease was simply that of landlord and tenant, and the only relief which the plaintiffs could have properly asked for was a decree for rent, if any was still due.

BHEKDHARI LAL v. BADHSINGH DUDHARIA ... XXVII

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Liability for rent—Regulation VIII of 1819, s. 6—Liability of the transferee of a fractional share of putni to pay rent—Personal liability of putnidar for rent, notwithstanding a stipulation in the putni lease that arrears of rent should be realized by auction sale of the putni—Bengal Tenancy Act (VIII of 1885), s. 65. Although the transferee of a fractional share of a putni cannot enforce registration of his name on payment of the necessary fee and tender of the requisite security, yet the transfer is not altogether void, and he is liable for rent severally and jointly with the registered tenant, if the landlord chooses to recognize him as one of the joint holders of the putni, and he is also liable for the entire rent of the putni estate. Notwithstanding a stipulation in the putni lease that on default of any instalment of rent, the landlord shall be entitled to realize the same by auction sale of the putni mehal, the putnidar is also personally liable for the rent of the said mehal. *Fotick Chunder Dey Sircar v. Foley, and Tarini Prosad Roy v. Narayan Kumari Debti* referred to.

SOURENDRA MOHAN TAGORE v. SURNOMOYI ... XXVI

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Nature of tenancy—Lease for construction of permanent works—Permanent tenure—conduct of lessor. The defendants and their predecessors in title held of the plaintiffs and their predecessors certain land under a pottah, which, though not expressly stated to grant a permanent lease, was granted for the purpose of constructing "a brick-built dock, buildings, etc., and workshops." The works were constructed; and during a period of 42 years the interest of the lessees was from time to time transferred, without any conduct on the part of the lessors or their successors indicating that they regarded the interest of the lessees as not permanent. Some years after the construction of the dock it ceased to be used as such. *Held*, that the tenure created by the pottah was of a permanent nature.

RUNGO LALI, LOHEA v. WILSON ... XXVI

204

Sale of tenure for arrears of rent—Act X of 1859—Non-attachment and non-publication of sale proclamation—Civil Procedure Code (Act XIV of 1882), s. 311—Non-registration of purchase in the landlord's sherishtah. There is no provision in Act X of 1859 under which the sale of a jote in execution of a rent decree is liable to be set aside on the ground of non-attachment and non-proof of publication of the sale proclamation. In a case governed by Act X of 1859, it was *held* that a person, who had purchased a transferable jote, but who did not get his name registered in the landlord's sherishtah had no locus standi against a subsequent auction-purchaser of the jote in execution of a decree obtained against the recorded tenant, and had no right to impugn the title of the auction-purchaser under the sale. *Sham Chand Kundu v. Brojjo-Nath Pal Chowdhry* followed.

PATIT SHAHU v. HARI MAHANTI ... XXVII

789

Suit by a landlord against tenant for a certain sum payable by him out of the rent to a third person by assignment—Whether such a suit is one for rent or for damages. *Held* (by the FULL BENCH), that a suit by a landlord against a tenant for a certain sum of money payable by him out of the rent to a third person under assignment, is one for rent and not for damages. *Hutnessur Biswas v. Hurish Chunder Boss* referred to. *Mohabul Ali v. Mahomed Faizullah* approved of.

BASANTA KUMARI DEBYA v. ASHUTOSH CHUCKERBUTTI ... XXVII

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Suit for ejectment—Notice to quit—Tenancy created by a kabuliyat—Six months' notice requiring the tenant to vacate the holding before the expiry of the last day of the year, whether good—Presumption as to a tenancy being a permanent one—Long possession, transfers of the holding, and erection of pucca building, whether sufficient for a presumption that the tenancy is a permanent one—Compensation on ejectment—

Landlord and Tenant—(concluded.)

Transfer of Property Act (IV of 1882) ss. 51 and 108, (ol. h). In a tenancy created by a *kabuliyat* with an annual rent reserved, a six months' notice to quit requiring the tenant to vacate the holding within, instead of on the expiry of the last day of a year of the tenancy, is a good notice in law, inasmuch as there was no appreciable interval between the expiry of the notice and the end of a year of the tenancy. *Page v. More* distinguished. Where a tenancy was created by a *kabuliyat*, which on the face of it contained nothing to imply permanency in the tenure created, which contained no words of inheritance, nor anything to show that the land was taken for residential or building purposes; that though the land passed by successive transfers, there was nothing to show that the landlord had knowledge of them or registered the transferees as tenants; that though there were *pucca* buildings on the land, they had not been in existence for such a length of time as would warrant an inference that the lease was one for building purposes; that there was nothing to show that they were erected under circumstances from which acquiescence of the landlord and the creation of an equitable right in the tenant could be inferred; or that they were erected with the knowledge of the landlord; these facts are not sufficient to warrant an inference that the tenancy was, when first created, intended to be permanent, or was subsequently by implied agreement converted into a permanent one. To resist ejectment by a tenant on the ground that the tenancy is a permanent one, and that the landlord stood by and permitted him (the tenant) to erect *pucca* buildings on the land in the belief that the said tenancy was a permanent one, it is incumbent on the tenant to show that in erecting the buildings he was acting under an honest belief that he had a permanent right in the land, and the landlord knowing that he (the tenant) was acting under such belief stood by and allowed him to go on with the construction of the buildings. *Lala Beni Ram v. Kundan Lal, Ramsden v. Dyson, Jug Mohan Das v. Pallonjee, De Busche v. Alt and Kunhamed v. Narayanar Mussad* referred to. Where it is proved that the tenancy is not a permanent one, that the tenant erected a *pucca* building on the land without the consent of the landlord, the tenant on eviction is not entitled to any compensation for the building from the landlord. *Dattatraya Rajaji Pai v. Shridhar Narayan Pai, Yeshwada v. Ram Chandra* distinguished.

ISMAIL KHAN MAHOMED v. JAIGUN BIBI ... XXVII 570

Suit for rent against a person holding land within a municipality and the land not proved to have been let out for agricultural or horticultural purposes—Bengal Tenancy Act (VII of 1885), s. 5, sub-sec. 1; s. 7, sub-sec. 3; and sch. III—Limitation Act (XV of 1877), sch. II, art. 116—Tenure-holder—Transfer of Property Act (IV of 1882), chap. V, s. 117. The mere fact that a person has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rent, is not sufficient to prove that he is a tenure-holder within the meaning of the Bengal Tenancy Act. It must be proved that the land was let out as a holding for agricultural or horticultural purposes. In a suit for rent for a period of six years by an *ijaradar* upon the basis of a *kabuliyat* alleged to have been executed by the predecessor of the defendant, it was contended for the first time before the Appellate Court that the suit was barred by limitation, being one for rent for a period of more than three years. It was found that the land was not let out for agricultural or horticultural purposes. *Held*, that inasmuch as the land was not let out for agricultural or horticultural purposes, the Bengal Tenancy did not apply, and therefore the suit was not barred by limitation.

UMRAO BIBI v. MAHOMED ROJABI... XXVII 205

Landlords—

Joint. See BENGAL TENANCY ACT, s. 188.

Law—

Ignorance or knowledge of, as a defence. See RAILWAY COMPANY.

Lease—

See LANDLORD AND TENANT.

By grantee in excess of his estate. See GRANT.

Construction of lease—Construction of a contract in a potta allowing relinquishment of the land leased, in whole or in part—Landlord and tenant. A potta granted a permanent *mokurari* lease for mining purposes, and gave to the tenant the privilege of surrendering either the whole or part of the land included in the lease, with a deduction to be made in the rent for the extent of the land that might be found on measurement to have been surrendered. *Held*, that this privilege could only

Lease—(continued.)

be exercised by the tenant upon a strict observance of the conditions expressly declared, or plainly implied, in the lease itself. The lease was of 1,974 *bighas*. The tenant executed a deed of relinquishment of 1,409 *bighas*, 8 *cottahs*, 8 *gundas*, whereof possession was surrendered with the exception of two plots, one of 24, and the other of 9 *bighas*. *Held*, that according to the true construction of the contract, there was error in the judgment of the High Court which decided that the retention of the plots did not altogether deprive the relinquishment of its effect. This retention did more than lessen the area actually surrendered. It was a mistake to suppose that an increased rent to be paid by the relinquishing tenant in proportion to the areas retained and surrendered, respectively, would adjust the point disputed as a matter of law. The contract was that in case the tenant surrendered a part the future rent was to be ascertained by the measurement of the area relinquished. To have made a new surrender would have been within the competency of the tenant. But for the tenant to continue to hold possession of part of the area which he had purported to relinquish was not open to him, or consistent with the validity of the surrender, the contract not admitting of approximate equivalents in regard to the possession of the total area professed to be surrendered but not surrendered. Therefore the surrender upon which rested the defence to a suit by the lessor for the full rent was invalid in law.

RAMCHURN SINGH v. RANIGANJ COAL ASSOCIATION ... XXVI 29

For construction of permanent works. See LANDLORD AND TENANT.

Of immoveable property outside jurisdiction, power of Court to set aside. See JURISDICTION.

Return of. See EVIDENCE.

Leave to sue—

See JURISDICTION.

Legal Necessity—

See HINDU LAW, MANAGER: PROBATE AND ADMINISTRATION ACT, s. 40.

Legal Practitioners' Act—

XVIII of 1879—

As amended by Act (XI of 1896), ss. 13, cl. (f), 14. *Professional misconduct—Misconduct prior to enrolment as Legal Practitioner—“any other reasonable cause”*—*Ejusdem generis—Permanent defect of character—“Taking Instructions” and “Misconduct”*—*Authority of Subordinate Courts to proceed under s. 14 of the Legal Practitioners' Act—Departmental enquiry—Legal proof.* One P, a Sub-Inspector of Police, was committed for trial to the Court of Sessions on charges of bribery, forgery and other offences, but was acquitted. He was, however, departmentally found guilty of misconduct and was dismissed from the Government service in 1891. In 1893, suppressing the fact of his dismissal, he obtained a certificate of good moral character from a pleader, and on the strength of that certificate gained admission to the mukhtarship examination which he passed, and was enrolled as a mukhtar and was practising as such for six years in the district of Bhagalpore, apparently without any fault. The Sessions Judge of Bhagalpore having made a reference under s. 14 of the Legal Practitioners' Act, recommending his dismissal for the aforesaid misconduct. *Held, per GHOSH, J.*—The misconduct on the part of P being antecedent to his passing the mukhtarship examination and enrolment as a mukhtar, and consequently having no relation to his business as mukhtar, it is extremely doubtful whether such misconduct is “any other reasonable cause” for his suspension or dismissal within the meaning of s. 13, cl. (f) of the Legal Practitioners' Act. And it is also doubtful whether, when he applied to the pleader for a certificate, P was bound to relate to him the past history of his life. *Per RAMPINI, J.*—The misconduct of P constituted a “reasonable cause” for his dismissal under the provisions of s. 13, cl. (f) of the Legal Practitioners' Act. *Per HILL, J.* (agreeing with RAMPINI, J.)—Section 13, cl. (f) of the Legal Practitioners' Act was intended to cover misconduct other than professional misconduct and to embrace all causes other than those previously enumerated in the section, which might reasonably be regarded as disqualifying a person for retaining the office of pleader or mukhtar. *In the matter of Gholab Khan* relied on. An offence committed prior to admission may be made the foundation of proceedings under s. 13 of the Legal Practitioners' Act provided it is of such a nature as to imply a permanent defect of character of a disqualifying kind. *Held, per HILL, J.* (agreeing with GHOSH, J.)—That P, while a Sub-Inspector of Police having been “departmentally,” and not on legal proof, found guilty of misconduct, no case either for

Legal Practitioners' Act—(continued.)

XVIII of 1879—(continued.)

suspension or dismissal from the profession of mukhtar had been made out against him. *In the matter of the petition of Ahmeenoodgeen Ahmed* referred to. *Held*, further, *per* HILL, J., that "taking instructions" and "misconduct" referred to in s. 14 of the Legal Practitioners Act relate to cls. (a) and (b), respectively, of s. 13 of the Act, and it is only in such cases that a Subordinate Court is authorized to proceed under s. 14. The charges in the present case not falling under either of these heads the proceedings were bad. The inquiry ought to have been held by the High Court. *In the matter of Southekal Krishna Rao* referred to.

IN THE MATTER OF PURNA CHUNDER PAL ... XXVII 1023

Legal Proof—

Of misconduct. See LEGAL PRACTITIONERS' ACT, s. 13.

Legal Representative —

See APPEAL.

Of registered proprietor. See LAND REGISTRATION ACT, s. 78.

Suit for rent by. See LAND REGISTRATION ACT, s. 78.

Legislature—

Power of Local. See SUPERINTENDENCE OF HIGH COURT.

Lender—

See ACCOMPLICE.

Lessor—

Conduct of. See LANDLORD AND TENANT.

Letters of Administration—

See PROBATE AND ADMINISTRATION ACT, s. 40.

Administrator-General's Act (II of 1874), s. 12—Verification of petition—Court Fees Amendment Act (XI of 1899). The Administrator-General as a public officer is exempted from verifying otherwise than by his signature any petition presented by him under the provisions of the Act (II of 1874). *In the Goods of McComiskey* followed. The form of affidavit prescribed by Act XI of 1899 indicates that it does not apply to an application by the Administrator-General.

IN THE GOODS OF AVDALL ... XXVI 404

Bond, Form of—Succession Act (X of 1865), s. 256—Practice. The Indian Succession Act, s. 256, requires that an administration bond should be taken in every case. It may, however, be varied, by special order of the Court, in the case of a limited or special administration and follow the English form.

IN THE GOODS OF GUBBOY ... XXVI 406

Court Fees Act (VII of 1870), s. 3, sch. I, art. 11, s. 19 H—Court Fees Amendment Act (XI of 1899)—Practice—Payment of ad valorem fee on Probate or Letters of Administration. In an application for probate or letters of administration the *ad valorem* fee prescribed by Statute should be prepaid to the satisfaction of the Court. Such payment must be made to the Registrar and certified by him or by the Taxing Officer where an exemption is claimed and allowed. This certificate should be produced to the Court with the application and affidavit of valuation.

IN THE GOODS OF OMDA BIBEE ... XXVI 407

Re-opening of proceedings for. See PROBATE.

Letters Patent, High Court —

cl. 12. See JURISDICTION.

cl. 15. See APPEAL.

cl. 17. See GUARDIANS AND WARDS ACT, s. 14.

cl. 28. See REVISION.

Libel—

Suit for. See SLANDER.

Licensed Vendor—

Liability of. See OPIUM ACT, SS. 5 AND 9.

Lien of Mortgage—

On balance of sale proceeds. See LIMITATION ACT, ART. 182.

Life Assurance—

See INSURANCE.

Light and Air—

Right to passage of. See EASEMENT.

Limitation—

See MORTGAGE: ONUS OF PROOF: PUBLIC DEMANDS RECOVERY ACT, s. 8: TITLE.

Bengal Tenancy Act (VIII of 1885), sch. III, art. 3—Limitation Act (XV of 1877), s. 22—Civil Procedure Code (XIV of 1882), s. 32—Parties—Adding parties to suit—Adding party by a Court of its own motion. No question of limitation arises, and s. 22 of the Indian Limitation Act does not apply, when the Court of its own motion acts under s. 32 of the Code of Civil Procedure, and orders that the name of any person be added as a defendant. *Grish Chunder Sasmal v. Dwarka Nath Dinda and The Oriental Bank Corporation v. Charriol* followed. *Khadir Moideen v. Rama Naik* referred to; and *Imam-ud-din v. Liladhar* dissented from.

FAKERA PASBAN v. BIBI AZIMUNNISSA ...

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Civil Procedure Code (Act XIV of 1882), s. 230—Decree for sale of mortgaged property, making the defendant personally liable in case of insufficiency—Mortgage decree—Limitation Act (XV of 1877), sch. II, art. 179, cl. 4—Step in aid of execution—Application for time—Application to review the order striking off the execution case and to restore it to file. A decree which directs the realization of the decretal amount by sale, in the first instance, of the mortgaged properties, and afterwards from the persons and other properties of the defendants, is a mortgage decree and not "a decree for the payment of money" within the meaning of s. 230 of the Civil Procedure Code. Application for time is not; "a step in aid of execution;" but an application for review of an order striking off an execution case and for its restoration to the file is undoubtedly a step in aid of execution within the meaning of the Limitation Act (XV of 1877), sch. II, art. 179. *Ram Charan Bhagat v. Sheoharai Rai and Fazil Houladar v. Krishna Bundhoo Roy* referred to and followed. *Konnachi Kather v. Pakker* dissented from. *Fakeer Buksh v. Chutterdharee Chowdhry and Purnessuree Dossee v. Nobin Chunder Tarun* distinguished.

KARTICK NATH PANDEY v. JUGGER NATH RAM MAHWARI ...

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Plaint presented within time—Plaint insufficiently stamped—Order to supply the deficiency not complied with within the time allowed—Registration of plaint—Civil Procedure Code (Act XIV of 1882), s. 54—Limitation Act (XV of 1877), s. 4. A plaint was filed one day before the expiry of the period of limitation, but the court-fees were deficient, and the plaintiff was ordered to pay the deficient court-fees within a week. This order was complied with one day after the expiry of the time allowed, and the plaint was registered. *Held*, that the suit was barred by limitation, as the deficient court-fees were not supplied within the appointed time, and that the fact of the plaint being registered does not prevent its rejection under s. 54 of the Civil Procedure Code, the terms of which are imperative and mandatory. *Moti Sahu v. Chhatrai Das and Huri Mohun Chuckerbutti v. Naimuddin Mahomed* distinguished. *Hutibul Hossein v. Mahomed Reza* dissented from. *Kishore Singh v. Nabdal Singh, Karman Singh v. Cockell* approved.

BRAHMOMOYI DAS v. ANDI SI ...

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Possession and actual user—Conflicting evidence of possession—Presumption of possession from title—Title and possession—Onus probandi—Character of land in dispute—Mode of enjoyment. It is only when the evidence of possession is strong on both sides and apparently equally balanced, that the presumption that possession goes with title should prevail. The principle does not apply where the evidence of possession is equally unworthy of reliance on both sides. *Dharm Singh v. Hursphad Singh* explained. Possession, however, is not necessarily the same as actual user. When therefore the plaintiff has to prove possession of a land in dispute within the statutory period of limitation, if there is anything special in the character of the land, for example, when it is permanently or temporarily incapable of actual enjoyment in any one of the customary modes, a presumption in favour of continuance of possession, though in no sense a conclusive one, may arise. *Mahomed Ali Khan v. Abdul Gunny* referred to.

THAKUR SINGH v. BHOGERAJ SINGH... ..

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Possession for period short of. See POSSESSION, SUIT FOR.

Presentation of a plaint, insufficiently stamped—Plaint not rejected, but the plaintiff ordered to put in the deficit Court-fee within a certain time—Effect of such an order—Court Fees Act (VII of 1870), s. 28—Civil Procedure Code (Act XIV of 1882), s. 54—Interest Act (XXXII of 1839)—Whether a Court is to allow interest from

Limitation—(continued.)

the date of the debt where there is no contract to pay, and no demand made for payment of interest. Held, that where a plaint was presented in the proper Court with insufficient stamp, and the Court without rejecting it (the plaint), allowed a certain time to put in the deficit Court-fee which was done within the time allowed, for the purposes of limitation the suit should be considered to have been instituted on the date when the plaint was first presented. *Huri Mohun Chuckerbutty v. Naimuddin Mahomed and Moti Sahu v. Chhatra Das* followed. *Yakutunnissa Bibee v. Kishoree Mohun Roy*, and *Venkatramayya v. Krishnayya* distinguished. Held also, that in a suit for money lent without any written instrument, where it was found that there was no express contract to pay interest, but it was not found that any demand of payment was made in writing, and that there was any demand giving notice to the debtor that interest would be claimed from the date of the demand, in such a case the creditor was not entitled to any interest before suit.

SURENDRA KUMAR BASU v. KUNJA BEHARY SINGH ...

XXVII 814

Limitation Act—**XIV of 1859—**

- s. 1, cl. 15. Act IX of 1871, s. 29 and art. 148—*Usufructuary mortgage—Limitation of suit—Extinction of mortgagor's title—New starting point by acknowledgment.* The representatives in estate of a mortgagor, who executed a usufructuary mortgage, dated 17th October 1788, sued the heirs of the mortgagee in 1893, alleging payment of the mortgage in 1881, and claiming the possession of the mortgaged property or other relief. The suit, in the absence of acknowledgment made within sixty years satisfying the requirements of the law of limitation for extension of that period, was barred on the 17th October 1848, by the effect of Act XIV of 1859, s. 1, cl. 15, which barred the suit after the 1st January 1862. Afterwards, by the effect of Act IX of 1871, s. 29, the right of property in the mortgagor was extinguished. In none of the documentary evidence adduced by the plaintiffs was there shown to have been made during the sixty years from the date of the mortgage onwards, any written acknowledgment, satisfying the requirements of the above cl. 15, and thereby giving ground for computing limitation from the date of such acknowledgment. Nor did the fact that a lease was made on the 8th January 1872 of some of the mortgaged property by one of the then mortgagees to one of the mortgagors, the lessor describing himself as usufructuary mortgagee, preclude the defendants from asserting their true title. The description neither estopped the alleged mortgagee from denying that he was in that character at the time of this suit, nor was it a representation which required that he should make it good. It was no essential part of a contract between these parties, and it did not affect the issue now raised. The judgment in *Citizens Bank of Louisiana v. First National Bank of New Orleans* referred to.

FATIMATULNISSA BEGUM v. SUNDAR DAS ...

... XXVII 1004

IX of 1871—

See LIMITATION ACT, ART. 144.

- s. 29. See LIMITATION ACT, 1859, s. 1, CL. 15.
art. 129. See HINDU LAW, CUSTOM.

XV of 1877—

See EVIDENCE.

- s. 2. See LIMITATION ACT, ART. 144.

- s. 4. See LIMITATION.

- s. 5. See PAUPER SUIT.

- s. 19. See JURISDICTION.

- s. 19. *Acknowledgment by guardian of minor—Guardians and Wards Act (VIII of 1890), ss. 27 and 29—Act XL of 1858—Guardian, Powers of.* An acknowledgment of a debt by the guardian of a minor appointed under the Guardians and Wards Act does not bind the minor and is not such an acknowledgment under s. 19 of the Limitation Act as would give a new period of limitation against the minor.

CHHATO RAM v. BILTO ALI ...

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- s. 19. *Acknowledgment of debt—Suit for arrears of rent—Limitation Act, sch. II, art. 110.* The plaintiffs sued the defendants for arrears of rent from the 4th December 1889 to the 31st July 1894 relying upon the following letter as an acknowledgment sufficient to take their demand out of the Limitation Act: "As we have informed your client, we are quite willing to pay him the rent due under our *mourasi pottah* if he can show a title to give us a good receipt for it that will satisfy our lawyers. If he is in the same position that his father was up to the time of his death, unable to produce a perfect title, we are still willing to pay him the

Limitation Act—(continued.)

XV of 1877—(continued.)

rent on his giving us a substantial indemnity similar to that which we had from his father." *Held*, that this was a sufficient acknowledgment within s. 19 of the Limitation Act. *Secretary of State for India v. Luchmeswar Singh* distinguished. **RUNGO LALL LOHEA v. WILSON** ... XXVI 204

s. 22. See LIMITATION.

s. 26. See EASEMENT: RIGHT OF WAY.

Schedule II—

art. 11. *Suit for possession of immoveable property on a declaration that a certain adoption was invalid—Effect of claim preferred on behalf of a minor by the manager without the sanction of the Court of Wards—Court of Wards Act (Bengal Act IX of 1879), s. 55.* An order which was passed during his minority is not binding upon a person whose estate is under the management of the Court of Wards, if the proceeding in which it was passed was not instituted by the manager with the sanction of the Court of Wards, *i.e.*, of the Commissioner to whom the Court of Wards delegated its authority to grant such sanction. In a suit brought by the plaintiff, as *shebait* of an idol, for recovery of possession of certain immoveable properties, or in the alternative in his own right as an heir to the last full owner, or a declaration that certain execution proceedings which were taken against a person who was not the legally adopted son of the last full owner, and therefore the sales held therein, were not binding upon him, the defence (*inter alia*) was that the suit was barred by limitation under arts. 11 and 118, sch. II of the Limitation Act. *Held*, that inasmuch as the order under s. 281 of the Civil Procedure Code was passed during the plaintiff's minority, and as the proceeding in which the said order was passed was not instituted by the manager with the sanction of the Court of Wards, the suit was not barred under art. 11, sch. II of the Limitation Act, although it was brought more than one year after the claim was rejected.

RAM CHANDRA MUKERJEE v. RANJIT SINGH ... XXVII 242

arts. 11, 15. See CLAIM TO ATTACHED PROPERTY.

art. 32. *Bengal Tenancy Act (VIII of 1885), ss. 25 and 155—Suit to compel the defendant to fill up a tank and to pay compensation, or in the alternative for khas possession—Limitation Act, sch. II, arts. 120 and 143.* In a suit brought by a landlord against a tenant where the primary relief sought was a mandatory injunction directing the defendant to fill up a tank excavated by him in contravention of the terms of the tenancy and to pay damages to the plaintiff for his wrongful act, and where the secondary relief sought was ejectment, the defence (*inter alia*) was that the suit was barred by limitation, inasmuch as it was brought more than two years after the excavation of the tank. *Held*, that art. 32 of sch. II of the Limitation Act (XV of 1877) applied to the case, and the suit was barred by limitation. *Somun Goze v. Raghubir Oja* and *Gangadhar v. Zakurriya* approved.

SHAROOP DASS MONDAL v. JOGGESSUR ROY CHOWDHRY... XXVI 564

art. 62. See LIMITATION ACT, ART. 132.

arts. 85, 89. See LANDLORD AND TENANT.

art. 89. See JURISDICTION.

art. 91. See GRANT.

art. 95. See SALE IN EXECUTION OF DECREE.

art. 97. See LIMITATION ACT, ART. 132.

art. 110. See LIMITATION ACT, s. 19.

art. 116. See HINDU LAW, JOINT FAMILY: LANDLORD AND TENANT.

art. 118. *Suit for possession of immoveable property on a declaration that an adoption is invalid.* Article 118, sch. II of the Limitation Act does not apply to a suit for possession of immoveable property, though it may be necessary for the plaintiff to prove the invalidity of an adoption. *Jagannath Prasad Gupta v. Ranjit Singh* referred to.

RAM CHANDRA MUKERJEE v. RANJIT SINGH ... XXVII 242

art. 120. See LIMITATION ACT, ART. 132.

art. 120. *Contribution, Suit for—Liability created by ekrarnama—Suit upon a covenant in the ekrarnama for money paid—Cause of action.* A suit upon a covenant in an *ekrarnama* (executed by some of the defendants who were adults, and by the guardian of the others who were minors at the time when the *ekrarnama* was executed) was brought by the plaintiffs for the purpose of obtaining from the defendants contribution in respect of a debt which had been realized by the sale of the property mortgaged by the father of the plaintiffs. The defence mainly was that the suit was barred by limitation, inasmuch as it was not brought within six

Limitation Act—(continued.)**XV of 1877—(continued.)**

years from the date when the *ekrarnamā* was executed, or from the date when the mortgage debt became repayable upon the mortgage bond. *Held*, that the cause of action in the case arose when the plaintiffs were damnified, i.e., when they paid the mortgage debt, and as the suit was brought within six years from that date it was not barred by limitation.

KUMARNATH BHUTTACHARJEE v. NOBO KUMAR BHUTTACHARJEE ... XXVI 241
arts. 120 and 143. See LIMITATION ACT, ART. 32.

art. 132. *Sale for arrears of revenue—Lien of Mortgagee on balance of sale-proceeds—Limitation Act, sch. II, arts. 62, 97, 120—Transfer of Property Act (IV of 1882), s. 73—Mortgage suit—Charge on proceeds of revenue sale—Revenue-paying estate—Act XI of 1859, s. 53.* When a mortgaged property, being a revenue-paying estate, is sold free from all incumbrances for arrears of revenue, the lien of the mortgagee is transferred from the property itself to the balance of the sale-proceeds which remains after satisfying the Government demand. The time within which a suit can be brought to recover money charged on a mortgaged estate, is not, therefore, shortened by reason of the estate having been sold for arrears of Government revenue; in such a case, a suit brought by the mortgagee for satisfaction of the mortgage-debt out of the surplus sale-proceeds, will be governed by art. 132 of the Limitation Act. Even if the original cause of action of the mortgagee, to enforce a charge on the mortgaged property, be considered to cease when the property was sold for arrears of revenue, and if it be considered that a new cause of action then accrued to him so as to entitle him to bring a suit for the recovery of the surplus sale-proceeds, art. 120 of the Limitation Act would apply to such a suit. *Ram Din v. Kalka Prasad and Miller v. Runga Nath Moulick distinguished.*

KAMALA KANT SEN v. AHUL BARKAT ... XXVII 180

art. 144. *Putnidar and Darputnidar, Dispossession of—Adverse possession—Relinquishment by the putnidar, Effect of.* The land in dispute along with other lands were let out in *putni* and *darputni* by the predecessor in interest of the plaintiffs. During the continuance of the said leases the land in dispute was taken possession of and held adversely by the defendants or their predecessor. The *putni* and *darputni* were relinquished by the *putnidar* and *darputnidar* in favour of the plaintiffs on the 29th June 1891, and they, on the 28th June 1893, brought a suit for recovery of possession of the disputed land from the defendants. The defence was that the suit was barred by limitation. *Held*, that art. 144, sch. II of the Limitation Act applied to the case, and that the suit was barred by limitation, inasmuch as it was not brought within twelve years from the date when the possession of the defendants became adverse to the plaintiffs. *Nuffer Chandra Pal Chowdhry v. Rajendra Lal Goswami, Gunga Kumar Mitter v. Asutosh Gossami, Sharat Sundari Dabia v. Bhobo Pershad Khan Chowdhri and Chinto v. Janki distinguished.*

GOBINDA NATH SHAHA CHOWDHRY v. SURJA KANTA LAHIRI ... XXVI 460

art. 144. *Suit by a reversioner for possession of immoveable property on death of Hindu female heir—Adverse possession—Limitation Act, 1877, s. 2—Revival of extinguished right—Limitation Act (IX of 1871).* A and I, daughters of one R, on his death succeeded in equal shares to the properties left by him. Subsequently A died, leaving behind her a minor son U, who after his mother's death held possession of half of the said properties as heir to his mother's father for more than twelve years. The period of twelve years expired before the Limitation Act (IX of 1871) came into operation. In a suit for recovery of possession of the share of the immoveable properties, which was originally in the possession of U, but afterwards passed into the hands of a third party, by the reversioner within twelve years from the death of I, the female heir, the defence was that the suit was barred by limitation. *Held*, that inasmuch as the possession of U was adverse to the female heir, and as her right to the disputed property was barred before the Limitation Act (IX of 1871) came into operation, the right of the reversioner was also barred. *Srinath Kur v. Prosunno Kumar Ghose followed. Tikaram v. Shama Charan dissented from.*

BRAJA LAL SEN v. JIBAN KRISHNA ROY ... XXVI 285

art. 148. See LIMITATION ACT, 1859, S. 1, CL. 15.

arts. 166 and 178. See SALE IN EXECUTION OF DECREE.

art. 179. See LIMITATION.

art. 179. *Step in aid of execution—Application by the decree-holder to be put in possession of property which he purchased in execution of his decree.* An application by a decree-holder to be put in possession of the property which he purchased

Limitation Act—(concluded.)

XV of 1877—(concluded.)

in execution of his decree is a step in aid of execution of that decree within the meaning of cl. (4), sch. II, art. 179 of the Limitation Act. *Moti Lal v. Makund Singh* followed.

SARIATOOLLA MOLLA v. RAJ KUMAR ROY ... XXVII 709

art. 179. *Step in aid of execution—Application for execution of decree against some of the joint judgment-debtors, out of time—Realization of a portion of the decretal amount by such execution, Effect of, as against other judgment-debtors who was not a party to the execution proceeding—Application in accordance with law.* A judgment-debtor, who was not a party to a previous application for execution of a decree or to any order made upon it, is not precluded from showing that the said application was barred by limitation, and that therefore it was not in accordance with law. A decree was obtained against four persons on the 13th August 1890. An application for execution was made against all of them on the 7th October 1893. A subsequent application was made against two of them on the 17th February 1897, and a portion of the decretal amount was realized. On a further application for execution against persons who were parties to the previous execution proceeding and also against a person who was not a party to the said proceeding, objection was taken by the latter that the application for execution as against him was barred by limitation. *Held*, that the application was barred by limitation, inasmuch as the objector was not a party to the previous execution proceeding, which was itself barred by limitation, and therefore it had not the effect of keeping the decree alive.

HARENDRA LAL ROY CHOWDHRY v. SHAM LAL SEN ... XXVII 210

art. 179, cl. (4). *Step in aid of execution—Application for execution "not in accordance with law"—Subsequent application for execution—Objection to the previous application.* An application for partial execution of a decree is a step in aid of execution within the meaning of cl. 4, art. 179, sch. II of the Limitation Act (XV of 1877). A judgment-debtor, who did not appeal against a previous order for execution of a portion of the decree and who did not dispute the validity of such order, cannot, in the matter of a subsequent application for execution of the remaining portion of the decree, contend that the first application was not "in accordance with law," and that the subsequent application being presented after the lapse of three years from the date of the decree was barred by limitation. *Dulichand Bhudar v. Bai Shwkor* followed.

NEPAL CHANDRA SADOOKHAN v. AMRITA LALL SADOOKHAN ... XXVI 888

Lis Pendens—

See HINDU LAW, MAINTENANCE.

Involuntary alienation—Execution proceedings—Revenue Sale Law (Act XI of 1859), ss. 13, 54—Sale for arrears of Government revenue—Mortgage—Sale in execution of mortgage decree—Right of redemption. A decree was obtained for the sale of a mortgaged property, being a share of an estate, on the 31st August 1889. In execution of that decree, the property was purchased by the plaintiffs on the 11th December 1891, and the sale was confirmed on the 5th March 1892. Meanwhile, pending the execution proceedings, a larger share of the estate, including the share mortgaged, was purchased by the defendants at a revenue sale on the 30th September 1891, which sale was confirmed on the 11th March 1892. In a suit instituted by the plaintiffs for the possession of the property purchased by them, the defendants having questioned the validity of the mortgage decree, and contended that they were not bound by it, not being parties thereto, and having in the alternative claimed the right to redeem the mortgaged property, *held*, that the defendants were bound by the mortgage decree, the principle of *lis pendens* applying to the case. *Held*, also, that the defendants, having purchased a share of an estate at a revenue sale, held under the provisions of ss. 13 and 54 of the Sale Law, acquired it subject to the mortgage which they were bound in law to discharge before the sale in execution of the mortgage decree had actually taken place, or before, at any rate, that sale had been confirmed on the 5th March 1892; and that having failed to do so, and there being no equities to the contrary, their right of redemption was extinguished.

HAR SHANKAR PRASAD SINGH v. SHEW GOBIND SHAW ... XXVI 966

Local Government—

Rule framed by. See REFORMATORY SCHOOLS' ACT.

Rules made by. See EVIDENCE.

Local Investigation—

By Amin. See MESNE PROFITS.

Lower Burma Courts Act—

XI of 1889, s. 4. See MORTGAGE.

Magistrate—

Criminal Procedure Code (Act V of 1898), s. 190, sub-sec. (1), cls. (a) and (c), and s. 191—Taking cognizance of offence by Magistrate upon receiving a complaint of facts—Right of the accused to claim a transfer—Penal Code (Act XLV of 1860), ss. 193 and 195—Sanction unnecessary when offence alleged to have been committed in the course of an investigation by the Police—Interference by the High Court in a pending case. The complainant made a complaint to the Magistrate by a petition in which he named three persons and charged them with offences under certain sections of the Penal Code. The Magistrate thereafter examined the complainant and some witnesses on his behalf and issued summonses against the three persons mentioned in the petition of complaint as well as against the petitioner in this case for an offence other than those mentioned in the said petition. *Held*, the Magistrate took cognizance of the offence as against the petitioner under cl. (a) and not cl. (c) of sub-sec. (1) of s. 190, and consequently he was not debarred by s. 191 of the Criminal Procedure Code from trying the case. No sanction under s. 195 of the Criminal Procedure Code is necessary for taking cognizance of an offence under s. 193 of the Penal Code when the alleged false evidence is said to have been fabricated, not in relation to any proceeding pending in any Court, but in the course of an investigation by the Police into the matter of an information received by them. It is inadvisable to interfere in a pending case unless there is some manifest and patent injustice apparent on the face of the proceedings and calling for prompt redress.

JAGAT CHANDRA MOZUMDAR v. QUEEN-EMPRESS ... XXVI 786

Discretion of. See COMPENSATION : WITNESS.

Duty of. See JURY.

Jurisdiction of. See CRIMINAL PROCEDURE CODE, SS. 144 : 145 : SECURITY FOR GOOD BEHAVIOUR.

Jurisdiction of. Power of, to pass orders in cases before Subordinate Court without transfer to his own Court—Judicial enquiry before issue of process, Legality of—Code of Criminal Procedure, ss. 192, 202, 203 and 204. *Held*, where the complaints were not made to the District Magistrate nor had the cases based on those complaints been withdrawn to his Court by any order, but were in the Court of a Joint Magistrate, who had examined the complainants, that the District Magistrate was not justified in interposing in the trial of the cases and had no authority under the law to pass any orders in those cases. Even if the cases had been removed by the District Magistrate to his own Court for trial, it was very questionable whether the District Magistrate could pass orders directing a judicial inquiry by another Magistrate before the issue of processes so as to postpone the trial.

JHUMUCK JHA v. PATHUK MANDAL ... XXVII 798

Jurisdiction of. Reference of case for trial of offence by Subordinate Court—Power of District Magistrate to issue warrants for arrest of other persons concerned in that offence. Where cognizance was taken of an offence on a Police report and the case was made over to a Subordinate Magistrate, *held*, that, so long as the case connected with that offence remained with the Subordinate Magistrate, no other Magistrate was competent to deal with it, and that applications for warrants against other persons concerned in that offence should be made to the Magistrate before whom the case was, and to no other Magistrate.

GOLAPDY SHEIK v. QUEEN-EMPRESS ... XXVII 979

Nomination of jurors by. See JURY.

Mahomedan Law—

Acknowledgment, Effect of—Legitimacy of children—Fornication—Sunnis. Under the Mahomedan law, where a child is begotten by a Mahomedan father on a Hindu prostitute living with him, no acknowledgment by the father can confer on the child the status of legitimacy.

DEHAN BIBI v. LALON BIBI ... XXVII 801

Maintenance—

See HINDU LAW, MAINTENANCE. INCOME TAX ACT (II OF 1886).

Allowance for. See ATTACHMENT.

Decree declaring charge on immoveable property for. See TRANSFER OF PROPERTY ACT, s. 39.

Maintenance—(continued.)

Form of decree for. See DECREE.

Grant by Zamindar for. See GRANT.

Of member of junior branch of Hindu family. See DECREE.

Malice—

See MALICIOUS PROSECUTION.

Malicious Prosecution—

Suit for damages for malicious prosecution—Malice—Dishonest motive—Effect of bringing a charge of "Assault" for "Criminal Intimidation"—Damages—Reasonable and probable cause—Pennl Code (Act XLV of 1860), ss. 351, 352, 503. Where, in a suit for damages for malicious prosecution on a charge of assault which was dismissed, it appeared from the facts as found by the lower Courts that there was 'criminal intimidation' on the part of the plaintiff, although he was not charged with that offence by the defendant. Held, that the plaintiff would not be entitled to any damages, as no malice or dishonest motive could be imputed to the defendant in bringing the charge of 'assault.'

MADHU LAL AHIR GAYAWAL v. SAHAI PANDE DHAMI ... XXVII 582

Manager —

Claim by, on behalf of minor without sanction of Court of Wards. See LIMITATION ACT, ART. 11.

Manager, De facto—

See HINDU LAW.

Marriage—

Evidence of. See HINDU LAW, MARRIAGE.

Measurement of Lands —

Order of Special Judge as to standard of. See SECOND APPEAL.

Member—

Of junior branch of Hindu family, Maintenance of. See DECREE.

Memorandum of Appeal—

Time of presentation of. See PAUPER SUIT.

Merchandise Marks Act—

IV of 1889—

See PENAL CODE, s. 486.

s. 3. See TRADE MARK.

Mesne Profits—

• See RIGHT OF SUIT.

Assessment of mesne profits in execution—Civil Procedure Code (Act XIV of 1882), s. 211—Local investigation by Amin—Civil Procedure Code, ss. 392, 393—Dakhilas or rent-receipts of tenants—Rents which by ordinary diligence might have been obtained—Interest—Discretion of Court in declining to take evidence after the report. The Court executing a decree for mesne profits commissioned an amin, under s. 392 of the Civil Procedure Code, to make a local investigation as to them. He was unable to obtain the rent dakhilas of tenants. He inquired as to the prevailing rates of rent for the land which he measured, and included in his estimate of the mesne profits rents which, with ordinary diligence, might have been obtained. Upon objections taken the questions arose: (1) whether the assessment should have proceeded only upon the rents actually realized, or the amin was right in taking the rent last mentioned into the account; (2) whether the evidence of the rent dakhilas was essential; (3) whether interest, not mentioned in the decree, should have been allowed; (4) whether or not evidence on the application of the objector, should have been taken by the Court after return of the evidence taken in the locality by the amin together with his report. Held, as to (1) that inclusion, in the assessment of mesne profits of rents, which at the prevailing rates might have been received by ordinary diligence, was authorized by s. 211 of the Civil Procedure Code. As to (2), that the dakhilas were important evidence but not essentially necessary. As to (3), that the expression "mesne profits" included, under s. 211, interest on them; but this could only be allowed for not more than three years from the decree, or until possession within that time. As to (4), the question must be decided on general principles in each case. In this instance

Mesne Profits—(continued.)

judicial discretion had been rightly exercised in the Court executing the decree declining to take fresh evidence.

GRISH CHUNDER LAHIRI v. SHOSHI SHIKHARESWAR ROY ... XXVII 951

Suit for. Turn of worship—Right of suit—A suit for wasilat in respect of profit derived from a turn of worship, whether maintainable. A suit for wasilat, in respect of profits derived from a turn of worship, which are in their nature uncertain and voluntary, is not maintainable. Ramessur Mookerjee v. Ishan Chunder Mookerjee followed.

KASHI CHANDRA CHUCKERBUTTY v. KAILASH CHANDRA BANDOPADHYA. XXVI 856

Minor—

See PROBATE.

Acknowledgment of debt by guardian of. See LIMITATION ACT, s. 19.

Contract relating to property of. See SPECIFIC PERFORMANCE.

Mortgage by minor—Attorney for both mortgagor and mortgagee—Notice of minority—

Evidence Act (I of 1872), s. 115—Estoppel—Contract Act (IX of 1872), ss. 11, 64—

Avoiding contract—Compensation—Specific Relief Act (I of 1877), ss. 38, 41.

Section 115 of the Evidence Act has no application to contracts by infants; but the term "person" in that section applies only to a person of full age and competent to enter into contracts. The words "person" and "party" in s. 64 of the Contract Act are interchangeable, and mean such a person as is referred to in s. 11 of that Act, i.e., a person competent to contract. A mortgagee employing an attorney, who also acts for the mortgagor in the mortgage transaction, must be taken to have notice of all facts brought to the knowledge of the attorney; and, therefore, where the Court rescinded the contract of mortgage on the ground of the mortgagor's infancy, and found that the attorney had notice of the infancy, or was put upon enquiry as to it, *held* (affirming the decision of JENKINS, J.), that the mortgagor was not entitled to compensation under the provisions of ss. 38 and 41 of the Specific Relief Act. *Ganesh Lal v. Bapu* dissented from; *Mills v. Fox* distinguished.

BROHMO DUTT v. DHARMO DAS GHOSE ... XXVI. 881

Representation of, in suit. See OATHS ACT, s. 9.

Right of, to an account. See HINDU LAW, JOINT FAMILY.

Sale of property of, by de facto manager. See HINDU LAW, MANAGER.

Minority—

See HINDU LAW, CUSTOM.

Minors—

See HINDU LAW, JOINT FAMILY.

Service of Summons on. See SUMMONS, SERVICE OF.

Misconduct—

Prior to enrolment as mukhtear. See LEGAL PRACTITIONERS' ACT, s. 13.

Misdirection—

See EVIDENCE.

Misjoinder—

Of causes of action. See MULTIFARIOUSNESS.

Mitakshara Law—

See HINDU LAW, JOINT FAMILY.

Money—

Borrowed by one partner by agreement. See CONTRIBUTION, SUIT FOR.

Deposited by defendant in Court, Right of plaintiff to draw out. See PRACTICE.

Paid, Suit on covenant in ekarnama for. See LIMITATION ACT, ART. 120.

Realized by Receiver appointed by decree-holder. See EXECUTION OF DECREE.

Money-decree—

On covenant in mortgage. See MORTGAGE.

Mortgage—

See HINDU LAW, JOINT FAMILY : LIMITATION ACT, 1859, s. 1, CL. 15 : LIS PENDENS.

Accounts—Account of redemption of a mortgage—Appropriation of payments—Set-off of rents and profits—Expenditure on improvements—Interest—Transfer of Property Act (IV of 1882), s. 76—Lower Burma Courts Act (XI of 1889), s. 4. That an account should have been taken between mortgagor and mortgagee in possession

Mortgage—(continued.)

consistently with the direction in s. 76 of the Transfer of Property Act, 1882, is in accordance with the "justice, equity and good conscience" required to be administered by s. 4 of the Lower Burma Courts Act, 1889. It made no difference, in the result of the account, whether the rents and profits received by the mortgagee in each year were set off year by year against the amount expended by the mortgager in that year for improvement and management, or their total was deducted at the end of possession from the sum expended by him. The balance of his expenditure had, in fact, exceeded in each year that of his receipts and carried only simple interest. The mortgage debt decreed bore compound interest. *Held*, that the account need not be taken on the principle that the mortgagee should give credit for his receipts first in reduction of that debt which was most burdensome to the debtor. There was no obligation to pay off the compound interest debt before the other. Whether the improvements and the expenditure were reasonable were questions of fact on which two Courts had concurred; and there was no ground for interference with their finding. During the life of the mortgagee, his son managed the property, living on it at a distance. The account directed was of sums "laid out in management." Salary to the manager was not paid, and in the account could not be allowed, such allowance not having been decreed. But the cost of this manager's being separately maintained during the father's life could be allowed. For the period after the father's death, as the son became mortgagee himself, such cost of maintenance could not be allowed.

KADIR MOIDIN v. NEPEAN ... XXVI 1

Attested by only one witness, Validity of. See TRANSFER OF PROPERTY ACT, ss. 58, 59.

By Hindu widow. See HINDU LAW, ALIENATION.

By minor. See MINOR.

Construction of mortgage—Covenants as to payment of interest—Default in payment of interest. A mortgage deed contained covenants for payment at the expiration of a year from its date, with interest to be paid month by month, in the month following that for which it should be due, and to run on from the date of the mortgage at the same rate until the money borrowed and the interest should be paid. It was also covenanted that if before the end of the year the mortgagor should make default in payment of interest during one month after it had become due, in that case the principal and interest should thereupon become claimable. With the latter requirement the mortgagor failed to comply, not paying the interest within the stated time. *Held*, that on the true construction of the deed, this default having taken place, this suit would lie for both the principal and interest accrued due within the year.

YEO HTEAN SEW v. ABU ZAFFER KORESHI ... XXVII 998

Construction of mortgage—Operative words in a mortgage deed—General language.

A mortgage deed having specially charged the property originally offered as security, extended the operation of the mortgage by general language to include all interests in the *mehals*, villages, and lands, comprised in the *sanad* of a *talukhdari* estate. It was now questioned whether one of the villages comprised in the *sanad* was part of the mortgaged property. The operative words, uncontrolled by anything in any recital declared all the above subject to the mortgage. The deed was, accordingly, *held* to include the village in question, effect being given to the operative words in their ordinary meaning.

THE LAND MORTGAGE BANK OF INDIA v. ABUL KASIM KHAN ... XXVI 995

Decree on, Sale in execution of. See JURISDICTION.

Enforcement of. See CONTRACT ACT, s. 60.

Form of mortgage—Definition for purposes of Stamp Duty—Assignment by way of mortgage of valuable security to secure pre-existing debt—Stamp Duty payable thereon—Stamp Act (1 of 1879), s. 3, sub-sec. (13); s. 61, sch. I, art. 29, cl. (b) and art. 44. Article 29 of sch. I of the Stamp Act (1 of 1879) applies to an instrument evidencing an agreement to secure the repayment of a loan, executed at the time the loan is made, and not to the case of an assignment by way of mortgage of a valuable security to secure a pre-existing debt. It contemplates an instrument contemporaneous with the advance and with the loan. For the purpose of ascertaining what stamp duty is payable on an instrument alleged to be a mortgage, it is necessary to see if the instrument is a mortgage as defined in the Stamp Act.

QUEEN-EMPRESS v. DEBENDRA KRISHNA MITTER ... XXVII 687

Limitation—Mortgage by conditional sale—Mortgagee in possession—Suit for foreclosure and recovery of possession—Redemption. A mortgagee by conditional sale,

Mortgage—(concluded.)

who was put into possession of the mortgaged property from the date of the mortgage and who is entitled under the deed to hold possession, is entitled, when wrongfully dispossessed, to recover possession of the property by a suit brought within time, although his claim for foreclosure may be barred by limitation. The possession recovered is, however, possession as mortgagee subject to the mortgagor's right of redemption.

AMAN ALI v. AZGAR ALI MIA ... XXVII 185

Transfer of Property Act (IV of 1882), s. 59—Mortgage deed signed by the mortgagor attested by one witness and containing an acknowledgment by the Sub-Registrar, whether valid—Indian Succession Act (X of 1865), s. 50—Mortgage being invalid whether a money decree can be made upon the covenant in the bond. The requirements of s. 59 of the Transfer of Property Act are not satisfied when a mortgage bond is signed by the mortgagor, attested by one witness, and contains the Sub-Registrar's signature to the endorsement, recording the admission of the execution by the executant; therefore, such a mortgage is not valid in law. When a suit is brought upon a mortgage bond, although the mortgage is held to be invalid on the ground that the requirements of s. 59 of the Transfer of Property Act were not satisfied, the plaintiff is entitled to recover, upon the covenant, money which the defendant covenanted to pay.

TOFALUDDI PEADA v. MAHAR ALI SHAHA ... XXVI 78

Unregistered. See EVIDENCE.

Mortgage Bond—

See INTEREST.

Mortgage Decree—

See DECREE : LIMITATION : RECEIVER.

Sale in execution of. See SALE IN EXECUTION OF DECREE.

Mortgaged Property—

Sale of. See DECREE : TRANSFER OF PROPERTY ACT, s. 99.

Mortgagee—

See TRANSFER OF PROPERTY ACT, s. 39.

In possession. See MORTGAGE.

Of certified purchaser. See BENAMI TRANSACTION.

Purchase by. See TRANSFER OF PROPERTY ACT, s. 99.

Substitution of heir of, in Execution Proceedings. See SUCCESSION CERTIFICATE ACT, s. 4.

Mortgagor—

Claim by, to attached property in Small Cause Court. See SMALL CAUSE COURTS (PRESIDENCY TOWNS) ACT.

Extinction of title of. See LIMITATION ACT, 1859, s. 1, CL. 15.

Mother's Brother's Son—

See HINDU LAW, INHERITANCE.

Mukhtear—

Appearance by. See CONTEMPT OF COURT.

Misconduct of. See LEGAL PRACTITIONERS' ACT, s. 13.

Multifariousness—

Misjoinder of causes of action—Civil Procedure Code (Act XIV of 1882), s. 44, Rule A. Where the suit is one to administer the assets of a deceased person, and in the claim various dealings by the executors of the estate are complained of as acts of mal-administration and sought to be redressed, such dealings do not constitute separate causes of action, and such a suit is not multifarious.

NISTARINI DASSI v. NUNDO LALL BOSE ... XXVI 891

Municipal Boundaries of Town of Calcutta—

See BENGAL TENANCY ACT.

Municipal Taxation—

See BENGAL MUNICIPAL ACT, s. 85.

Municipality—

Power of. See JURISDICTION OF CIVIL COURT.

Mutation of Names—

Without objection of donor. See GIFT, VALIDITY OF.

Nationality—

See FOREIGN COURT, JURISDICTION OF.

Negligence—

See CARRIERS' ACT: RAILWAY COMPANY.

Non-attendance—

On service of Summons. See CONTEMPT OF COURT.

Non-occupancy Raiyat—

See BENGAL TENANCY ACT, s. 46.

Notice—

For removal of huts, Validity of. See JURISDICTION OF CIVIL COURT.

Of charge. See TRANSFER OF PROPERTY ACT, s. 39.

Of minority. See MINOR.

Of sale, Publication of. See SALE FOR ARREARS OF RENT.

Service of, Evidence of sufficiency of. See PUBLIC DEMANDS RECOVERY ACT.

To accused, Want of. See CHARGE.

To give up possession on expiry of lease or to pay rent. See LANDLORD AND TENANT.

To quit, Service of. See LANDLORD AND TENANT.

To quit, Sufficiency of. See LANDLORD AND TENANT.

Notification—

Of substance of warrant, Absence of. See WARRANT OF ARREST.

Nuisance—

Criminal Procedure Code (Act V of 1898), s. 133—Bonâ fide question of title—Obstruction to a public way. When the person called upon under s. 133 of the Criminal Procedure Code to show cause why an obstruction should not be removed from a public way, denies that it is a public way, it is for the Magistrate to determine whether this is a *bonâ fide* objection, and he cannot, in spite of the objection (unless he determines that it is not *bonâ fide*) refer the matter to a jury.

KAILASH CHUNDER SEN v. RAM LALL MITTRA

... XXVI 869

Oaths Act—

X of 1873—

s. 5. See FALSE EVIDENCE.

s. 9. *Civil Procedure Code (Act XIV of 1882), s. 462—Offer by guardian of minor defendant to be bound by oath of plaintiff.* The offer of the guardian of a minor defendant on behalf of the minor to abide by the deposition to be given by a plaintiff on oath taken in a particular form under the Indian Oaths Act, stands on a very different ground from an agreement or compromise contemplated by s. 462 of the Civil Procedure Code. In such a case the minor is bound by the consent of his guardian, although given without the leave of the Court provided that there is no fraud or gross negligence on the part of the guardian. *Chengal Reddi v. Venkatn Reddi* approved of.

SHEO NATH SARAN v. SUKH LAL SINGH

... XXVII 229

Objection—

Taken for first time on appeal. See APPELLATE COURT.

Occupancy—

See RIGHT OF OCCUPANCY.

Occupancy Holding—

Sale of. See SALE FOR ARREARS OF RENT.

Occupancy Rights—

Transfer of. See RIGHT OF OCCUPANCY.

Offence—

Committed in course of investigation by Police, Sanction for prosecution of. See MAGISTRATE, JURISDICTION OF.

Completion of. See KIDNAPPING.

Under Gambling Act. See PENAL CODE, s. 218.

Offerings—

Made to Deity, Suit for share of. See RIGHT OF SUIT.

Official Acts—

Presumption of due performance of. See SETTLEMENT.

Official Assignee—

Non-appearance of, Dismissal of suit for. See CIVIL PROCEDURE CODE, s. 370.

Onus of Proof—

See CARRIERS' ACT : ENHANCEMENT OF RENT : LIMITATION : RAILWAY COMPANY.

Accretion—Right of riparian proprietors—Title to alluvial land contested between villages on opposite banks—Possession—Prescription—Limitation. The plaintiffs were the proprietors of a village on the southern bank, who disputed with those of a village on the northern bank the ownership of alluvial land formed by the Ganges. The current, after having encroached upon the southern bank, went away from that side of the river towards the northern, leaving the tract of alluvial land now in dispute. This appeared on its previous site to the south of the main stream. It was then carried away by diluvion, and again appeared after that. This land was claimed by the plaintiffs, not as part of their old land, but on the strength of their having held possession, adversely and without interruption, for more than twelve years before their dispossession by the defendants, by whom they alleged themselves to have been ousted within less than twelve years before they brought this suit. The evidence did not support their claim, the burden of proof being on them. It was shown that after the second recession of the river towards the north, and after the reappearance of the alluvial land on the south of the current, the land had been taken by the Government into their possession, and that the latter had made over the greater part of it to the defendants who had since held this part. There had not been shown to have been any actual possession held of the remainder by the plaintiffs, who had thus failed as to the whole to prove the continued possession necessary to their acquiring title.

UDIT NARAIN SINGH v. GOLABCHAND SAHU ... XXVII 221

Partnership—Alleged agreement—Contract Act (IX of 1872), s. 253. In a partnership suit where one party does, but the other party does not, allege a specific agreement that the shares in the said partnership were unequal, the existing presumption as to the equality of the partner's shares casts the burden of proof on those alleging the agreement who must therefore begin.

JADOBRAM DEY v. BULLORAM DEY ... XXVI 261

Suit by reversionary heir—Hindu widow—Burden of proving ownership of the husband through whom title is made. It is incumbent on a plaintiff suing as the reversionary heir of a Hindu proprietor, who has died leaving a widow, to show that the property claimed in the suit, and found in her possession, has vested in the husband. There is no presumption of law arising where the late husband possessed considerable property, that property found to be in the possession of the widow after his death must have been included in that which belonged to him unless she shows that she obtained the property from another source.

DIWAN RAN BIJAI BAHADUR SINGH v. INDARPAL SINGH... XXVI 871

Opinion—

As to existence of usage, Admissibility in evidence of. See RIGHT OF OCCUPANCY.

Opium Act—

I of 1878—

ss. 5 and 9. *Licensed vendor, Liability of, under s. 9 for keeping incorrect accounts.* Section 5 of the Opium Act (I of 1878) declares that the Local Government with the previous sanction of the Governor-General in Council may make rules consistent with the Act regulating the sale of opium. Under this section rules were issued by the Government of Bengal with the previous sanction of the Governor-General in Council on the 21st February 1898, rule 15 of which declares that a person to whom a license has been granted may sell opium by retail in accordance with the conditions specified in the license. The conditions of the license for retail sale of opium are contained in Form No. 1 made under rule 15. Under art. 13 of this form the holder of the license is to keep a daily correct account showing the quantity of opium received and sold and other details. Article 18 sets out that an infringement of any of the conditions contained in the form or imposed by the Opium Act the license may be cancelled. The petitioner, a licensed vendor of opium, was convicted of having kept incorrect accounts in contravention of the

Opium Act—(continued.)**I of 1878—(continued.)**

rules made under s. 5 of the Opium Act, and having thereby committed an offence punishable under s. 9 of that Act. He was sentenced to pay a fine of Rs. 200 and in default of payment to undergo rigorous imprisonment for four months. *Held*, that the conviction and sentence must be set aside, there being nothing in any of the rules made under s. 5 of the Act which would make the preparation of an incorrect account punishable under s. 9.

UMESH CHUNDER GHOSE v. QUEEN-EMPRESS... .. XXVI 571

Order—

Amending Sale Certificate. See APPEAL.

Concerning ferry. See SUPERINTENDENCE OF HIGH COURT.

For stay of proceedings. See PRIVY COUNCIL, PRACTICE OF.

Granting application for review of Order. See APPEAL.

Not properly passed. See REFORMATORY SCHOOLS ACT.

Of Special Judge as to standard of measurement of lands. See SECOND APPEAL.

Refusing to amend clerical error in probate. See APPEAL.

Refusing to set aside award. See APPEAL.

Returning plaint to be presented in proper Court. See APPEAL.

Oudh Estates Act—**I of 1869—**

Estate of a sanad-holding talukhdar—Lineal primogeniture by custom—Award of a body of talukhdars within s. 33 of Oudh Estates Act—Withdrawal of a voluntary admission. The title to a talukhdari estate devolving upon a single heir by a custom of lineal primogeniture was contested. The plaintiff claimed to succeed his deceased brother as talukhdar. The defendant, who was his paternal uncle, was in possession. Before the annexation of the province the *kabuliya*t had been taken in the name of the plaintiff's brother as talukhdar, who afterwards had been settled with, at both the summary settlements. By primogeniture, whether lineal or by proximity of degree (of which latter kind there was no evidence as to its being the customary one) he was the heir. To him a *sanad* had been granted, and the talukhdari had been entered in list II under the Act of 1869. On the other hand, it was urged that the above was consistent with the existence of a trust for the benefit of the titular talukhdar's uncles of whom the defendant was the survivor, they having assented to the recognition of a nominal title in their nephew. *Held*, that, in intention as well as in form, the grant of the talukhdari had been made absolutely to the sanad-holding talukhdar. In regard to the state of things before annexation, it might have been questioned whether or not the property was being held *benami* at that time. But after the Oudh Estates Act, 1869, had become law, the title shown by the plaintiff must prevail, and he must recover the estate, unless a trust for the defendant should have been established. There had been no consideration given, and there was nothing to create a trust. There had been no transfer, no estoppel, and no bar by time. In 1868 an award had been made by a body of talukhdars as arbitrators within s. 33 of the Act, between members of the family other than the present disputants. This as well as *wajib-ul-ars* of one of the villages of the talukh was admissible as evidence of what was the custom in regard to its devolution. In 1879 the plaintiff had, on his brother's death, while admitting "the custom prevailing in my family of *gaddinashini*," joined in a petition that the defendant's name should be entered *dakhil kharij* in the revenue records. *Held*, that there might be a withdrawal of any gratuitous admission, unless there should be some obligation not to withdraw it; that there was no such obligation here; and that there had been no proof of any title upon which the admission could rest.

MUHAMMAD IMAM ALI KHAN v. HUSAIN KHAN XXVI 81

Settlement of estate—A talukhdar settled with on terms imposing a trust on him—Second summary settlement, 1858—Effect of the confiscation—Rights of the Government. A sanad-holding talukhdar, whose name has been entered in lists I and II, made in conformity with the Oudh Estates Act, 1869, holds the talukh subject to such trusts as have been validly created. At annexation, four descendants of a Muhammadan proprietor were entitled in equal shares to the ancestral estate, which in 1858, at the second summary settlement, was settled with the only one of the four who presented himself to the Settlement Officer. The settlement with him, as talukhdar, which was then made was, however, made upon terms providing that the absent co-sharers on their return should obtain their shares. This accorded with his application expressing his willingness. *Held*,

Oudh Estates Act—(continued.)

I of 1869—(continued).

that the question whether the *talukhdar* had become a trustee for the plaintiff in respect of his share depended on the terms on which the estate had been granted to the *talukhdar* by the Government at the second summary settlement, it having been at their absolute disposal as a consequence of the confiscation of March 1858. The trust was not affected by the *sanad*. No special provision as to the co-sharer's return, or admission to share had been deemed necessary by the Chief Commissioner, who authorized the settlement with the *talukhdar* in reliance on his assurance. The right of the co-sharer, who returned in 1859, was accordingly established.

HASAN JAFAR v. MUHAMMAD ASKARI ... XXVI 879

Succession to a talukhdari—Effect of declaration by holder as to who should be his heir. The official enquiries made of talukhdars at an early period of British administration, as to who were to be their successors, were not intended to derogate from the rights of talukhdars in their heritable and transferable estates. To such an enquiry an answer in 1862 made by a sanad-holding talukhdar, since deceased, who was entered in lists I and II (under the Oudh Estates Act, 1869), stated that she appointed to be her heir the father of the present plaintiff, appellant. The father, however, died before the talukhdar, and the son now claimed that this nomination amounted to a gift of the talukhdari estate, subject to a trust for the life of the then talukhdar. *Held*, that the answer of 1862 did not operate to confer any estate upon the person named.

BALBHADDAR SINGH v. SHEO NARAIN SINGH... XXVII 344

Oudh Land Revenue Act—

XVII of 1876—

ss. 121, 123. *Transfer of share of under-proprietors in arrears of rent—Right to interest on rent from transferee—Oudh Rent Act (XXII of 1886), s. 141.* Under the Oudh Land Revenue Act, 1876, ss. 121, 123, the shares of defaulting under-proprietors were transferred to three of them who offered to pay. The present suit was brought by the superior proprietor, the *talukhdar*, in whose estate the *mehal* was comprised, against the whole body of under-proprietors for arrears of rent accrued, while the term of the above transfer was running. *Held*, that the provision in s. 123 of the Oudh Land Revenue Act, 1876, to the effect that such transfer shall not affect the joint liability of the co-sharers of the *mehal*, had not the effect of charging the co-sharers other than the three transferees with any liability for rent accrued during the term of the transfer. Interest was also claimed, but as to this it was *held* that under-proprietors were not tenants within the meaning of the Oudh Rent Act 1886, s. 141, providing for payment of interest on rents due from tenants.

MUHAMMAD MEHNDI ALI KHAN v. MUHAMMAD YASIN KHAN ... XXVI 528

Oudh Rent Act—

XXII of 1886—

s. 141. See OUDH LAND REVENUE ACT, ss. 121, 123.

Ownership—*Evidence of.* See BENAMI TRANSACTION: TITLE.*Of property by husband, Proof of, by widow.* See ONUS OF PROOF.**Paper Books for Appeal—***Filing of.* See PRACTICE.**Pardon—**

Criminal Procedure Code (V of 1898), ss. 337 and 339—Tender of pardon—Trial of person who having accepted a pardon has not fulfilled the conditions on which it was offered—Prosecution for giving false evidence—Sanction of High Court. When a pardon under s. 337 of the Criminal Procedure Code has been tendered to and accepted by any person in connection with an offence he should not be tried for any alleged breach of the conditions of his pardon, or for any offence connected with that for which he has received pardon, until the trial of the principal offence has been completed. No prosecution for the offence of giving false evidence in respect of a statement made by a person who has accepted a tender of pardon should be entertained without the sanction of the High Court as provided by s. 339, cl. (3) of the Code.

QUEEN-EMPRESS v. NATU ... XXVII 187

Parties—

Adding parties on appeal—Respondents—Power of the Appellate Court to add parties as respondents—Code of Civil Procedure (Act XIV of 1882), s. 559. C, owner of a factory, executed a *hundi* in favour of B, and purchased land from B from the proceeds thereof. C then sold his factory to H, who obtained possession of the land. In a suit brought by B upon the *hundi*, C and H were made defendants, but C did not appear in the first instance and an *ex parte* decree was passed against him alone. C appealed against B without making H a party respondent to his appeal. The lower Appellate Court passed an order, adding H as a respondent, and eventually passed a decree against H. On second appeal by H to the High Court, *held*, referring to s. 559 of the Civil Procedure Code (1882), that the lower Appellate Court was right in adding H as a party respondent to the appeal. *Atma Ram v. Balkishen* dissented from. *Upenulal Lal Mukerjee v. Girindra Nath Mukerjee*, and *Manickya Moyee v. Boroda Prosad Mookerjee* referred to.

HUDSON v. BASDEO BAIYYE XXVI 109

Civil Procedure Code (Act XIV of 1882), ss. 108, 109—Whether an auction-purchaser is a necessary party to an application to set aside an ex parte decree. An auction-purchaser of property sold in execution of an *ex parte* decree, is not a necessary party to an application made by the judgment-debtor to set aside the said decree, inasmuch as the auction-purchaser does not come under the description of "opposite party" in s. 109 of the Code of Civil Procedure.

JATINDRA MOHAN PODDAR v. SRINATH ROY XXVI 267

Co-contractors—Right of some of several co-contractors to sue alone—Refusal to join in the suit as plaintiff, Effect of. Where two parties contract with a third party, a suit by one of them making the other a co-defendant ought not to be dismissed merely because the plaintiff has not proved that the co-defendant had refused to join as a co-plaintiff.

PYARI MOHUN BOSE v. KEDAR NATH ROY XXVI 409

Joinder of parties—Dismissal of suit for non-joinder of parties—Necessary party—Civil Procedure Code (Act XIV of 1882), ss. 28, 32, 295 and 315—English Judicature Act, 1875, Order XVI, Rules 11 and 48. On a suit brought by the plaintiff for the establishment of his right to and confirmation of possession to certain immoveable property, and for a declaration that it was not liable to attachment and sale in execution of certain decrees held by defendants 1 to 4 against defendants 5 to 7, the defence mainly was that it was not maintainable in the absence of certain persons, who, like the defendants 1 to 4, had obtained decrees against defendants 5 to 7 and had attached the property in dispute, and the plaintiff preferred claims against the said attachments, but they were rejected upon adjudication. *Held*, that inasmuch as the absent decree-holders had applied for attachment and sale of the property in dispute in execution of their decrees and had successfully resisted the claim of the plaintiff, the plaintiff had a right to some relief against them (the absent decree-holders) in respect of the matter involved in the suit, and as their presence was necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, the absent decree-holders were necessary parties to it, and the plaintiff not having brought them on the record as defendants the suit was not maintainable. *Mahomed Badsha v. Nicol Fleming* distinguished.

DURGĀ CHARAN SARKAR v. JOTINDRA MOHAN TAGORE XXVII, 493

Non-joinder of. See HINDU LAW, JOINT FAMILY.

Question between. See SECOND APPEAL.

Substitution of. See SUCCESSION CERTIFICATE ACT, s. 4.

To suit. See APPEAL: CIVIL PROCEDURE CODE, s. 244.

Partition—

See HINDU LAW, JOINT FAMILY.

Estates Partition Act (Bengal Act VIII of 1876), ss. 122 and 128—Incumbrance created by a co-sharer before partition—Effect of partition by Collector, where the land so incumbered fell exclusively into the share of another co-sharer. On partition by a Collector under the Estates Partition Act (Bengal Act VIII of 1876) when any land of an undivided joint estate, which was incumbered by any co-sharer, is allotted to any other co-sharer, the latter takes it free from the incumbrance so created. *Khan Ali v. Pestonji Eduljee* distinguished. The cases of *Nuthoo Lall Chowdhry v. Saadat Lall* and *Ahmedoolah v. Ashraff Hossein* have been overruled in effect by the decision of the Privy Council in the case of *Byjnath Lall v. Ramooddeen Chowdhry*.

JOY SANKARI GUPTA v. BHĀBAT CHANDRA BARDHAN XXVI 434

Partition—(continued.)

Hindu widow's right to share on. See HINDU LAW, MAINTENANCE.
Of estates. See ENHANCEMENT OF RENT.
Of joint family house. See EASEMENT.
Right to. See CO-SHARERS.

Partnership—

See HINDU LAW, JOINT FAMILY.
Agreement as to shares in. See ONUS OF PROOF.

Assignment by plaintiff's partners of their shares—Decree for winding up and for an account. The plaintiff, as a partner in lending a sum of money upon security given, had a half share in the joint adventure with the first and second defendants. These two, without the plaintiff's exonerating them from liability to him, had assigned their shares to two other persons. The assignees were added as co-defendants after this suit had been filed claiming a decree for a judicial winding up, and for an account. It was not proved that the plaintiff had ever relinquished his claim upon the assignors as a partner, though he might have been aware of the assignment. The two added defendants appeared in the Court below, but not upon this appeal. *Held*, that the facts were sufficient to entitle the plaintiff to have the winding up of the partnership and the account decreed against all the four. The suit had been dismissed by the Recorder as having been prematurely brought before the complete execution of a decree, already obtained before this suit was filed, by the plaintiff, appellant, against the borrowers of the money; that decree having followed upon an award of arbitrators which directed that all sums realized in the adventure should be divided in equal moieties between the plaintiff and the original defendants. *Held*, that this suit ought to have been allowed to proceed, and should not have been dismissed. The plaintiff having, on this appeal, agreed to account for all money received by him in the transaction, an account should be directed with a declaration that the added defendants were jointly and severally liable to account, with the first and second defendants, for what had been received by them from the adventure.

DOMATY NURSIAM v. RAMEN CHETTY XXVII

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Business. See CONTRIBUTION, SUIT FOR.
Minors carrying on, with others. See SUMMONS, SERVICE OF.

Party failing to appear—

Right of, to support statement of facts. See REFERENCE TO REGISTRAR.

Passengers—

Carriage of, by rail. See RAILWAY COMPANY.

Pauper Suit—

Application for leave to appeal as a pauper—Time of presentation of memorandum of appeal—Consent of the applicant to pay sufficient Court-fees after the Statutory period of limitation—Sufficient cause—Limitation Act (XV of 1877), s. 5—Civil Procedure Code (Act XIV of 1882), s. 582A. A suit was brought *in forma pauperis* on behalf of a minor represented by his next friend in the Court of the Munsif, and it was dismissed under some alleged compromise. An appeal was preferred to the District Judge within time, but the memorandum of appeal was insufficiently stamped. An application was also filed with the memorandum of appeal for leave to appeal *in forma pauperis*. At the time of the hearing of the said application objection having been taken by the respondent that the minor had become entitled to certain immoveable property, those representing the minor offered to pay proper Court-fees on the memorandum of appeal within a month. The Court allowed that to be done in the presence of both parties and admitted the appeal. The Court-fees were also paid within the time allowed. On an objection by the defendant, appellant in the High Court, that the appeal by the plaintiff in the lower Appellate Court was out of time, *held*, that, inasmuch as the appeal was admitted by the District Judge without any objection from the defendant, the case came either under s. 5 of the Limitation Act or under s. 582A of the Civil Procedure Code, and, therefore, the appeal was not out of time.

DURGA CHARAN NASKAR v. DOOKHIRAM NASKAR XXVI

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Payment—

Into Court by defendant in satisfaction of claim. See PRACTICE.
Of rent of putni, Person interested in. See VOLUNTARY PAYMENT.

Payments—

Appropriation of. See CONTRACT ACT, s. 60 : MORTGAGE.

Penal Code—

Act XLV of 1860—

- s. 21. See PUBLIC SERVANT.
- s. 24. See SUMMARY TRIAL.
- s. 88. See REFORMATORY SCHOOLS ACT.
- s. 114. See PENAL CODE, s. 218 : RIOTING.
- ss. 116, 198. See SANCTION FOR PROSECUTION.
- s. 143. See CHARGE : RECOGNIZANCE TO KEEP P'CE.
- s. 143. *Conviction under.* See RECOGNIZANCE TO KEEP P'CE.
- s. 144. See CRIMINAL PROCEDURE CODE, s. 437.
- s. 147. See CHARGE : RIOTING.
- s. 149. See RIOTING.
- s. 161. See PENAL CODE, s. 218.
- s. 174. See CONTEMPT OF COURT.
- s. 177. See COMPLAINT.
- s. 182. See SANCTION FOR PROSECUTION.
- s. 186. See PUBLIC SERVANT.
- ss. 191, 198 ; 193, 196. See FALSE EVIDENCE.
- s. 193. See MAGISTRATE, JURISDICTION OF.
- s. 211. See FALSE CHARGE.
- s. 213. See ACCOMPLICE.
- s. 218. "Charged," *Meaning of, in that section—Criminal Procedure Code (Act V of 1898), s. 4, cl. (f)—Cognizable offence—Offence under Gambling Act (Bengal Act II of 1867)—Accomplice—Witness present on the occasion of the giving of a bribe—Penal Code, ss. 114 and 161—Illegal gratification—Abetment of offence of giving bribes.* The District Superintendent of Police gave a warrant under the Gambling Act (Bengal Act II of 1867) to D, a Sub-Inspector, to arrest persons found gambling in a certain house. In order to save two persons from legal punishment for having committed an offence under the Gambling Act in that house D framed a first information and a special diary incorrectly. *Held*, he was properly charged with, and found guilty of having committed, an offence under s. 218 of the Penal Code. The word "charged" in that section is not restricted to the narrow meaning of "enjoined by a special provision of law." An offence under the Gambling Act, being an offence for which the District Superintendent of Police may arrest or by warrant direct an arrest, is a cognizable offence within the meaning of s. 4, cl. (f) of the Criminal Procedure Code. The words "a Police Officer," in that clause do not mean "any and every Police Officer"; it is sufficient if the Legislature by any law limits the power of arrest to any particular class of Police Officers. D and F, a head constable, were also charged under s. 161, and s. 161 read with s. 114 of the Penal Code, respectively, and it was contended that these charges were not sustainable, because they rested entirely on the testimony of persons alleged to have been accomplices, who had not been corroborated in material particulars. *Held*, the mere presence of a person on the occasion of the giving of a bribe, and his omission to promptly inform the authorities, do not constitute him an accomplice, unless it can be shown that he somehow co-operated in the payment of the bribe or was instrumental in the negotiations for the payment. *Queen v. Chundo Chundalinee, Queen-Empress v. Maganlal, Queen-Empress v. Chagan Dayaram, Queen-Empress v. O'Hara, Ishan Chundra v. Queen-Empress, Jogendra Nath Bhaumik v. Sangat Garo, Rajoni Kanto Bose v. Asan Mullick and Alimuddin v. Queen-Empress distinguished.*

QUEEN-EMPRESS v. DEODHAR SINGH

... .. XXVII 144

- ss. 224, 225. See ARREST.
- s. 225 B. See WARRANT OF ARREST.
- ss. 323 ; 325. See RIOTING.
- s. 342. See ACCOMPLICE : WITNESS.
- s. 350. See CRIMINAL PROCEDURE CODE, s. 522.
- ss. 351, 352. See MALICIOUS PROSECUTION.
- s. 353. *Detering a public servant from discharge of his duty—Public servant acting under warrant of attachment—Non-production of the warrant at the trial.* One of the accused was convicted under s. 353 of the Penal Code (assaulting or using criminal force to a public servant in the execution of his duty) and two others of the abetment of an offence under that section. But the warrant of attachment under which the public servant was acting was not produced at the trial, nor was any secondary evidence given to show its contents. *Held*, in the absence of any

Penal Code—(continued.)**Act XLV of 1860—(continued.)**

evidence as to the terms of the warrant either by the production of the original or in the form of secondary evidence, it was impossible to hold that the conviction was good.

TAFAZZUL AHMED CHOWDHRY v. QUEEN-EMPRESS ... XXVI. 630

ss. 360, 361, 363. See KIDNAPPING.

s. 379. See CHARGE: HIGH COURT, JURISDICTION OF: SUMMARY TRIAL.

s. 384. See ACCOMPLICE.

s. 401. See EVIDENCE IN CRIMINAL CASE.

s. 408. See PRESIDENCY MAGISTRATE, JUDGMENT OF.

s. 426. See CRIMINAL PROCEDURE CODE, s. 437.

s. 457. See HIGH COURT, JURISDICTION OF.

ss. 467, 468, 471. See FALSE EVIDENCE.

s. 477A. *Criminal Procedure Code (Act V of 1898), s. 222 (2), 234—Criminal breach of trust by public servant—Acquittal—Framing new charge—General falsification of accounts for a period extending over two years.* The alteration in the law by s. 222 (2) of the Criminal Procedure Code (Act V of 1898) does not apply to a charge under s. 477A of the Penal Code. It applies only to criminal breach of trust or dishonest misappropriation of money.

QUEEN-EMPRESS v. MATI LAL LAHIRI ... XXVI 560

ss. 485, 486. See TRADE MARK.

s. 486. *Selling books with counterfeit property mark—Goods—Indian Merchandise Marks Act (IV of 1889).* Books are the subject of trade and are goods within the meaning of s. 2, cl. (4) of the Indian Merchandise Marks Act (IV of 1889); therefore, when a person sells books with a counterfeit property mark, he commits an offence under s. 486 of the Indian Penal Code.

KANAI DAS BAIRAGI v. RADHA SHYAM BASAK ... XXVI 292

s. 494. See BIGAMY.

s. 500. See DEFAMATION.

s. 503. See MALICIOUS PROSECUTION.

Penalty—

See INTEREST.

Permanent Tenure—

See LANDLORD AND TENANT.

"Person"—

Meaning of. See STAMP ACT, s. 58.

Person Aggrieved—

See BIGAMY.

Personal Discharge—

Application by insolvent for. See INSOLVENT ACT, s. 51.

Petition—

Verification of. See LETTERS OF ADMINISTRATION.

Place—

Open, Meaning of. See POLICE ACT, s. 34.

Plaint—

Amendment of. See DECLARATORY DECREE, SUIT FOR.

Order returning, for presentation in proper Court. See APPEAL.

Presentation of. See LIMITATION.

Registration of. See LIMITATION.

Plaintiff—

Non-appearance of, Dismissal of suit for. See CIVIL PROCEDURE CODE, s. 370.

Refusal to join suit as. See PARTIES.

Right of, to draw out money deposited in Court by defendant. See PRACTICE.

Plea—

In bar of suit. See HINDU LAW, JOINT FAMILY.

Of fraud. See FRAUD.

Pleading Fraud—

See FRAUD.

Police—

Obligation to show authority on which they act. See ARREST.

Police Act—

V. of 1861—

s. 34 as amended by s. 13 of Act VIII of 1895. *Cow, Slaughter of—Open verandah—Annoyance to residents of locality—Open place, Meaning of—Residents or passengers—Police Act Amendment Act (VIII of 1895), s. 13.* The slaughtering of a cow in an open verandah, so as to cause annoyance to the residents of the locality, and in spite of their remonstrances is a breach of the law, being an act in an "open place" within the terms of s. 34 of Act V of 1861 as amended by Act VIII of 1895. The words "open place" coupled with "road, street or thoroughfare" should not be interpreted *ejusdem generis*. It seems rather that the addition of these words was intended to have a wider significance, and this is shown by another amendment in the same section made at the same time in which the annoyance, etc., caused must be not to the residents and passengers, but to the residents or passengers. The intention of the Legislature was to extend the Act not only to passengers who would be on such a road, street, or thoroughfare, but to residents, who are not passengers.

KHAN BAPUTI DEWAN v. BISPATI PUNDIT ... XXVII 655

Police Officer—

See PENAL CODE, s. 218.

Confession to. See CONFESSION.

Possession—

See ONUS OF PROOF: TITLE.

Adverse. See GRANT: LIMITATION ACT, ART. 144.

After sale in execution of decree. See CIVIL PROCEDURE CODE, s. 244.

Conflicting evidence of. See LIMITATION.

Gift without. See GIFT, VALIDITY OF.

Order as to, made by Civil Court. See CRIMINAL PROCEDURE CODE, s. 145.

Order of Criminal Court as to. See CRIMINAL PROCEDURE CODE, s. 145.

Right of landlord to recover. See BENGAL TENANCY ACT, s. 88.

Suit by reversioner for. See LIMITATION ACT, ART. 144: 'RES JUDICATA.'

Suit for. See DECLARATORY DECREE, SUIT FOR: GRANT.

Suit for. Previous possession, short of the statutory period of limitation—Dispossession—Suit brought more than six months after dispossession, Effect of—Failure to prove title. Mere previous possession for any period short of the statutory period of twelve years will not entitle a plaintiff to a decree for recovery of possession in a suit brought more than six months after dispossession, even if the defendant could not establish any title to the disputed land. *Wise v. Ameerunnissa Khatoon* referred to. *Ismail Ariff v. Mahomed Ghous* distinguished. *Enaetoolah Chowdhry v. Kishen Soondur Surma* and *Mohabeer Pershad Singh v. Mohabeer Singh* dissented from.

NISA CHAND GAITA v. KANCHISAM BAGANI ... XXVI 579

Suit for, after rejection of claim. See LIMITATION ACT, ART. 11.

Possession and Foreclosure—

Suit for. See MORTGAGE.

Pottah—

Contract in, allowing surrender of land. See LEASE.

"Dawami" made by grantee in excess of his estate. See GRANT.

Practice—

See APPEAL TO PRIVY COUNCIL: DECLARATORY DECREE, SUIT FOR: LETTERS OF ADMINISTRATION: PRIVY COUNCIL, PRACTICE OF: REFERENCE TO REGISTRAR.

Agreement as to costs between attorney and client—Change of attorney—Right of attorney to his taxed costs. Where F, an attorney, agreed to conduct a suit for his client and to accept Rs. 150 for his personal services, and not in respect of out-of-pocket costs and Counsel's fees, and in the event of his client being successful to recover his full costs from the opposite party and to refund the Rs. 150, it was held, upon the client desiring to change to another attorney, that he could do so upon payment to F of his taxed costs.

GHASSEE JEMADAR v. NASSIRUDDIN MISTRY ... XXVI 769

Practice—(continued.)

- Attorney's costs—Summary Jurisdiction—Collusive and fraudulent compromise to deprive attorney of his costs.** An attorney applied for an order that the plaintiff and the defendant, or either of them, should pay to him his taxed costs on the ground that they had fraudulently and collusively compromised the suit with the object of depriving him of his costs. *Held*, that in cases of this kind, where charges of fraud and collusion are made, it is inconvenient for the Court to dispose of the issues on affidavits alone. *Held*, also, that it is not the practice of the Court to interfere summarily between attorneys and their clients as regards claims for costs. *Kheller Kristo Mitter v. Kally Prosonno Ghose* dissented from.

RAMDOYAL SEROWGIE v. RAMDEO XXVII 269

- Cases to be entered in the list of suits for liquidated claims—Rules 281, 284 (High Court, Original Side)** Removal of cases improperly entered in that list—*Ordinary mortgage suit.* *Held*, that the practice of the Court having been for many years to place ordinary mortgage suits on the list of suits for liquidated claims in the view that the incidental relief sought in such suits did not prevent them from being regarded as suits in which the claim was in substance a claim only for a liquidated demand in money, the practice should be adhered to. *Held*, also, that when a suit is transferred from the general list of causes (at the instance of the plaintiff) it is desirable that this should be done on notice to the defendant, so that he may not be taken by surprise.

BENODE LALL ROY v. BUSSUNTO KUMARI DEBI XXVII 355

- Commission, Right of purdahnashin lady to be examined on—Civil Procedure Code (Act XIV of 1882), s. 640.** The defendant applied for a commission to examine a Hindu purdahnashin lady. The plaintiff objected on the ground that the lady had prior to this appeared in public, and had also been examined in Court in a *palki*. *Held*, the lady being a purdahnashin, she was entitled to be examined on commission.

MOHESH CHUNDER ADDY v. MANICK LALL ADDY XXVI 650

- Deposit by defendant of money in Court in satisfaction of claim—Right of plaintiff to draw out such money and prosecute suit for balance claimed—Discretion of Court—Code of Civil Procedure (Act XIV of 1882), ss. 377, 379.** Suit for recovery of Rs. 5,500 on three promissory notes. Defendant pleaded minority at the date of the transactions, denied all liability, also denied receiving Rs. 5,500, but admitted receipt of Rs. 1,500, which sum together with interest he tendered to the plaintiff in full satisfaction of his claim. On refusal by the plaintiff to accept that sum it was paid into Court. The plaintiff then applied to the Court for payment to him of the said amount. The defendant contended that the amount should be kept in Court pending the hearing as all liability was denied and offered to pay interest if plaintiff succeeded in his suit. *Held*, that the plaintiff was entitled to take the money out of Court.

DWARKA DASS AGURWALLAH v. GIRISH CHUNDER ROY XXVI 766

- Divorce Act (IV of 1869), s. 36—Alimony pendente lite, Application for—Denial of means by respondent—Reference to Registrar—Respondent ordered to attend Court for cross-examination as to his means.** On an application alleging means made by a petitioner, the wife, for alimony pendente lite, the respondent denied means. The Court refused to refer the matter to the Registrar to inquire and report, but ordered the respondent to attend Court for cross-examination as to his means.

STEVENSON v. STEVENSON XXVI 764

- Evidence taken on commission on behalf of defendant—Right of plaintiff to refer to such evidence as part of record of suit—Civil Procedure Code (Act XIV of 1882), ss. 389, 390—Act VIII of 1859, s. 179.** Defendant examined a witness on commission. The commission was returned to the Court. The plaintiff in opening his case claimed the right to refer to the evidence taken on commission as part of the record of the suit. Defendant objected, contending that if plaintiff read it, he must read it as his own evidence. *Held*, that the plaintiff was entitled to refer to the evidence as part of the record. *Dwarkanath Dutt v. Gunga Dayi* followed.

NISTARINI DASSEE v. NUNDO LALL BOSH XXVI 591

- Filing paper books for appeal—Application for enlargement of time to file paper books—Subsequent application at the hearing of the appeal to file paper book then ready—Discretion of Court—Sufficient cause—High Court Rules, Appellate Side, Chapter 7, Rule 11.** An extension of time for filing paper books in an appeal will not be granted unless "sufficient grounds" be shown for granting the application. Where the appellants waited from the 19th August 1898, the date of filing their memorandum of appeal, till the 22nd September 1898, before applying for office

Practice—(concluded.)

copies of the necessary papers to enable them to prepare their paper book, and an application was made by the appellants on the 12th December 1898, for two months further time to file their paper book, the delay between the 13th August and the 22nd September 1898 being unexplained. *Held*, that no sufficient cause had been shown for extension of time, nor was the case altered by the fact that the paper books were ready when a subsequent application was made on the appeal being called on for hearing, and an application for leave to file them was consequently dismissed.

MOTI CHAND v. FUL CHAND XXVII 57

Remission of Process fees—Rules of High Court, Calcutta, Chapter XIV—Process fees—Remission of fees in analogous appeals by the same appellants. Where twenty-nine appeals were presented by certain appellants, and an application was made for remission of process fees, and that only five sets of process fees instead of twenty-nine should be charged under Chapter XIV of the Rules of High Court, on the ground that the appeals were analogous and on behalf of the same appellants, the Court (GHOSE and RAMPINI, JJ.), refused the application. *Held*, by RAMPINI, J., that the High Court has no power to grant the remission, and that the fees proscribed by the rules must be levied

IN THE MATTER OF THE APPLICATION OF STUDD XXVI 124

Preliminary Objection to Appeal—

Time occupied in hearing. See COSTS.

Prescription—

See ONUS OF PROOF : RIGHT OF WAY.

Presidency Magistrate—

Judgment of. Sentence of imprisonment—Reasons for conviction to be recorded—Code of Criminal Procedure (Act V of 1898), s. 370, cl. (i)—Penal Code (Act XLV of 1860), s. 408. Section 370 of the Code of Criminal Procedure requires that in a case in which the accused is sentenced to imprisonment a Presidency Magistrate shall record a brief statement of the reasons for the conviction. It is not sufficient for him to record that the offence is proved, for that may necessarily be implied to be his opinion from the fact that he has convicted the accused. The law contemplates something further as the reason for the conviction.

NATABAR GHOSE v. PROVASH CHANDRA CHATTERJEE XXVII 461

Jurisdiction of. See SANCTION FOR PROSECUTION.

Proceedings of. See REVISION.

Presumption—

As to fictity of rent. See ENHANCEMENT OF RENT.

As to possession. See LIMITATION.

Primogeniture—

Custom of. See OUDH ESTATES ACT.

Principal and Agent—

See LANDLORD AND TENANT.

Holding out, by the principal, of the agent's authority. The right of a third party against the principal on the contract of his agent, though made in excess of the agent's actual authority, was nevertheless enforced where the evidence showed that the contracting party had been led into an honest belief in the existence of the authority to the extent apparent to him.

RAM PERTAB v. MARSHALL XXVI 701

Private Defence of Property—

Right of. See RIOTING.

Private International Law—

See FOREIGN COURT, JURISDICTION OF.

Privileged Communication—

See EVIDENCE ACT, s. 127.

Privy Council—

Practice of. Petition for special leave to appeal—Reasons omitted in order admitting to review—Civil Procedure Code (Act XIV of 1892), s. 626. With reference to the requirement in s. 626 of the Civil Procedure Code that reasons should be recorded

Privy Council—(continued.)

by the Judge granting an order of admission to review, the mere omission to record them was not held a ground for granting special leave to appeal from the order or from the decree, which was subsequently made.

SHANKAR BAKSH v. BULWANT SINGH ... XXVII 383

Stay of proceedings in India pending appeal—Protection of property pending an appeal by special leave—Order for stay of proceedings—Civil Procedure Code (Act XIV of 1882), Ch. XLV. Special leave of Her Majesty in Council was obtained for the filing an appeal from a decree of the High Court affirming the dismissal of the petitioner's suit. The High Court rejected his application as plaintiff (appellant) for an order staying execution and continuing the possession of a manager of the estate in litigation pending the result of the appeal. The rejection was grounded on the absence of authority for this purpose, the High Court being authorized, in their judgment, only to make such an order in regard to appeals admitted by themselves. On this petition that the High Court's decision might be reversed, or such order made as would protect the property to abide the ultimate disposal of the suit, their Lordships were of opinion that direct interference to continue the management or to appoint a Receiver, was impracticable. But that, on the other hand, interference had, on occasion, been effected where the appellant being in possession, an order for stay of proceedings had maintained the existing state of things. Therefore, an order staying proceedings should now be recommended by them, the petitioner being answerable in damages, and any aggrieved respondent having leave to move for the discharge of the order.

MOHESCHANDRA DHAL v. SATRUGHAN DHAL ... XXVII 1

Probate—

Clerical error in, order refusing to amend. See APPEAL.

Evidence. Probate is rightly granted where the judge believes the witnesses who speak to the execution of the will and the disposing mind of the testator. The rule in *Tyrell v. Painton*, requiring proof that the testator actually knew and approved the contents of the will does not apply, unless surrounding circumstances excite suspicion.

SHAMA CHARN KUNDU v. KHETROMONI DASI ... XXVII 521

Minor—Special citation—Probate and Administration Act (V of 1881), ss. 50, 83—Procedure—Service of Summons—Code of Civil Procedure (Act XIV of 1882), ss. 443, 647. Where executors applied for probate and there was living a minor widow entitled to maintenance and residence under the will. *Held*, that a special citation should issue upon the widow and be served personally on her and on her father with whom she resided.

IN THE GOODS OF AMRITA LAL MULLICK ... XXVII 380

Or Letters of Administration, Payment of fee on. See LETTERS OF ADMINISTRATION.

Probate of part of a will—Probate and Administration Act (V of 1881), s. 25. Probate can be granted of a portion only of a will to the extent to which the contents are proved where the other portion is lost; and there is nothing in s. 25 of the Probate and Administration Act (V of 1881) to prohibit such a grant of probate. *Sugden v. Lord St. Leonards* referred to.

KEDAR NATH MITTER v. SAROJINI DASI ... XXVI 634

Right of person cognisant of proceedings and not objecting to re-open them—Caveator—Costs. A party cognisant of proceedings in an action for probate, or letters of administration and not objecting to the grant is not as a rule entitled to have the matter re-opened and the grant revoked. In this case he was allowed to re-open the case under certain circumstances and upon certain conditions.

IN THE GOODS OF BHUGGOBUTTY DASI ... XXVII 927

Probate and Administration Act—

V of 1881—

s. 25. See PROBATE.

ss. 40 and 90. *Letters of Administration—Effect of Transfer of immoveable property by a Hindu widow with the Judge's sanction, on obtaining Letters of Administration—Legal necessity—Fraudulent representation.* An alienation made with the permission of the District Judge by a Hindu widow who had obtained letters of administration in respect of the estate, is valid as an absolute alienation under s. 90 of the Probate and Administration Act (V of 1881), irrespective of the existence of legal necessity.

KAMIKHYA NATH MUKERJEE v. HARI CHURN SEN ... XXVI 607

Probate and Administration Act—(continued.)

V of 1881—(continued.)

ss. 60, 63. See PROBATE.

ss. 82 and 92. *Direction in the will that all the executors will act jointly—Act of an executor who has taken out probate and the others not having done so, how far binding on the estate of the testator.* Where by a will more than one person are appointed executors, and all of them jointly are empowered to alienate any property for payment of debts and to borrow money for the improvement and preservation of the estate of the testator, s. 92 of the Probate and Administration Act (V of 1881), by reason of any such direction in the will does not disqualify one of the several executors who alone has obtained probate, to act singly, the others having refused to accept service. Where such an executor renewed *hatchittas* which were originally executed by the testator, in the same terms as the testator did, and a suit was brought upon these *hatchittas* against the heirs of the testator. *Held*, that the debt was binding on the estate of the testator. *Farhall v. Farhall* referred to and *Syed Nerul Hossein v. Sheo Sahai* distinguished.

SATYA PRASHAD PAL CHOWDHRY v. MOTILAL PAL CHOWDHRY ... XXVII 688

s. 86. See APPEAL.

s. 90. See PROBATE AND ADMINISTRATION ACT, s. 40.

Procedure—

See APPEAL TO PRIVY COUNCIL : WORKMAN'S BREACH OF CONTRACT ACT.
For Probate or Letters of Administration, Re-opening of. See PROBATE.

Proceedings—

In more Courts than one. See GUARDIANS AND WARDS ACT, s. 14.

Process-fees—

Remission of. See PRACTICE.

Professional Misconduct—

See LEGAL PRACTITIONERS' ACT, s. 13.

Prohibitory Order—

See ATTACHMENT.

Promissory Note—

Suit on. See HINDU LAW, JOINT FAMILY.

Property—

Meaning of. See ASSAM LAND AND REVENUE REGULATION.

Restoration of possession of. See CRIMINAL PROCEDURE CODE, s. 522.

Suit for conversion of, to uses not intended. See LIMITATION ACT, ART. 32.

Property-mark—

Selling books with counterfeit. See PENAL CODE, s. 486.

Proprietor—

Unregistered. See LAND REGISTRATION ACT, s. 78.

Prospective Order—

See INSOLVENT ACT, s. 51.

Provincial Small Cause Courts Act —

IX of 1937 —

s. 25. See CALCUTTA MUNICIPAL CONSOLIDATION ACT, s. 125.

sch. II, cl. (8). *Suit by an assignee of arrears of rent after they fall due, whether cognizable by the Small Cause Court—Bengal Tenancy Act (VIII of 1885), s. 3, sub-sec. 5—Rent.* *Held* by the Full Bench (BANERJEE, J., dissenting), that a suit brought by an assignee of arrears of rent, after they fell due, for the recovery of the amount due, is a suit for rent, and therefore excepted from the cognizance of the Court of Small Causes.

SRISH CHUNDER BOSE v. NACHIM KAZI ... XXVII 827

Public Demands Recovery Act—

Bengal Act VII of 1880—

ss. 2 and 7. *Bengal Act VII of 1868, s. 8—Certificate of sale—Evidence of sufficiency of service of notice—Act XI of 1859, s. 28—Sale for arrears of rent.* Section 8 of Bengal Act VII of 1868 does not apply to a certificate of title granted to a purchaser

Public Demands Recovery Act—(continued.)

Bengal Act VII of 1880—(continued).

at a sale in execution of a certificate issued under s. 7 of Bengal Act VII of 1880, for arrears of rent alleged to be due to an estate under the Court of Wards, but it is limited in its application to the two descriptions of certificates of title therein referred to, namely, certificates granted under s. 28 of Act XI of 1859, and those granted under s. 11 of Bengal Act VII of 1868. *Pulin Chandra Roy v. Akbar Hossein and Biola Nath Maiti v. Mohinuddin Mahomed* approved.

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ss. 2, 8, 10 and 12. Bengal Act VII of 1868, ss. 2 and 8—*Sale for arrears of cesses*—*Suit to set aside such a sale on the ground that no notice was issued under s. 10 of the Act, whether maintainable in the Civil Court.* A suit to set aside a sale held for arrears of cesses on the ground that no notice of the certificate under s. 10 of Bengal Act VII of 1880 was served upon the plaintiff is maintainable in the Civil Court. *Baijnath Sahai v. Ramgul Singh and Saroda Charan v. Kista Mohun* referred to.

CHUNDER KUMAR MUKERJEE v. SECRETARY OF STATE FOR INDIA ... XXVII 698

s. 8, cl. (b) and s. 12. *Suit to set aside certificate and sale—Limitation.* A certificate was issued under the Public Demands Recovery Act (Bengal Act VII of 1880), and notice under s. 10 of the Act was served on the 12th December 1895. The debtor objected under s. 12 on the ground that no arrears were due, but the objection was overruled on his failure to procure evidence, on the 7th August 1895, and the sale took place on the 10th August 1895. In a suit brought on the 8th August 1896 to set aside the certificate and the sale: *Held*, that the terms of s. 8, cl. (b), providing the limitation of one year from the date of service of notice are peremptory, and in no way controlled by the provisions of s. 12, and the suit in respect of the certificate was, therefore, barred by limitation. *Held*, also, that if the certificate cannot be cancelled, the sale held in execution of it also cannot be cancelled.

RAJBUNS SAHAI v. KAMESHAR PROSAD ... XXVI 172

s. 12. See PUBLIC DEMANDS RECOVERY ACT, s. 8.

Public Document—

See EVIDENCE ACT, s. 65.

Public Servant—*Authority of.* See PENAL CODE, s. 353.*Criminal breach of trust by.* See PENAL CODE, s. 477A.*Deterring from discharge of his duty.* See PENAL CODE, s. 353.*Penal Code (Act XLV of 1860), s. 21 and s. 186—Surveyor employed by the Collector.*

The Collector acting in the management of a *khas mehal*, the property of the Government, is as much "the Government" within the meaning of s. 17 of the Penal Code as when he is exercising any other of the duties of his official position. A surveyor employed by the Collector in the *khas mehal* department to make a survey of a certain portion of a water-course is a "public servant" within the meaning of s. 21 of the Penal Code. *Reg. v. Ramajirav and Chatter Lal v. Thacoor Pershad* referred to.

BAJOO SINGH v. QUEEN-EMPRESS ... XXVI 158

Public Way—*Obstruction to.* See NUISANCE.**Purchase—**

By third party while decree and order for sale are valid. See SALE IN EXECUTION OF DECREE.

Purchase-money—*Interest on.* See SALE FOR ARREARS OF RENT.*Source of.* See BENAMI TRANSACTION.**Purchaser—**

Application by, to set aside sale or for compensation. See SALE IN EXECUTION OF DECREE.

At revenue sale. See SALE FOR ARREARS OF REVENUE.*Liability of.* See BENGAL TENANCY ACT, s. 67.

Not a party to suit. See SALE IN EXECUTION OF DECREE.
Of decree. See CIVIL PROCEDURE CODE, s. 244.

Purchaser—(continued.)

Of putni taluk during pendency of appeal for setting aside sale, Payment by. See VOLUNTARY PAYMENT.

Rights of. See SALE FOR ARREARS OF RENT.

Purchasers—

Contest between rival. See TITLE.

Purdanashin Lady—

Right of, to be examined on commission. See PRACTICE.

Putnidar—

Dispossession of. See LIMITATION ACT, ART. 144.

Liability of. See LANDLORD AND TENANT.

Relinquishment by. See LIMITATION ACT, ART. 144.

Question—

In execution of decree. See APPEAL. CIVIL PROCEDURE CODE, S. 244: SECOND APPEAL.

Of law and fact raised in Appellate Court. See APPELLATE COURT.

Of title. See SMALL CAUSE COURTS (PRESIDENCY TOWNS) ACT.

Questions—

For Court executing decree. See CIVIL PROCEDURE CODE, S. 244.

Railway Company—

Duty to carry passengers safely—Explosion in carriage—Negligence—Onus of proof—Ignorance or knowledge of law as a defence—Its limitation—Damages, Measure of—Costs. Held by the Appellate Court (affirming the decision of the Court below): In providing for the safety of their passengers it is the duty of a railway company to exercise such a degree of care, at the very least, as may reasonably be required from them under all the circumstances of the case, and where an accident happens they must show that it was not preventible by any care or skill. If a railway-carriage be rendered dangerous to the passengers travelling therein by reason of the fact that there are fireworks in it, and if the carrying of the fireworks could have been prevented by the exercise of due care on the part of the railway company, they are liable for damage for negligence should an explosion of the fireworks occur. Where loss of life and damage have resulted from the explosion of fireworks in a passenger carriage, the onus is on the railway company to show that they took due care to prevent the conveyance of fireworks in that manner, and not on the plaintiff to show that they did not. *Scott v. London Dock Co., Kearney v. London, Brighton and South Coast Railway Co., Byrne v. Boadle, Cotton v. Wood, Foulkes v. Metropolitan Railway Co., Welfare v. London and Brighton Railway Co., and Daniel v. Metropolitan Railway Co.* referred to. Costs, in a case like the present, should be allowed as between attorney and client, so as not to exhaust the damages or the larger portion thereof. *Narayan Jetla v. Municipal Commissioners of Bombay, Sorabji Ratanji v. Great Indian Peninsula Railway Co., and Ratan Bai v. Great Indian Peninsula Railway Co.* followed. *Per O'KINEALY, J.* (in the Court below):— In the absence of evidence that the defendants had taken steps to prevent passengers from taking fireworks into the carriage, the Court cannot presume that the fireworks were taken clandestinely into the compartment notwithstanding the fact that such carriage of fireworks is an offence, and that every one is presumed to know the law. The maxim that everyman is presumed to know the law is limited to the determination of the civil or criminal liability of the person whose knowledge is in question. It cannot legitimately be made use of where (as in the present case) the parties are different and distinct from him.

EAST INDIAN RAILWAY COMPANY v. KALLY DASS MOOKERJEE ... XXVI, 465

Railway Receipts for Goods—

Tender of. See CONTRACT.

Ralyat brought on Land by Lessee—

Right of, on expiry of lease. See BENGAL TENANCY ACT, S. 116.

Ratification—

See SETTLEMENT.

Receipt—

Granting unstamped. See STAMP ACT, S. 58.

Proof of demand of. See STAMP ACT, S. 58.

Refusal to grant stamped. See STAMP ACT, S. 58.

Receipts for Rent—

See MESNE PROFITS.

Receiver—*Appointed by decree-holder, Money realised by.* See EXECUTION OF DECREE.*Appointment of.* See CRIMINAL PROCEDURE CODE, s. 145: DECREE.

Appointment of Receiver—Civil Procedure Code (Act XIV of 1882), s. 508—Discretion of Court—Waste. The removal of a large amount of property by the defendant, and under circumstances which might fairly give rise to suspicion during the pendency of the suit in which the question of title to that property would be determined, is a sufficiently strong ground for the appointment of a Receiver. *Sidheswari Dabi v. Abhoyeswari Dabi, Chandidat Jha v. Padmanand Singh and Sham Chand Giri v. Bhairam Pandey* referred to.

SIA RAM DAS v. MOHABIR DAS ... XXVII 279

Mortgage decree—Execution of mortgage decree by sale of properties in the possession of the Receiver—Attachment. A judgment-creditor can sell properties in the hands of a Receiver of the Court in execution of a mortgage decree, although he cannot execute a decree against such properties by way of attachment and sale. *Semble*—A proceeding by way of attachment is an interference with the possession of the Receiver. *Hem Chunder Chunder v. Frankristo Chunder* distinguished.

JOGENDRA NATH GOSSAIN v. DEBENDRA NATH GOSSAIN ... XXVI 127

Recognizance to keep Peace—

Conviction under s. 143 of the Penal Code (Act XLV of 1860)—Code of Criminal Procedure (Act V of 1898), s. 106. An offence under s. 143 of the Penal Code is not one of the offences specified in s. 106 of the Code of Criminal Procedure which would justify an order directing a person or persons to furnish security to keep the peace. There may be findings in the case which would justify such an order if such findings can be brought within the terms of s. 106. *Jib Lal Gir v. Jogmohan Gir* referred to. Where the accused were convicted under s. 143 of the Penal Code and ordered under s. 106 of the Code of Criminal Procedure to furnish security to keep the peace, and it was alleged that the facts as proved showed that the accused came in a body, some of whom were armed with *lathis* and some of whom used threats and did other acts, showing an evident intention to commit breaches of the peace. *Held*, that there should have been an express finding to that effect; that if the accused or any of them acted in such a manner, they should have been convicted of criminal intimidation or other offence which would enable the Magistrate to bind them over to keep the peace; and that the order under s. 106 should be set aside.

SHEO BHAJAN SINGH v. MOSAWI ... XXVII 983

Criminal Procedure Code (Act V of 1898), s. 106—Security for keeping the peace on conviction—Conviction under s. 143 of the Penal Code (Act XLV of 1860). Conviction of a person under s. 143 of the Penal Code is not necessarily a ground for making an order against him under s. 106 of the Criminal Procedure Code. In order to bring his acts within the terms of the latter section, there must either be an express finding to the effect that his acts involved a breach of the peace, or an evident intention of committing the same, or the evidence must be so clear as to satisfy the Court (without an express finding), that such was the case.

JIP LAL GIR v. JOGMOHAN GIR ... XXVI 578

Record of Rights—

See ENHANCEMENT OF RENT: JURISDICTION OF CIVIL COURT.

Record of Suit—*Evidence on commission referred to as part of.* See PRACTICE.**Redemption—***Of mortgage, Account on.* See MORTGAGE.*Right of.* See LIS PENDENS: MORTGAGE: SALE IN EXECUTION OF DECREE.**Reference—***For trial by Subordinate Magistrate.* See MAGISTRATE, JURISDICTION OF.*To arbitration not in writing.* See ARBITRATION.

To High Court. Criminal Procedure Code (Act V of 1898), s. 307—Power of Judge in dealing with evidence. In making a reference under s. 307 of the Code of Criminal Procedure the Sessions Judge is limited to the evidence at the trial which was before the jury.

QUEEN-EMPRESS v. JADUB DAS ... XXVII 295

Reference—(continued.)

To Registrar. See PRACTICE.

To Registrar. *Statement of facts, filing of, after appointed time—Right of party failing to appear and support such statement—Practice—Rules of High Court, Nos. 522, 537.* On the 4th February 1899 one G was granted a month's time to file his statement of facts in a reference which was pending before the Registrar, and in default thereof it was ordered that the reference should be heard *ex parte* against him. The statement of facts was filed before the Registrar seven days after the proper time. The Registrar refused to deal with the statement of facts without an order of Court. G then applied to the Court for an order that the Registrar might be at liberty to refer to the statement of facts, and that G might be permitted to appear and support them. The party opposing contended that G ought not to be allowed to file his statement of facts, that he might appear in person, but had no right to employ counsel or attorney. *Held*, that G was entitled to file his statement of facts and that the reference should be proceeded with in the usual course.

TARAK MOHINIEY DASSEE v. GREES CHUNDER DASS ... XXVI 585

Reformatory Schools Act—

VIII of 1897—

ss. 8, 11, 16 and 31. *Rule framed by the Local Government—Youthful offender—Evidence of age—Order not properly passed—Penal Code (Act XLV of 1860), s. 83.* If an order for detention in a Reformatory School in substitution for transportation or imprisonment be not properly passed, a Court is not debarred by s. 16 of the Reformatory Schools Act (VIII of 1897) from altering or reversing such order. A boy of about 9 years of age was found in the grounds of the residence of the Commissioner of Patna at 3 A. M. in the morning with a brass *lota* in his hand. He was tried summarily and, without any preliminary inquiry as to the age of the boy being made, was sentenced to three months' rigorous imprisonment, or in lieu thereof to be detained in a Reformatory School for seven years. *Held*, the accused did not come within the definition of "youthful offenders" as given in the Rules framed by the Local Government under s. 8 of the Reformatory Schools Act, and the offence of the accused being his first offence the case should have been dealt with under s. 31 of the Act. It is not that a Magistrate is under no circumstances competent to find from the appearance of a person convicted by him that he is a youthful offender, but it is generally desirable that there should be some reliable evidence on the point, and especially when it is necessary to determine the period of detention. The age of the accused being under twelve years the Magistrate should, considering the provisions of s. 83 of the Penal Code, have found that the accused had attained sufficient maturity of understanding to judge of the nature and consequences of his act.

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Refusal to join as Plaintiff—

See PARTIES.

Registered Proprietor—

Representative of. See LAND REGISTRATION ACT, s. 78.

Registrar—

See REFERENCE TO REGISTRAR.

Reference to. See PRACTICE.

Registration—

Of deed of sale. See TRANSFER OF PROPERTY ACT, s. 54.

Of name. See LAND REGISTRATION ACT, s. 78.

Registration Act—

III of 1877—

ss. 17 (b), 48, 50. See SPECIFIC RELIEF ACT, s. 27.

s. 49. See EVIDENCE.

Regulation—

VIII of 1819—

s. 6. See LANDLORD AND TENANT.

s. 8. See SALE FOR ARREARS OF RENT.

s. 14. See VOLUNTARY PAYMENT.

Regulation—(continued.)

III of 1822—

s. 5. See SETTLEMENT.

VII of 1822—

See LANDLORD AND TENANT.

s. 7.. See SETTLEMENT.

IX of 1825—

s. 4. See LANDLORD AND TENANT.

XI of 1825—

s. 4, sub-secs. 1 and 5. *Changes in a river's channel—Rights of riparian owners—Accretion by alluvion distinguished.* The current of a river changing its course encroached upon either bank alternately, detaching land from one bank, followed by the effect that land was added to the opposite bank. The river having taken a course more to the east than its original one, the area of the defendants' village (till then only partly on the western side, inasmuch as the river traversed it throughout) appeared entirely on the west bank. Some land of the plaintiff's village on the eastern side was also carried away, the river continuing its eastward tendency. By another change, in the opposite direction, the current resumed its original channel more towards the west with the effect that the piece of land that had belonged to the defendant's village, and had been submerged when on the east bank during the above change in the river's course emerged in the end on its former site on the east bank. This restored land was identifiable. But the owner of the village on the east bank now claimed it as an accretion by alluvion to his property which it adjoined. *Held*, that the right of property remained in the original owner, the defendant. The owner of the adjoining village on the eastern side could not make out a title to it either under sub-sec. 1, under sub sec. 5 of s. 4 of Regulation XI of 1825, or in virtue of any known principle. There was no proof of a custom giving this land to him on account of contiguity, and there had been no gain to him from the river by alluvion within the meaning of the Regulation.

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III of 1872. See SONTAL PERGUNNAHS SETTLEMENT REGULATION.

I of 1886. See ASSAM LAND AND REVENUE REGULATION.

V of 1893. See SONTAL PERGUNNAHS JUSTICE REGULATION.

Relationship—*Statement as to.* See EVIDENCE ACT, s. 32.**Relevant Fact—**

See FRAUD.

Religious Endowment—

See INCOME TAX ACT.

Relinquishment—*By putnidar, Effect of.* See LIMITATION ACT, ART. 144.*Of land, Contract allowing.* See LEASE.**Remuneration—**

See INCOME TAX ACT.

Rent—

See ENHANCEMENT OF RENT : PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, CL. (8).

Acceptance of, after term of settlement. See SETTLEMENT.*Accrued due against female heir after death of last full owner.* See SALE FOR ARREARS OF RENT.*Arrears of.* See BENGAL TENANCY ACT, s. 188 : LIMITATION ACT, s. 19 : SALE FOR ARREARS OF RENT.*Arrears of, accrued due against female heir after death of last full owner.* See ' RES JUDICATA.'*Arrears of, Decree for.* See BENGAL TENANCY ACT, s. 148.*Arrears of, Execution of decree for ejectment for.* See BENGAL TENANCY ACT, s. 66.*Arrears of, Extension of time for payment of.* See BENGAL TENANCY ACT, s. 66.*Arrears of, Interest on.* See INTEREST : OUDH LAND REVENUE ACT, SS. 121, 123.*Arrears of, of separate share.* See SALE FOR ARREARS OF RENT.*Arrears of, Realisation of.* See LANDLORD AND TENANT.*Arrears of, Suit for.* See BENGAL TENANCY ACT, s. 66.*Arrears of, Transfer of share of under-proprietor in.* See OUDH LAND REVENUE ACT, SS. 121, 123.

Rent—(continued.)

Assessment of, in respect of accretion to parent estate. See LANDLORD AND TENANT.

Customary rate of. See ENHANCEMENT OF RENT.

Dispute regarding right to collect. See CRIMINAL PROCEDURE CODE, s. 145.

Enhancement of. See BENGAL TENANCY ACT, s. 29 : ENHANCEMENT OF RENT.

Fair and equitable. See ENHANCEMENT OF RENT.

Increase in amount of, by reason of increase in area. See BENGAL TENANCY ACT, s. 29.

Increase in rate of. See BENGAL TENANCY ACT, s. 29.

Liability for. See LANDLORD AND TENANT.

Omission to claim interest on. See INTEREST.

Presumption as to fixity of. See ENHANCEMENT OF RENT.

Settlement of fair and equitable rent. See ENHANCEMENT OF RENT.

Suit for. See JURISDICTION : LAND REGISTRATION ACT, s. 78 : LANDLORD AND TENANT : ' RES JUDICATA ' : SUCCESSION CERTIFICATE ACT, s. 4, CL. 2.

Suit for. No alternative claim for use and occupation—Damages for use and occupation—Variance between pleading and proof—Ferry tolls. In a suit for rent, when no alternative claim is made for use and occupation, no damages can be decreed for use and occupation. *Lukhee Kanto Dass Chowdhry v. Sumneruddi Lusker and Surendra Narain Singh v. Bhai Lal Thakur* referred to and followed. The rent law in Bengal does not apply to ferry tolls. *Nutyamund Ghose v. Kissen Kishore and Lalun Monee v. Sona Monee Dabee* distinguished. *Hari Mohan Sirkar v. Moncreiff* applied.

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Report by District Court—

To High Court. See GUARDIANS AND WARDS ACT, s. 14.

Representative of Party—

See CIVIL PROCEDURE CODE, s. 214.

Reputation—

See SECURITY FOR GOOD BEHAVIOUR.

Res judicata—

See CIVIL PROCEDURE CODE, s. 244 : SMALL CAUSE COURTS (PRESIDENCY TOWNS) ACT.

Civil Procedure Code (Act XIV of 1882), s. 13—Suit for rent—Suit for establishment of title. A decision in a suit for rent brought by a plaintiff against a person who is alleged to have been his tenant in respect of certain land, does not operate as *res judicata* in a subsequent suit brought by the same plaintiff for establishment of his title to the land, not only against the alleged tenant, but also against the person whose title as landlord the tenant defendant had set up in the rent suit.

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Suit to set aside sale for arrears of rent accrued due against female heir after death of last full owner—Subsequent suit by reversioner to recover immoveable property sold—Civil Procedure Code (Act XIV of 1882), s. 13. A previous suit brought by a female heir to set aside a sale in execution of a decree for arrears of rent accrued due against her after the death of the last full owner was dismissed. In a subsequent suit by the reversioner for recovery of possession of the immoveable property so sold, the defence was that the suit was barred as *res judicata*. Held, that the dismissal of the previous suit, which was for recovery only of the limited estate of female heir, would not be a bar to the subsequent suit, which was for the recovery of the absolute estate, which vested in the reversioner.

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Respondent—

Adding person as. See CIVIL PROCEDURE CODE, s. 551 : PARTIES.

Costs of, Security for. See APPEAL TO PRIVY COUNCIL.

Denial of means by. See PRACTICE.

Ordered to attend Court for Cross-examination as to his means. See PRACTICE.

Restoration of Possession—

Of property. See CRIMINAL PROCEDURE CODE, s. 532.

Resumption—

See SETTLEMENT.

Retrial—

Necessity for, on alteration of charge. See ATTEMPT TO COMMIT OFFENCE.
Power of Appellate Court to order. See SESSIONS JUDGE, JURISDICTION OF.

Re-valuation made by Municipality—

Legality of. See CALCUTTA MUNICIPAL CONSOLIDATION ACT, S. 125.

Revenue—

Liability for. See DECREE.

Revenue Court—

See FALSE EVIDENCE.

Revenue Officer—

Decision of. See JURISDICTION OF CIVIL COURT.

Revenue-paying Estate—

Sale of. See LIMITATION ACT, ART. 132.

Revenue Sale Law—

Act XI of 1859—

s. 13. See LIS PENDENS.

s. 28. See PUBLIC DEMANDS RECOVERY ACT.

s. 37. See ASSAM LAND AND REVENUE REGULATION.

s. 54. See LIS PENDENS.

Reversioner—

Suit by. See ONUS OF PROOF.

Suit by, for possession of immoveable property. See LIMITATION ACT, ART. 144 :
 'RES JUDICATA.'

Review—

Civil Procedure Code (Act XIV of 1882), ss. 102, 103 and 623—Dismissal of a suit for default under s. 102—Review of judgment without applying to re-instate the suit under s. 103 of the Code. Where a suit was dismissed for default under s. 102 of the Code of Civil Procedure, and an application for review of judgment was made by the plaintiff without a previous application to have the order of dismissal set aside under s. 103 of the Code: *Held*, that the Court had jurisdiction to entertain the application for review of judgment. *Koilash Mondol v. Nabadwip Chandra Kar* distinguished.

RAJ NARAIN PURKAIT v. ANANGA MOHAN BHANDARI ... XXVI 598

Revision—

See CRIMINAL PROCEDURE CODE, s. 145.

High Court's power in revision—Hearing of rule to show cause—Discretion of Court—Criminal Procedure Code (Act V of 1898), s. 439. Discretion of the High Court in revision at the hearing of a rule to consider, and decide matters in respect to which a rule had been prayed for, but not granted.

DURGA DAS RUKHIT v. QUEEN-EMPRESS ... XXVII 820

High Court's power of revision—Presidency Magistrate, Proceedings of—Order for further inquiry—Criminal Procedure Code (V of 1898), ss. 423, 435, 439—High Courts Charter Act (24 and 25 Vic., c. 104), s. 15—Letters Patent, High Court, 1865, cl. 28. The High Court has powers of revision in respect of an order of discharge passed by a Presidency Magistrate by reason, not of s. 28 of the Letters Patent, 1865, but of s. 15 of the Charter Act (24 and 25 Vic., c. 104). That section has always been interpreted in a very extended meaning so as to give ample powers of superintendence, that is to say, powers of revision over proceedings of subordinate Courts. But the High Court has no power under the Code of Criminal Procedure to interfere in revision with an order of dismissal or discharge passed by a Presidency Magistrate. *Colville v. Kristo Kishore Bose* dissented from *Opoorba Kumar Sett v. Probodh Kumary Dass* referred to. A Presidency Magistrate acting under s. 203 of the Criminal Procedure Code dismissed a complaint on the report of the Police without examining the complainant and without finding on such examination that there was no sufficient ground for proceeding. The High Court, acting under s. 15 of the Charter Act, ordered a further inquiry to be made into the matter of the complaint.

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High Court's power of revision—Presidency Magistrate, Proceedings of—Order for further inquiry—Criminal Procedure Code (V of 1898), ss. 423, 435 and 439—Letters Patent, High Court, 1865, cl. 28. The High Court has under ss. 425 and

Revision—(continued.)

439, read with s. 423 of the Criminal Procedure Code, the power to revise the proceedings of a Presidency Magistrate and order a further inquiry to be made. It has the same power under cl. 23 of the Letters Patent of 1865.

COLVILLE v. KRISTO KISHORE BOSE ... XXVI 740

High Court's Power of revision—Withdrawal of the operation of the Criminal Procedure Code—Scheduled Districts Act (XIV of 1874), s. 6—Assam Frontier Tracts Regulation, 1880, s. 2—Jurisdiction of the High Court—Power of the Supreme Council. The effect of the rules laid down by the Chief Commissioner of Assam under s. 6 of the Schedule Districts Act (XIV of 1874), taken in conjunction with the notification issued by him in the exercise of the powers conferred by s. 2 of the Assam Frontier Tracts Regulation, 1880, directing that the Criminal Procedure Code should cease to operate in the North Cachar Hills from the date of the notification, is to supersede all previously existing criminal authority in that district by that of the Chief Commissioner. The power of the Supreme Legislative authority of India to remove any place or territory from the jurisdiction of the High Court is, as was said in *Empress v. Burnh* "expressly authorized and contemplated" by the Statutes and Letters Patent which affect the constitution and jurisdiction of the Court. *Semble*—Notwithstanding the withdrawal of the operation of the Criminal Procedure Code from a certain District the High Court may continue to exercise appellate and revisional powers over that District.

SOONDERJEE NANJEE v. MAYLON ... XXVI 874

Power of High Court in. See CRIMINAL PROCEDURE CODE, s. 145: SANCTION FOR PROSECUTION: SUPERINTENDENCE OF HIGH COURT.

Right of Occupancy—

See BENGAL TENANCY ACT, s. 116.

Effect of purchase of by co-sharer landlord. See CO-SHARERS.

Not transferable by custom. See CIVIL PROCEDURE CODE, s. 244.

Sale of. See SALE FOR ARREARS OF RENT.

Transfer of occupancy rights—Bengal Tenancy Act (VIII of 1885), ss. 178, 183—Usage or custom—Evidence Act (I of 1872), s. 48—Admissibility of opinion as to existence of custom or usage. In this suit the plaintiffs by virtue of putni settlements sought to obtain *khas* possession of certain *jote* lands which purported to have been conveyed by the *jotedars*, the first set of defendants, to the second set of defendants, although there was no custom or usage in the village recognising the transferability of occupancy rights. *Held*, that in order to establish usage under ss. 178, 183 of the Bengal Tenancy Act, it was not necessary to require proof of its existence for any length of time. *Held*, also, that the statements made by persons who were in a position to know of the existence of a custom or usage in their locality were admissible under s. 48 of the Evidence Act. *Dalghish v. Guzuffer Hossain* followed.

SARIATULLAH SARKAR v. PRAN NATH NANDI ... XXVI 184

Transfer of portion of. See BENGAL TENANCY ACT, s. 88.

Transferability of. See BENGAL TENANCY ACT, s. 22: CIVIL PROCEDURE CODE, s. 244.

Right of Private Defence of Property—

See RIOTING.

Right of Suit—

See CIVIL PROCEDURE CODE, s. 244: LAND REGISTRATION ACT, s. 78: MESNE PROFITS, SUIT FOR: SALE IN EXECUTION OF DECREE: SUCCESSION CERTIFICATE ACT, s. 4.

Fraud—Sale in execution of ex parte decree—Suit to set aside a sale on the ground of fraud, challenging the decree in execution of which the sale took place as fraudulent, although the said decree was set aside on the ground of non-service of summons—Civil Procedure Code (Act XIV of 1882), ss. 108 and 244. An *ex parte* decree for rent was obtained against A and others, and in execution of that decree certain lands of the judgment-debtors were sold and were purchased by a third party. Subsequently, at the instance of A the said *ex parte* decree was set aside on the ground of non-service of summons, and the original suit was restored, but that was dismissed for default, as the then plaintiff did not proceed with it. An application was then made by A to set aside the sale on the ground of fraud which was rejected because the auction-purchaser was not made a party to the proceedings. A then brought a suit for declaration of title to a portion of the land sold and for

Right of Suit—(continued.)

confirmation of possession, challenging, not only the sale, but also the decree, on the ground of fraud. The defence mainly was that regard being had to the provisions of s. 244 of the Civil Procedure Code the suit was not maintainable. *Held*, that, although there was no decree to be actually set aside, the plaintiff was entitled to show that the decree under which the sale was held was obtained by fraud as against him, and that therefore the suit was maintainable. *Abdul Mazumdar v. Mahomed Gazi Chowdhury and Pran Nath Roy v. Mohesh Chandra Moutra* referred to.

RAM NARAIN TEWARI v. SHEW BHUNJAN ROY ... XXVII 197

Jurisdiction of Civil Court—Obstruction to public way—Suit by zamindar for removal of obstruction—Special damage—Special inconvenience—Cause of action. No suit lies for the removal of an obstruction to a public way, unless the plaintiff proves special damage from the obstruction; and this equally applies whether the plaintiff is a zamindar or any ordinary member of the community.

RAJ NARAIN MITTER v. EKADASI BAG ... XXVII 793

Suit for declaration and enforcement of a hereditary right to officiate as priest—Code of Civil Procedure (Act XIV of 1882), s. 11—Mesne profits—Suit to have a share in the offerings made to a deity, by one member of a family, against another based upon an implied arrangement amongst them. A suit by one member of a family against another, for the declaration and enforcement of a hereditary right to officiate as priest at the worship performed by votaries at the foot of a certain tree, and also to have a share in the offerings made to the deity, is maintainable. *Kali Kantu Sumu v. Gouri Prosad Surma* followed. *Jawahar Misser v. Bhagoo Misser* and *Kashi Chandra Chuckerbutty v. Kailash Chandra Bandopadhyya* distinguished.

DINO NATH CHUCKERBUTTY v. PRATAP CHANDRA GOSWAMI ... XXVII 90

Right of Way—

See EASEMENT.

Limitation Act (XV of 1877), s. 26—Easement—Prescription—Continuance of enjoyment as of right—Cessation of user—Actual user. No rule can be laid down as to what would or would not constitute a continuance of the enjoyment as of right of a right of way, when there has been no exercise of it for any given period; that must depend upon the circumstances of each case and the nature of the right claimed. For the plaintiff to succeed in a suit for the declaration of a right of way, as required under s. 26 of the Limitation Act, conceding that he need not prove an actual user of the way up till the end of the statutory period of twenty years, there must, when there is no user for a long time, be circumstances from which the Court can infer the continuance of enjoyment as of right over the whole statutory period, and the cessation of the user must be at least consistent with such continuance. The enjoyment required by the Act cannot be in abeyance, and at the same time continue so as to give the plaintiff the special right claimed. The question of continued enjoyment is an inference to be drawn from facts, rather than one of fact, and if there are no facts to sustain the inference, a decision in favour of such enjoyment cannot stand. The plaintiffs sued the defendant for the declaration of a right of way, as acquired under s. 26 of the Limitation Act, over a plot of land belonging to the defendant. It was alleged that in April 1892, the defendant dispossessed the plaintiffs from the dominant tenement; and that the plaintiffs sued the defendant for recovery of possession of it under s. 9 of the Specific Relief Act, and having obtained a decree, got possession on the 19th June 1895. It was further alleged that thereupon the defendant, on the 21st June 1895, obstructed the disputed way by erecting sheds. The present suit was instituted on the 25th November 1895. *Held*, that the enjoyment of the right of way on the part of the plaintiffs not having continued until within two years of the institution of the suit the suit must fail. *Koylash Chunder Ghose v. Sonatun Chung Barooie* distinguished.

JANHAVI CHOWDHURANI v. BINDU BASHINI CHOWDHURANI ... XXVI 598

Rioting—

Acquittal of rioting and conviction of grievous hurt—Constructive guilt—Abetment—Penal Code (Act XLV of 1860), ss. 114, 325, with 149. Where the accused persons have been acquitted of rioting, they cannot be properly convicted of grievous hurt under s. 325 by the application of s. 149 of the Penal Code, where it has not been found that these persons or any of them were members of an unlawful assembly in prosecution of the common object, of which grievous hurt was caused by any other member of the same assembly, or that the offence was such as each member

